

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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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.

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

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR ENTRY OF FINAL  
JUDGMENT ON PLAINTIFFS' SIXTH  
CLAIM FOR RELIEF**

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

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

## I. INTRODUCTION

Plaintiffs in the above-captioned matter, by and through their undersigned counsel, hereby reply to Defendants' Opposition to Plaintiffs' Motion for Entry of Final Judgment on Plaintiffs' Sixth Claim for Relief ("Def. Opp."), (doc. 200) and Defendant-Intervenor Enbridge Energy Limited Partnership's Opposition to Plaintiffs' Motion for Entry of Final Judgment on Plaintiffs' Sixth Claim for Relief ("Int. Opp."), (doc. 199). As set forth in Plaintiffs' Memorandum in Support of Motion for Entry of Final Judgment on Plaintiffs' Sixth Claim for Relief ("Pl. Memo."), (doc. 193), Plaintiffs ask the Court to make an express finding that judgment is final and there is no just reason for delay and to enter final judgment on Plaintiffs' Sixth Claim for Relief pursuant to Fed. R. Civ. P. 54(b).

## II. ARGUMENT

Rule 54(b) permits a district court to enter a final judgment on one claim upon an express determination: (1) that its judgment is final; and (2) there is no just reason for delay. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8 (1980); see also *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 774 (8th Cir. 2009). It is undisputed that the Order dismissing Plaintiffs' Sixth Claim for Relief ended the litigation on the merits and is a

final judgment. *See, e.g.*, Int. Opp. at 3. Thus, the Court need only determine whether there is no just reason for delay.

**A. There is No Just Reason for Delay in Entering Final Judgment on Plaintiffs’ Sixth Claim for Relief**

In determining whether there are no just reasons to delay entry of judgment pursuant to Rule 54(b) “a district court must take into account judicial administrative interests as well as the equities involved.” *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980).

**1. Judicial Administrative Interests do not Present a Just Reason for Delay**

Consideration of the judicial administrative interests in this case does not present a just reason for delay; rather it supports entering final judgment on the constitutional claim to enable an immediate appeal.

*(a) The constitutional claim and the remaining NEPA claims are distinct and separable*

As set forth in the opening brief, Plaintiffs’ constitutional claim is legally and factually severable from the remaining NEPA claims, and the relief that Plaintiffs seek under the constitutional claim is different from the relief they seek under the NEPA claims. Defendants argue that the claims are interrelated because they are based on the same “nucleus of operative facts,” quoting *Nw. Airlines, Inc. v. Astraea Aviation Services, Inc.*, 930 F. Supp. 1317, 1324 (D. Minn. 1996), *aff’d*, 111 F.3d 1386 (8th Cir. 1997) as

recognizing that test in the Eighth Circuit. Def. Opp. at 4. Defendants, however, omit the very next sentence of *Northwest Airlines*, which notes that “the Supreme Court has explicitly rejected the proposition that claims can never be separate for Rule 54(b) purposes if they arise out of the same factual setting.” 930 F. Supp. at 1324 (citations omitted).

While the constitutional claim and the NEPA claims both arise out of the same Presidential Permit, the underlying facts that the Court of Appeals will have to consider with respect to the constitutional claim are different than those underlying the NEPA claims. This Court dismissed Plaintiffs’ constitutional claim based on its finding that “Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.” Order at 25 (doc. 185). Thus, an appeal of the constitutional claim will require the Court of Appeals to determine whether Congress’s inaction has, in fact, resulted in acquiescence to the executive permitting and regulation of international tar sands pipelines. An appeal of the NEPA claims, on the other hand, will not involve this factual inquiry. The issue in the NEPA claims is whether the environmental impact statement (EIS) and the record of decision (ROD) are legally sufficient under NEPA and NEPA regulations, which is completely distinct from whether Congress has approved of Presidential Permits for tar sands crude oil pipelines.

Defendants concede that the constitutional claim involves legal theories that are separate and distinct from those of the remaining NEPA claims. Def. Opp. at 3, 6. For example, the constitutional claim will require the Court of Appeals to weigh important questions involving separation of powers, and to decide whether acquiescence is possible where the President has no independent statutory or constitutional authority. Defendants argue, however, that the constitutional and NEPA “arguments have overlapped” because a “resolution of the constitutional claim will necessarily involve consideration of the EIS and the State Department’s role in the NEPA process.” Def. Opp. at 4-5; *see also* Int. Opp. at 5. While the Court of Appeals will likely review the permit to determine its scope and effect as to the full length of the pipeline, the constitutional claim does not involve the same examination of the EIS that the NEPA claims require. The NEPA issues, such as whether the EIS contains an adequate cumulative impacts analysis, considers trans-boundary impacts, adequately analyzed spills, and whether the purpose and need determination is sufficient, are all irrelevant to the constitutional claim. In any case, even if the claims did overlap, that is not enough to deny Rule 54(b) certification. “Some but not complete factual overlap between nominally separate claims ... should invite discretion by the district court.” *Nw. Airlines, Inc.*, 930 F. Supp. at 1324 (quoting *Olympia Hotels Corp. v.*

*Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990) (entering Rule 54(b) judgment as to some of the six claims, which all arose out of the same contractual relationship, because the factual overlap was not complete).

Enbridge tries to create an overlap in the constitutional claim and the remaining NEPA claims by mischaracterizing Plaintiffs' claim as being that the State Department's "action in imposing mitigation measures" is unconstitutional. Int. Opp. at 5. The issue raised by the constitutional claim is whether the State Department impermissibly regulates foreign commerce. Plaintiffs contend it does this by permitting the importation of tar sands crude. In addition, it regulates commerce through Articles 13 and 14 of the permit, which incorporate Enbridge's application, its Environmental Mitigation Plan, the EIS and the Programmatic Agreement. Those apply to the length of the pipeline and the Superior Terminal, not just up to the pipeline's first shutoff valve. Although the court of appeals would review the incorporated portions of those documents to determine whether they constitute "regulation," it would not be ruling on whether they are sufficient under NEPA and the NEPA regulations. Thus, those permit provisions do not create any overlap with the issues raised by the remaining NEPA claims.

Defendants further mistakenly contend that Plaintiffs are merely presenting alternative legal theories for the same relief where recovery is

limited to only one of them, and rely on *Edney v. Fidelity & Guaranty Life Ins. Co.*, 348 F.2d 136, 138 (8th Cir. 1965), to argue that entry of final judgment is therefore inappropriate. Def. Opp. at 5. In *Edney*, the plaintiff brought three alternative legal claims in an effort to recover \$15,000 owed on an insurance policy, although the plaintiff could ultimately only recover the money on one of the claims. *Id.* at 137-38. Here, the relief that Plaintiffs seek under the constitutional claim is distinct from the relief sought under the NEPA claims, and success on the NEPA claims would not obviate the need for Plaintiffs to appeal the constitutional claim and seek the additional relief that they request.

Although both the constitutional claim and the NEPA claims seek to have the permit vacated, that is not the only relief sought by the constitutional claim. If Plaintiffs prevail on the constitutional claim, the Presidential Permit will be vacated because the State Department lacks the authority to issue it, and thus the State Department could not re-issue the permit. A win on the NEPA claims would also vacate the Presidential Permit, but would invite the preparation of a new or supplemental EIS and would ultimately allow the agencies to issue a new ROD and re-issue the Presidential Permit. That is almost certain in this case given that pipeline construction is complete and Enbridge's substantial investment in the project. Indeed, Defendants do not

deny that they would re-issue the permit regardless of whether Plaintiffs succeed on one or more of the NEPA claims.

*(b) There would be no duplicative or piecemeal appeals*

Contrary to Defendants' and Intervenor's assertions, *see* Def. Opp. at 8; Int. Opp. at 7, Rule 54(b) certification of the constitutional claim would not create a situation of duplicative or piecemeal appeals. Because the question of whether the Presidential Permit encroaches upon Congress's Foreign Commerce power is not at all relevant to the resolution of Plaintiffs' NEPA claims, there is no risk that this question would be raised in a subsequent appeal of the NEPA claims.

In arguing that entry of judgment will result in duplicative appeals, Defendants point to only two issues that may be duplicated, neither of which withstands scrutiny. First, Defendants argue that the issue of the State Department's regulation of the Alberta Clipper Pipeline is likely to be raised in both appeals. Def. Opp. at 8. However, in reviewing the constitutional claim, the Court of Appeals will not have to conduct more than a perfunctory reading of Articles 13 and 14 of the permit to determine whether the permit applies to the entire pipeline or only to border facilities, as Defendants claim. Although the Court of Appeals would review the sections of the EIS and ROD incorporated into the permit, that would not entail a substantive analysis

of whether these sections comply with NEPA or the NEPA regulations. Thus, this “overlap” is insubstantial and does not warrant delay in entering judgment.

Second, Defendants argue that the issue of whether the State Department’s issuance of the ROD and Presidential Permit was “presidential action” or “agency action” is likely to be duplicated in successive appeals. *Id.* However, Plaintiffs are not challenging the ROD in the constitutional claim. In fact, the distinction between “agency” and “presidential” action is irrelevant to the constitutional claim, which asserts that neither the President nor the Department of State has the authority regulate foreign commerce. The only issues on appeal of the constitutional claim will be whether the Executive has the constitutional authority to issue the Alberta Clipper Presidential Permit, and/or whether that permit is *ultra vires* since it: (1) exceeds any alleged inherent presidential authority to regulate foreign commerce; and (2) exceeds any grant of congressional authority.

(c) *There are no other judicial administrative reasons for Delay*

Defendants argue that the constitutional claim would become moot if Plaintiffs succeed on the NEPA claims because “the subject of the appeal would not longer exist and the court of appeals only considers live disputes.” This argument is also without merit. *See* Def. Opp. at 7. Defendant’s

assertion of mootness is purely speculative. The constitutional claim currently presents a “case and controversy” as required by Art. III, § 2 of the Constitution. If at a future time the permit is vacated, Enbridge decides not to proceed with the pipeline, or any other event renders the claim moot the Court of Appeals could dismiss the appeal. Defendants’ speculation of future mootness is not a valid ground on which to deny entry of final judgment on this claim.

Moreover, because the State Department is likely to re-issue the permit even if Plaintiffs are successful on their NEPA claims, the constitutional claim falls under a mootness exception. The Supreme Court has upheld “an exception to the mootness doctrine for cases that are capable of repetition, yet evading review.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). That is, where “(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Id.* (quotations omitted)(emphasis added). That test is met here. If Plaintiffs prevail on the NEPA claims, the ROD and Presidential Permits may be vacated, rendering the permit “too short in duration” for the constitutional challenge to be fully litigated. Defendants would then correct the deficiencies in the EIS and issue a new ROD and Presidential Permit, at which point the

Plaintiffs would be subject to the same constitutionally invalid action again. That is also why, if Plaintiffs prevailed in the NEPA claims before the appeal of the constitutional claim was resolved, it would not put Plaintiffs in the position of seeking an advisory opinion on the appeal. There would still be a live case and controversy.

Defendants nonetheless assert that an appeal of the constitutional claim would be an “impermissible advisory opinion” and would be “solely for the purpose of obtaining guidance for the parties in the Keystone XL matter.” Def. Opp. at 13. That is mistaken because Plaintiffs are not seeking an advisory opinion for a hypothetical set of facts. There exists an actual controversy with certain and immediate legal effects in the context of the Alberta Clipper pipeline. Nor is this case analogous to *Taco John's of Huron, Inc. v. Bix Produce Co., LLC*, 569 F.3d 401 (8th Cir. 2009). There, the district court had impermissibly entered final judgment as to only one defendant for the purpose of resolving a question of liability that also applied to the remaining co-defendants. *Id.* at 402. Here, the constitutional claim was dismissed as to all Plaintiffs, so entry of final judgment is not being sought merely to provide guidance to other parties to this action. The fact that this novel constitutional question would likely reoccur if Plaintiffs prevail on the NEPA claims and Defendants re-issue the permit after a revised or

supplemental EIS, and *will* reoccur in the case of Keystone XL, is indicative of the importance of resolution of the question presented by the constitutional claim. The court should consider the fact that the issue will reoccur in deciding whether there is no just reason for delay. *See e.g. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1099 (3rd Cir. 1980).

Finally, Defendants argue that a court should not decide constitutional questions if there are other grounds on which to base a decision. Def. Opp. at 9 (citing *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). The situation in *Spector* is distinguishable from the case at bar—the *Spector* Court declined to judge the constitutionality of a state tax law because there were many local questions, such as questions of subject matter and applicability of the tax, which remained unanswered by the lower courts. *Id.* Here, the constitutional issue is squarely before the Court, as Plaintiffs' Sixth Claim for Relief claims a violation of the foreign commerce clause. In fact, the Court has entered a final decision dismissing that claim. Plaintiffs will seek a review of that decision in the Court of Appeals, either after entry of final judgment pursuant to Rule 54(b), or upon the conclusion of the remaining NEPA claims. But as discussed above, the NEPA claims *cannot* obviate a decision on the constitutional claim, because the relief sought in the

constitutional claim is distinct from the relief available under NEPA. Thus, the Court of Appeal will not be able to avoid adjudicating the constitutional claim and this Court will not be overreaching by entering final judgment pursuant to Rule 54(b).

2. **A Consideration of the Equities Favors Entry of Final Judgment**

Plaintiffs have demonstrated a serious risk of hardship and prejudice if an appeal of the constitutional claim is delayed until the resolution of the NEPA claims. *See* Pl. Memo. at 8-14. The distinct constitutional questions raised by the constitutional claim are uniquely important to all parties in this case as well as to other pipeline operators that are seeking Presidential Permits for similar projects.

Nonetheless, Defendants and Intervenor contend that there would be no harm during a delay of the appeal. However, this contention overlooks the harms described in the May Declaration (doc. 104), as cited in Plaintiffs' opening brief, Pl. Memo. at 11, and the considerable evidence in the record of environmental harm that will occur due to the operation of the pipeline. *See, e.g.*, Pl. Mot. For Prelim. Inj., (doc. 93) at 20-22; Pl. Reply In Support of Mot. For Prelim. Inj., (doc. 130) at 28-31. Operation of the Alberta Clipper pipeline, the Superior Terminal, and the refineries that will process the tar sands crude will cause increased emissions of hazardous air pollutants from

refining, flaring, and fugitive emissions sources such as tanks, valves, flanges; and increased water pollution including mercury, selenium, vanadium, and other contaminants. Pl. Mot. for Prelim. Inj. at 22. It will cause increased greenhouse gas emissions from the extraction, processing, and refining of the tar sands crude. Final Environmental Impact Statement (FEIS), (doc. 100) at 4-401–402. Water resources, fisheries, and sensitive species would be affected from withdrawal and discharge of large amounts of water for hydrostatic testing along the pipeline. *Id.* at 4-151, 4-157, 4-213. There is a severe risk of water and soil contamination from vehicle fuel leaks and spills, and from crude oil spills at the pump stations, valves, pigging facilities, and from the pipeline itself. *Id.* at 4-47, 4-54. Wildlife habitat will be affected due to the continuous noise and activity during the pipeline’s operation. *Id.* at 4-120. The operation of the Alberta Clipper will also cause severe trans-boundary impacts from expanded tar sands development, including destruction of boreal forests, contaminated air and water resources, and impacts to migratory bird populations. Pl. Mot. for Prelim. Inj. at 21-22. This Court has recognized that Plaintiffs are likely to suffer irreparable injury from these harms. *See* Order of February 3, 2010, at 42 (doc. 183).

Defendants point out that Plaintiffs sought a preliminary injunction and temporary restraining order but were unsuccessful. Def. Opp. at 11. While

that is true, the circumstances surrounding the construction of the Alberta Clipper—the amount of money invested in the project even before the issuance of the ROD and Presidential Permit, the number of workers employed during construction, and the incredibly fast construction schedule—weighed against Plaintiffs obtaining an injunction. Those are not, however, relevant to whether entry of final judgment on the constitutional claim is appropriate, as the standard for obtaining a preliminary injunction or temporary restraining order differ from the showing of hardship or prejudice to support Rule 54(b) certification.

Defendants also argue that if Plaintiffs succeed on the constitutional claim that Enbridge “would not be required to obtain *any* permit to cross the border.” Def. Opp. at 12 (emphasis at original). That is irrelevant to the issue on this motion—whether the Court’s ruling is final and whether there is any just reason for delay—but it is also wrong. In fact, the Alberta Clipper pipeline is subject to multiple permits and approvals. If the permit was held unconstitutional Enbridge would still be subject to permission from U.S. Commissioner of Customs. *See* Alberta Clipper Permit, (doc. 44-3) at 2. It would also still be subject to approval by the U.S. Department of Transportation (DOT). In the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 60101 et. seq., Congress specifically delegated authority to DOT to

regulate “transportation of hazardous liquids . . . by pipeline . . . in or affecting . . . foreign commerce.” 49 U.S.C. § 60101(a)(22)(A). *See also Spiller v. Walker*, No. A-98-CA-255-SS, 1998 U.S. Dist. LEXIS 18341, at \*23 (W.D. Tex. Aug. 25, 1998) (rejecting an argument by Federal Defendants that an oil pipeline potentially crossing the Mexican border was not federal action, and finding that it is “obvious” that the pipeline could not be “completed or run ‘without any federal approval,’”); *id.* at \* 49 (discussing DOT’s “extensive and intricate oversight and approval” of the pipeline); and *Spiller v. Walker*, A-98-CA-255-SS, 2002 WL 1609722, at \*2 (W.D. Tex. July 19, 2002). In addition, the Alberta Clipper pipeline is subject to regulation by FERC, the U.S. Army Corps of Engineers, the U.S. Forest Service and other agencies. *See* Pl. Opp. to Mot. to Dismiss, (doc. 150) at 45; Def. Opp. to Mot. for Prelim. Inj., (doc. 82) at 2-4, 19-20, 23-24, 28-29.

Defendants’ argument also fails because it does not recognize the existence of Plaintiffs’ *ultra vires* claims. If Plaintiffs prevailed on those, this particular permit would be vacated as exceeding constitutional authority, but that does not mean that any possible presidential permit to Enbridge would be unconstitutional. Moreover, the court could find that while the President clearly has the commander-in-chief powers to protect the borders from incursion, e.g. to *prevent* a pipeline crossing, it does not necessarily follow

that he has power to *allow* a pipeline crossing. If Plaintiffs prevailed on appeal of the constitutional claim and the Alberta Clipper permit were vacated, Enbridge would lack permission to cross the border. Vacation of the permit does not mean that no permission whatsoever would be required.

The only authority Defendants cite for their contention that no permit would be required is to quote their own preliminary injunction brief and an 1898 attorney general opinion. Def. Opp. at 13 and n. 5. However, the case law after that opinion indicates that the President’s constitutional authority to issue such permits is questionable because it is a matter for Congress. *See* Pl. Opp. to Mot. to Dismiss at 38–41. Even if Congress had not acted in this case (which Plaintiffs contest in light of all of the congressional acts on pipelines), the court “cannot regard a failure by Congress to exercise its undoubted powers [over foreign commerce entering this country] as proof that some other branch of the government has the right to do what Congress might readily have authorized.” *U.S. v. Western Telegraph Co.*, 272 F. 311, 313 (D.N.Y. 1921); *see also Medellin v. Texas*, 552 U.S. 491, 532 (2008) (“Past practice does not by itself create power.”). Thus, if the Alberta Clipper permit were found unconstitutional, the pipeline would still be subject to authorization and regulation by Congress.

### III. CONCLUSION

For the reasons set forth above, and in Plaintiffs' Memorandum in Support of Motion for Entry of Judgment on Plaintiffs' Sixth Claim for Relief, Plaintiffs respectfully request that pursuant to Rule 54(b) the Court make an express determination that there is no just reason for delay and direct the entry of final judgment on Plaintiffs' Sixth Claim for Relief.

Respectfully submitted, this 2nd day of April, 2010.

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