

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATURAL RESOURCES DEFENSE)	
COUNCIL, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No.: 08-CV-01363 (RJL)
)	
UNITED STATES DEPARTMENT OF)	
STATE, et al.,)	
)	
Defendants,)	
)	
and,)	
)	
TRANSCANADA KEYSTONE PIPELINE, LP,)	
)	
Intervenor-Defendant.)	

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

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INTRODUCTION

Defendants U.S. Department of State, et al. (“State Department” or “Defendants”) hereby oppose Plaintiff Natural Resources Defense Council’s (“NRDC” or “Plaintiff”) Motion for Summary Judgment (Docket No. 22) and cross-move for summary judgment. NRDC argues that the issuance by the State Department of a Presidential Permit granting permission for a border-crossing for an oil pipeline violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* The Presidential Permit was issued pursuant Executive Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004). NRDC’s lawsuit presents a novel challenge to the issuance of a Presidential Permit for an oil pipeline and invites the Court to invalidate the permit solely on the basis that the State Department’s environmental impact statement (“EIS”) did not adequately consider the potential environmental effects of refining the oil that will be transported through the pipeline and, in particular, the potential effects on climate change. The Court should decline this invitation.

The Court should reject NRDC’s NEPA claim for two primary reasons. First, the State Department conducted a thorough analysis of the impacts of refineries that would modify or expand their operations for the purpose of receiving oil from the Keystone Pipeline. After making only minimal and general statements regarding refinery pollution and climate change during the comment period on the draft environmental impact statement (“DEIS”), NRDC now seeks to argue that the State Department’s analysis was insufficient. NRDC should not be permitted to second guess the State Department’s analysis based on information that NRDC chose not to submit during the administrative process. Moreover, NRDC’s belated submission does not demonstrate that the State Department’s analysis was inaccurate.

Second, although the State Department did analyze the impacts of refining oil transported

through the Keystone pipeline, including the release of greenhouse gases, in doing so, the State Department did more than was required by NEPA. The State Department's analysis could properly have been limited to the construction and operation of the pipeline because the State Department's authority extends only to approving or denying a permit for the pipeline to cross the international border. The State Department's authority does not extend to the companies that will buy oil transported through the pipeline and process it in their refineries. Because the State Department has no control over the refining of oil, under the Supreme Court's decision in Dep't of Transp. v. Public Citizen, 541 U.S. 752, 767 (2004), it could properly have excluded potential refinery impacts from the analysis in the EIS. The Court may not invalidate the State Department's Presidential Permit based on NEPA analysis that was not required.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Keystone Pipeline Project

The Keystone Pipeline is being constructed for the purpose of transporting crude oil from Western Canada to the United States. AR 1230 (EIS) at 15276.^{1/} The pipeline would initially have the capacity to transport 435,000 barrels per day ("bpd") from an oil supply hub in Hardisty, Alberta, Canada to the Wood River Refinery in Roxanna, Illinois and a terminal in Patoka, Illinois. Id. The pipeline would have the capacity to increase the average supply to 591,000 bpd if market conditions warranted it. Id. The project consists of an 1,850 mile Mainline, including roughly 767 miles in Canada and 1,082 miles in the United States. Id. The project also includes a planned extension, the Cushing Extension, which would include 296

^{1/} "AR" refers to documents contained in the Administrative Record filed in this case. Each reference contains a document number and internal page number.

additional miles of pipeline and would extend from Steele City, Nebraska to Cushing, Oklahoma. Id. at 15276-77. Under the project proposal, the majority of the oil transported through the pipeline will be delivered to the Wood River Refinery, which is undergoing a major capitol project in anticipation of receiving oil from the pipeline. Id. at 15277. Keystone began construction of the Mainline in April 2008 and plans to complete it by November 2009. AR 564 (ROD) at 4422. Keystone plans to commence construction of the Cushing Extension in late 2009 or early 2010 and to complete that portion of the pipeline within a year. Id.

The need for the Keystone Pipeline project is driven by increasing crude oil supply from Western Canada, increasing crude oil demand in the United States, and the projected oil production of other U.S. suppliers of crude oil. AR 1230 (EIS) at 15278. Western Canada produces 600,000 to 1.1 million bpd of heavy crude and synthetic oil from tar sands and at total of 2.3 million bpd, including conventional oil production. Id. at 15279. The U.S. demand for oil is expected to increase to 26.9 million bpd by 2030, which is 6.2 million bpd over the 2005 total. Id. Canada has been the United State's largest supplier of oil because of its reliability and proximity to U.S. markets. Id. The world demand for oil has increased rapidly over the past three years based on rapid demand growth in Asia, the United States, and the Middle East. Id. at 15280. Political instability in several of the United States' top 11 suppliers of crude oil is expected to increase the demand for crude oil from Canada. Id. Based on the increased production of heavy crude in Western Canada, projections indicate a likely shortfall in pipeline capacity for crude oil by 2009. Id. at 15281. An additional 1.5 million bpd in capacity may be necessary by 2015. Id. By enabling the transport of an additional 450,000 bpd of heavy crude, the Keystone Pipeline would provide some of the needed additional capacity. Id.

B. The State Department's Presidential Permit

The State Department's authority to issue a Presidential Permit for an oil pipeline extends only to the construction, operation, and maintenance of facilities at the U.S. border. AR 564 (ROD) at 4438-39. Based on the President's powers over foreign affairs under Article II of the Constitution, the President has the authority to grant or deny permission for a border crossing, and, historically, such permits were issued directly by the President. See A. Hackworth, Digest of International Law, Vol. IV, § 350, pp. 247-56 (1942); John Bassett Moore, A Digest of International Law, Vol. II, § 227, pp. 452-66 (1906) (Docket Nos. 26-6 & 26-7). In 1968, President Lyndon issued an executive order delegating the authority to issue Presidential Permits for certain border crossings to the Secretary of State. See Exec. Order 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968). In 2001, President Bush issued Executive Order 13212, which indicated that it was the Administration's policy, "to the extent consistent with applicable law, to expedite projects that will increase the production and transmission of energy." Exec. Order 13212, 66 Fed. Reg. 28357 (May 18, 2001). And, in 2004, in furtherance of this policy, President Bush issued Executive Order 13337, which puts the approval of border facilities for the importation or exportation of petroleum products or other fuels on a different administrative track from the approval process for other border facilities. See Exec. Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004). Pursuant to Executive Order 13337, the Secretary of State has the authority, after conferring with other agency heads, to issue a Presidential Permit for the construction of facilities at the international border for the "the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country" when doing so would "serve the national interest." Exec. Order 13337 ¶ 1(a), (g).

Keystone submitted its Application for a Presidential Permit to the State Department on

April 19, 2006. AR 1331. In the Application, Keystone described the project in detail and explained why the project would serve the national interest. Id. 18023-31, 18095-100. Keystone also described its ongoing efforts to comply with Canadian and U.S. environmental laws. Id. at 18031-35, 18100-02. There is no overarching federal oversight of the construction of domestic oil pipelines. Rather, Keystone was required to fulfill a patchwork of federal and state requirements relating to different environmental aspects of the pipeline project and the different geographic regions in which it would be built. Id. at 18100-15. Keystone conducted substantial public outreach in connection with the project. Id. at 18115-18. Upon receipt of the application, the State Department, in consultation with other federal agencies, conducted an environmental review of Keystone's application, which included the preparation of the State Department's EIS under NEPA, consultation with Indian tribes under Section 106 of the National Historic Preservation Act ("NHPA"), and consultation with the Fish and Wildlife Service under Section 7 of the Endangered Species Act ("ESA"). AR 564 (ROD) at 4418-20, 4424-37; AR 1230 (EIS) at 15293-96. The State Department requested substantial additional information, which Keystone provided. See, e.g., AR 888, 893.

On February 28, 2008, the State Department issued a Record of Decision and National Interest Determination ("ROD"), which allowed the Keystone Pipeline to cross the U.S.-Canada border. AR 564 (ROD). In authorizing the Presidential Permit, the State Department required that Keystone follow certain mitigation measures during the construction and operation of the pipeline. AR 564 (ROD) at 4428-34. The State Department's decision to issue the permit, which was signed by the Under Secretary of State for Economic, Energy, and Agricultural Affairs, was based on a determination under Executive Order 13337 that the issuance of a Presidential Permit for the Keystone Pipeline would serve the national interest. Id. at 4439-40.

After reviewing Keystone's Application and the EIS and consulting with other agency heads, the Under Secretary found that the construction of the Keystone Pipeline would serve the national interest by: (1) increasing the diversity of oil supplies available to the United States, (2) shortening the transportation pathway for a portion of crude oil imports, (3) increasing oil supplies from a stable and reliable trading partner, and (4) providing additional sources of crude oil to make up for declines in imports from other suppliers. Id. at 4438. And, on March 11, 2008, the State Department issued the Presidential Permit for the Keystone Pipeline authorizing the border crossing. AR 567.

C. The National Environmental Policy Act Process

Preparation of the EIS was an important part of the State Department's review of Keystone's Application. The State Department initiated the NEPA process for the Keystone Pipeline Project on October 4, 2006 by issuing its notice of intent to prepare an EIS. AR 1230 (EIS) at 15288; 71 Fed. Reg. 59849, 59851 (Oct. 11, 2006). The State Department conducted 13 different scoping meetings in various geographic locations in October and November 2006 and received and considered numerous comments from the public regarding the appropriate scope of the EIS. AR 1230 at 15288-89, AR 1249 at 15943-52. On August 10, 2007, the State Department released its DEIS for the Keystone Pipeline Project. AR 1230 at 15289. The State Department held 13 public comment meetings on the DEIS in September 2007 and accepted comments on the DEIS up through September 24, 2007. Id. Hundreds of comments were submitted orally and over a thousand comments were submitted in writing from the public, agencies, Keystone, and other interested groups and considered by the State Department. Id. at 15289-92, AR 1249 at 15955-16034. After addressing the comments, the State Department issued its final EIS on January 11, 2008. AR 1225.

II. STATUTORY FRAMEWORK

A. National Environmental Policy Act

NEPA serves the dual purpose of, first, informing agency decision-makers of the significant environmental effects of proposed major federal actions and, second, insuring that relevant information is made available to the public so that they “may also play a role in both the decisionmaking process and the implementation of that decision.” See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The Council on Environmental Quality’s regulations implementing NEPA provide guidance as to the nature and content of an EIS. See 40 C.F.R. § 1502. Those regulations direct the preparer to include an analysis of alternatives to the proposed action in an EIS, see id. § 1502.14, and further instruct that the document should include discussions of direct, indirect, and cumulative impacts, id. §§ 1502.16 (a)-(b), 1508.7, 1508.8, as well as means to mitigate adverse environmental impacts from the proposed action. Id. § 1502.16(h). The regulations, however, clarify that agencies must discuss impacts only in proportion to their significance. Id. § 1502.2.

In reviewing the sufficiency of an EIS, a court is charged only with ensuring that the agency has presented a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.” California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). Thus, “a reviewing court may not ‘fly speck’ an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies.” N. Plains Res. Council v. Lujan, 874 F.2d 661, 665 (9th Cir. 1989); Sierra Club v. Adams, 578 F.2d 389, 393 (D.C. Cir. 1978) (“We are not to ‘fly speck’ the statement.”); 40 C.F.R. § 1500.3 (“it is the Council’s intention that any trivial violation of

these regulations not give rise to an independent cause of action”). While it “is . . . always possible to explore a subject more deeply and to discuss it more thoroughly,” the “line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.” Coal. on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987).

In addition, a reviewing court may not force an agency to elevate environmental concerns over other appropriate considerations. Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980). “Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.” Robertson, 490 U.S. at 350. “NEPA does not require that certain outcomes be reached as a result of the evaluation.” Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987) (internal citation omitted). Rather, “[o]nce satisfied that a proposing agency has taken a ‘hard look’ at a decision’s environmental consequences, the review is at an end.” Block, 690 F.2d at 761 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

STANDARDS OF REVIEW

I. ADMINISTRATIVE PROCEDURE ACT

The substantive statute before the Court, NEPA, does not grant an independent right of action. Thus, Plaintiff’s NEPA challenge in this case is brought pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06; see also City of Olmsted Falls, Ohio v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002) (reviewing NEPA claim under the APA standard). In evaluating the legal sufficiency of the agency’s action, the Court must apply the “arbitrary and capricious” standard of the APA, 5 U.S.C. § 706(2)(A), (C). See Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375-76 (1989); Louisiana Ass’n of Indep. Producers v. FERC, 958 F.2d 1101, 1117 (D.C. Cir. 1992).

The reviewing court's only role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). "The ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id.; see also NRDC v. Pena, 972 F. Supp. 9, 15 (D.D.C. 1997) (citing Citizens Against Burlington. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991)). In considering NEPA claims, courts apply a "rule of reason" to determine whether the agency's analysis contains a "reasonably thorough discussion of the significant aspects of probable environmental consequences." Laguna Greenbelt, Inc. v. Dep't of Transp., 42 F.3d 517, 523 (9th Cir. 1994); see also Public Citizen, 541 U.S. at 767. A court's review is limited to the administrative record before the agency at the time of its decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978); Overton Park, 401 U.S. at 419-20.

II. SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In APA actions, the Court's review is based on the agency's administrative record. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883-84 (1990). Thus, there are no material facts essential to the Court's resolution of the litigation, and the Court need not, indeed, may not, "find" underlying facts. See id.; Lun Kwai Tsui v. Attorney General, 445 F. Supp. 832, 835 (D.D.C. 1978). Rather, the only issues presented are issues of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1282 (D.C. Cir. 2005) ("[C]laims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.") (quoting Atl. States Legal Found. v. E.P.A., 325 F.3d 281, 284 (D.C. Cir. 2003)).

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S NEPA CLAIM

For the reasons stated in Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docket No. 26) and Reply in support thereof (Docket No. 36), the Court lacks jurisdiction over Plaintiff's NEPA claim. As explained in Defendants' briefs, the State Department's issuance of the Presidential Permit pursuant to Executive Order 13337 was done solely pursuant to the President's constitutional authority over foreign affairs and, therefore, is not subject to judicial challenge under the APA. Moreover, under D.C. Circuit law, a litigant may not bring a "separate" NEPA challenge to an action that is not itself subject to judicial review. Therefore, the Court should dismiss Plaintiff's claim for lack of jurisdiction and grant summary judgment for Defendants.

II. THE STATE DEPARTMENT'S EIS FOR THE PRESIDENTIAL PERMIT FOR THE KEYSSTONE PIPELINE COMPLIED WITH NEPA

The State Department's EIS thoroughly analyzed the potential environmental impacts of issuing the Presidential Permit for the Keystone Pipeline. NRDC contends that the State Department's EIS is inadequate under NEPA because it does not sufficiently analyze the impacts of refining oil transported through the Keystone Pipeline, potential cumulative impacts, or a reasonable range of mitigation. NRDC's arguments are without merit.

A. The State Department Adequately Analyzed the Potential Environmental Impacts of Refining Oil Transported Through the Keystone Pipeline

The State Department's EIS contains an adequate analysis of the impacts of refining crude oil that is transported through the Keystone Pipeline. The State Department appropriately focused on the impacts of refining heavier Canadian crude oil only at the Wood River Refinery because that refinery will receive the bulk of the oil transported through the Keystone Pipeline

and is the only refinery that will undergo a modification and expansion specifically to accommodate Keystone oil. Having failed to identify other specific refineries that will modify or expand their refining processes in order to receive oil from the Keystone Pipeline during the NEPA process, NRDC has waived its right to argue that those refineries should have been considered. Even if NRDC's extra-record material is considered by the Court, that material only emphasizes that no refineries other than Wood River will significantly modify or expand their operations as a result of the approval of the Keystone Pipeline. Furthermore, in its analysis of refinery impacts at the Wood River Refinery, the State Department properly relied on the analysis of agencies with expertise and authority over air and water permits. Finally, because the State Department may not legally impose any conditions on oil refineries and refineries may modify, expand, and operate their facilities without any approval from the State Department, NEPA does not require that such activities be included in the EIS. Thus, even if the State Department's analysis of refining impacts were deficient, there would be no violation of NEPA.

1. The State Department's EIS Analyzed the Potential Direct and Indirect Effects of Issuing the Presidential Permit, Including the Potential Impacts Associated With the Wood River Refinery

In evaluating the potential environmental effects of issuing a Presidential Permit for the Keystone Pipeline, the State Department considered both the direct and indirect effects of its decision to issue the permit. See 40 C.F.R. § 1508.8(a)-(b). Not all potential environmental effects need to be analyzed in a NEPA document. Rather, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” Public Citizen, 541 U.S. at 767 (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)). Under the relevant standard, the State Department properly analyzed the direct and indirect effects of issuing a permit for the Keystone Pipeline, including the effects of the expansion and modification of the Wood River Refinery.

a. Only the Wood River Refinery Is Expected to Undergo Modifications to Accommodate Keystone Oil

During the permitting process, the State Department submitted numerous requests for information from Keystone, and one of those requests specifically asked Keystone for information regarding the refineries which would receive oil shipped through the Keystone Pipeline. AR 893 at 9127. The State Department asked Keystone to “[v]erify that there will be no changes to the receiving refineries based on new shale oil input,” and also to “[v]erify that there will be no expansion to these refineries and no increase in emissions.” Id. In its response, Keystone stated:

As presently proposed, the majority of the crude oil to be transported from Canada by the Keystone Pipeline is expected to be delivered to an existing WRB Refining LLC owned and ConocoPhillips operated refinery in Wood River, Illinois. Currently, shippers have contracted to ship 340,000 barrels per day of crude oil on the Keystone pipeline. ConocoPhillips has contracted with Keystone to ship the majority of that volume to the WRB Refining, LLC Wood River

refinery which is operated by ConocoPhillips Company. Because the identity of this refinery is already known, it will not be necessary to engage in large-scale, hypothetical modeling or other types of simulation in order to forecast many of the reasonably foreseeable environmental impacts resulting from Keystone's deliveries of Canadian crude oil to refineries in the United States. Moreover, Keystone expects that the remaining 95,000 barrels per day that the Keystone pipeline is capable of transporting is likely to be shipped on a short-term spot basis, in limited amounts to refineries throughout the country. Under these circumstances, it is not possible to predict with any certainty where that remaining 95,000 bpd of the crude oil transported to Keystone will be refined or what might be the likely environmental impacts of refining these 95,000 barrels of oil per day.

Id.

Keystone also explained that “[i]t is a matter of public record that more than \$1,000,000,000 of spending for a major capital project at the Wood River Refinery is being contemplated in anticipation of receiving Canadian crude oil from the Keystone Pipeline.” Id. The project is known as the “Coker and Refinery Expansion Project (CORE)” and “will increase both the refinery’s total crude processing capacity and the percentage of heavy crude oil processed” at the Wood River Refinery. Id. Keystone acknowledged that the expansion of modification of the refinery is being conducted because “the heavier, higher sulfur, crude which will be delivered via the Keystone pipeline will replace lighter, low sulfur crude oil currently delivered to the Wood River Refinery.” Id. Further, “WRB Refining LLC intends to increase the refinery’s ‘coking’ capacity in order to handle some 190,000 bpd of Canadian crude oil and refine it into motor gasoline, low sulfur diesel fuel and other products,” and anticipates “an increase of some 10-15% in capacity at the Wood River Refinery.” Id. at 9128.

Keystone also explained that the refinery enhancement project at the Wood River Refinery required permits under federal environmental laws, including under the Clean Air Act (“CAA”) and Clean Water Act (“CWA”). Id. Keystone went through the process of securing

those permits from the Illinois Environmental Protection Agency (“Illinois EPA”). Id. Keystone acknowledged that its applications to the Illinois EPA showed that air emissions would increase at the Wood River Refinery due to the increase in coking capabilities and the expanded capacity. Id. In particular, emissions of particulate matter (“PM”), carbon monoxide (“CO”), and volatile organic matter (“VOM”) are expected to increase. PM10 emissions are expected to decrease, and nitrogen oxide (“NO”) emissions are expected to remain about the same. Id. With respect to water emissions, Keystone filed an application for a revised discharge permit under the CWA. Id. Keystone also submitted studies to the Illinois EPA showing that the expanded refining capacity will not result in water quality impacts or increase quantities of discharge into the Mississippi River. Id. at 9128-29.

Keystone also expected “that some 20% of the crude oil capable of being transported on the Keystone pipeline will be shipped on a short-term spot basis, in limited amounts, to refineries throughout the country.” Id. at 9129. Based on information provided by the Energy Information Agency, Keystone estimated that there were roughly 75 refineries in the central part of the country that would be in a position to take all or portions of the remaining 95,000 bpd transported through the pipeline. Id. Together, those 75 refineries have a daily capacity of 12,527,702 bpd. Id. The 95,000 bpd that would be available to those refineries from the Keystone pipeline is less than 1% of their daily capacity. Id. Moreover, those facilities currently are being operated at capacity, and, therefore, oil from the Keystone Pipeline is expected to be used only to a limited degree by these other unidentified refineries. Id. Because the precise destination of the oil is uncertain, Keystone indicated that it could not assess in detail the potential environmental impacts of refining oil at these other facilities. Id. All of the facilities that would receive Keystone oil would be subject to CAA permitting requirements. Therefore,

Keystone did not expect that the delivery of small amounts of oil from the Keystone Pipeline to these facilities would significantly alter the environmental impacts of those refineries. Id.

Based on the information provided by Keystone, the State Department analyzed the CORE project at the Wood River Refinery as a “connected action” in the EIS. AR 1230 at 15292; see also 40 C.F.R. § 1508.25(a)(1) (connected actions are actions that are “closely related” to the action under review and therefore should be considered in the same EIS). The State Department analyzed the CORE project because, based on the information presented by Keystone, the project “would increase both the refinery’s total crude processing capacity and the percentage of heavy crude oil processed.” Id. The State Department noted that the Wood River Refinery is currently refining “lighter, low-sulfur crude oil from foreign oil sources.” Id.; see also AR 1231 at 15315-16. The CORE project is being conducted for the purpose of accommodating increased amounts of Canadian heavy crude from the Keystone Pipeline and therefore the State Department analyzed the CORE project as a connected action in the EIS. See id.; see also 40 C.F.R. § 1508.25(a)(1)(ii).

Contrary to NRDC’s suggestions, Plf. Mem. at 24 n.14, the State Department did not take Keystone’s explanation at face value, but rather sought further explanation from Keystone and examined publicly available information to determine whether other refineries would undergo expansion or modification projects to accommodate Keystone oil. See AR 227 at 1964 (April 30, 2007 e-mail from Keystone’s counsel explaining that the capital improvement projects at the Patoka, Illinois and Cushing, Oklahoma refineries would be minor); AR 295 at 2331-32 (July 11, 2007 e-mail from State Department to U.S. EPA explaining that a planned refinery in South Dakota would not be connected to the Keystone Pipeline). Such information gathering and exchanges with Keystone continued through the finalization of the EIS. See AR 529 at 4210-11

(January 29, 2008 e-mail from State Department to its contractor explaining that a reported new pipeline was not being planned in conjunction with the Keystone Pipeline).

As the above discussion demonstrates, during the permit application and NEPA processes the State Department was cognizant of the potential for increased adverse environmental effects due to the refining of heavy Canadian crude oil transported through the Keystone Pipeline. The State Department sought information from the applicant regarding the refineries that would process Keystone oil and whether the refineries would be expanded or modified to accept Keystone Oil. The State Department analyzed the potential environmental effects of the CORE project, which is the only identified refinery expansion and/or modification project that is causally related to the construction of the Keystone Pipeline. See 40 C.F.R. § 1508.8(b). It was not necessary for the State Department to analyze the potential environmental effects of refining oil at other refineries because those refineries will not modify or increase their operations specifically to receive Keystone oil. See Fund for Animals v. Thomas, 127 F.3d 80, 83-84 (D.C. Cir. 1997) (the duty to prepare a NEPA document is triggered by a proposal to change the *status quo*); see also Comm. for Auto Responsibility v. Solomon, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) (same).

The State Department was not required to speculate as to what other refinery modification or expansion projects might eventually occur as a result of the construction of the Keystone Pipeline. See Nat'l Wildlife Fed'n v. FERC, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (“*Kleppe* thus clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.”) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976));

TOMAC v. Norton, 240 F. Supp. 2d 45, 52 (D.D.C. 2003) (Bureau of Indian Affairs not required to speculate about “additional development projects that are not already in the planning stages”). Based on the information gathered during the permitting process, only the Wood River Refinery is being expanded or modified specifically for the purpose of receiving oil transported through the Keystone Pipeline. Other refineries may receive Keystone oil but are not undergoing capital expansion projects for that purpose. Thus, there are no potential increased environmental impacts at those other refineries that can be causally linked to the construction of the Keystone Pipeline. Accordingly, based on the rule of reason established by the Supreme Court, the State Department appropriately exercised its judgment and determined that an analysis of the potential environmental impacts associated with refineries other than the Wood River Refinery was not required. See Public Citizen, 541 U.S. at 767; Coal. on Sensible Transp., 826 F.2d at 66 (“The NEPA involves an almost endless series of judgment calls.”).

b. Plaintiff Has Waived the Right to Argue that Refineries Other Than Wood River Should Have Been Considered in the EIS

NRDC argues based entirely on extra-record materials that refineries other than the Wood River Refinery should have been considered in the EIS. See Plf. Mem. at 15-25; Plf. SAF ¶¶ 71-100 (Docket No. 22); Kyle Decl. Exs. G-S (Docket Nos. 22-31 - 22-56). These materials should not be considered by the Court and should be stricken from the judicial record. See Defendants’ Opposition to Plaintiff’s Motion to Submit Extra-Record Materials and Motion to Strike Extra-Record Evidence and Memorandum in Support (“Def. Extra-Record Opp.”) (Docket No. 41). As explained in that opposition, NRDC’s submission of extra-record materials should be rejected because, among other reasons, NRDC chose not to submit the materials during the administrative review process for the Presidential Permit and therefore has waived its

opportunity to pursue those arguments in litigation. See Public Citizen, 541 U.S. 752, 764 (2004) (parties have a duty to “‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration” in its decision making process) (quoting Vermont Yankee, 435 U.S. at 553).

NRDC’s comments on the DEIS fall short of demonstrating that NRDC “forcefully presented” during the administrative process the issues it now seeks to raise in litigation. See Vermont Yankee, 435 U.S. at 554. In its comments on the DEIS, NRDC suggested that the State Department should “consider the environmental impacts of refinery expansions to refine the expanded amount of tar sands oil that will be imported into the United States.” See NRDC’s Comments on the DEIS dated September 24, 2007, Nakagawa Decl. Ex. C at 3 (Docket No. 22-12). NRDC argued that “proposals to upgrade existing refineries in the United States are already underway to increase their capacity for refining heavier crude oil such as those derived from tar sands.” Id. at 4. But, NRDC made no mention of the numerous financial reports, press releases, and other documents that it now seeks to introduce into this litigation. Instead, NRDC argued that “major expansions in refining capacity to take more blended bitumen – which is the least refined tar sands oil that can be transported through a pipeline – are now in the works at the BP Whiting plant in Indiana and at the ConocoPhillips Wood River plant in Roxanna, IL.” Id. at 5.

As discussed above, the State Department analyzed the potential environmental effects of the CORE project at Wood River. As to the BP Whiting Refinery (the only other refinery project mentioned in NRDC’s comments on the DEIS), NRDC does not mention it anywhere in its summary judgment papers and therefore apparently concedes that there is no link between that expansion project and the Keystone Pipeline. Nevertheless, NRDC now argues that, “[b]y the time DOS issued its January 2008 FEIS, a half-dozen existing U.S. refineries – including

three owned and operated by Keystone partner and joint owner ConocoPhillips – had been identified publicly as either certain or reasonably likely to refine Western Canadian heavy crude oil from the Keystone pipeline.” Plf. Mem. at 16. Because NRDC did not “forcefully present” information regarding these “half-dozen” refineries when it had the opportunity to do so during the NEPA process, it should not be permitted to argue in litigation that the State Department’s analysis of the potential environmental impacts from those refineries was inadequate. See Public Citizen, 541 U.S. at 764; see also Common Sense Salmon Recovery v. Evans, 329 F. Supp. 2d 96, 105 (D.D.C. 2004).

c. Even if the Court Considers the Extra-Record Materials Submitted by NRDC, the CORE Project at Wood River is the Only Refinery Expansion Project that Is Not Speculative

Even if the Court considers the extra-record materials submitted by NRDC, the Court should still find that the State Department considered all reasonably foreseeable impacts associated with the refining of oil caused by the issuance of the Presidential Permit. NRDC argues that it was reasonably foreseeable that “the project’s indirect effects would extend to multiple refineries.” Plf. Mem. at 21. As explained above, however, the only existing refinery modification and expansion project being conducted *specifically* for the purpose of receiving Keystone oil is the CORE project at the Wood River Refinery. See AR 1231 at 15315-16. The other two facilities to which Keystone oil will be shipped are terminals at Patoka, Illinois and Cushing, Oklahoma. AR 1230 at 15276. Those two facilities will not undergo substantial expansion or modification projects to receive Keystone oil. AR 227 at 1964 (April 30, 2007 e-mail from Keystone’s counsel to the State Department). From three primary facilities, oil will be shipped to as many as 75 different refineries in the mid-West. AR 893 at 9129. These refineries already process heavy crude and are operating at capacity, and, therefore, there are not expected

to be significant modifications or upgrades at these facilities in order to receive Keystone oil. Id. Therefore, it is not reasonably foreseeable that the refining of heavy crude at these refineries will not result in any increased environmental impact. See 40 C.F.R. § 1508.8(a)-(b).

The extra-record materials submitted by NRDC do not demonstrate that the other refineries will undergo expansions or modifications specifically to accommodate oil from the Keystone Pipeline. While NRDC draws certain inferences from those documents, it fails to show that there are any modification projects, other than the CORE project at the Wood River Refinery, that are being conducted for the purpose of receiving oil from the Keystone Pipeline. NRDC argues that “[a]t least three of the Keystone oil refineries omitted from the FEIS – Borger, Coffeyville, and McPherson – had entered into long-term agreements to process Keystone oil well before DOS issued its Permit.” Plf. Mem. at 23. The issue is not whether other refineries will receive Keystone oil. Indeed, many refineries will receive oil from the Keystone Pipeline, but they will do so to replace other sources of oil. AR 893 at 9129. Rather, the issue is whether, as result of receiving Keystone oil, the refineries will undergo significant modification or expansion which will result in a change in the particular refinery’s impact on the environment. See, e.g., Fund for Animals, 127 F.3d at 83-84 (NEPA analysis is required for actions that will change the *status quo* with respect to the impact on the environment). NRDC has not identified refineries that will under go such changes as a result of the Keystone Pipeline.

With respect to the Coffeyville and McPherson refineries, the materials submitted by NRDC confirm Keystone’s statement that the relatively small amounts of oil shipped to other refineries would not have significant environmental effects because they would likely “be used to replace other sources of crude oil that are more expensive to purchase or transport.” AR 893 at 9129. In a September 6, 2007 SEC filing, CVR Energy Corp. states, “We have also

committed to additional pipeline capacity [of 25,000 bpd] on the proposed Keystone pipeline project currently under development by TransCanada Keystone Pipeline, LP which will provide us with access to incremental oil supplies from Canada.” Kyle Decl. Ex. P at 3-4, 157. This report does not state and does not suggest that the McPherson refinery will undergo a significant capital improvement project to accommodate Keystone oil. Similarly, the National Cooperation of Refining Association’s (“NCRA”) 2007 annual report indicated that it would accept 20,000 bpd from the Keystone Pipeline. Kyle Decl. Ex. Q at 4. NRDC fails to mention, however, that the same report also indicated that the refinery already is processing heavy crude from Canada: “Heavy sour crude oil consumed at the refinery and sourced from Canada made up 15% of the crude slate.” *Id.* at 5. The company is currently studying its refining capabilities, but this report does not say that any modification or expansion projects are planned.

With respect to the Borger refinery, NRDC argues that ConocoPhillips’ 2007 annual report, filed with the SEC on February 28, 2008, showed it would receive oil from the Keystone Pipeline. Plf. Mem. at 18; Kyle Decl. Ex. S. This annual report was issued after the EIS was finalized on January 11, 2008 and on the same date that the ROD was signed. AR 1225 at 15210 (EIS); AR 564 (ROD) at 4440. Therefore, the State Department could not have considered this document during the NEPA process, and NRDC has not argued that the State Department should prepare a supplemental EIS. Moreover, even if the State Department could have considered this document, it is not clear that oil from Keystone will be processed at the Borger refinery and the report does not describe any ongoing refinery expansion or modification project at Borger. *See* Kyle Decl. Ex. S at 23, 25 (stating that Keystone oil would be processed by WRB Refining LLC, which owns Wood River and Borger refineries).

NRDC argues that the State Department should have attempted to obtain additional

information to confirm that other refineries would not undergo expansion projects. See Plf. Mem. at 22 (citing 40 C.F.R. § 1502.22(a)). Contrary to NRDC's argument, the State Department conducted a reasonable investigation of potential refineries that would undergo expansions, see Section II.A.1.a., supra, and NRDC has failed to identify any additional information that the State Department could have obtained. Similarly, NRDC's suggestion that the State Department did not sufficiently substantiate the information submitted by Keystone is without merit. See Plf. Mem. at 24 n.14 (citing Hammond v. Norton, 370 F. Supp. 2d 226, 251-52 (D.D.C. 2005)). The State Department did, indeed, attempt to substantiate the information submitted by Keystone, and its investigation did not lead it to believe that the information submitted by Keystone regarding refineries was "inaccurate or exaggerated." See Hammond, 370 F. Supp. 2d at 252.^{2f}

Finally, NRDC's contention that the State Department did not adequately respond to comments on the DEIS regarding the potential impacts of refining Keystone oil is without merit. See Plf. Mem. at 22. In response to comments, the State Department was required (among other options) to "[s]upplement, improve, or modify its analyses," or "[e]xplain why the comments do not warrant further agency response." 40 C.F.R. § 1503.4(a)(3), (5). The State Department did both. In response to the comments of NRDC and others regarding refining impacts, the State Department provided additional analysis of air and water quality impacts at the Wood River Refinery and of greenhouse gas emissions. AR 1234 at 15408-09 (water quality); AR 1243 at

^{2f} Unlike the Hammond case, NRDC has not alleged that Keystone has withheld or misrepresented information to avoid NEPA analysis. See Hammond, 370 F. Supp. 2d at 247-53 (finding that the Bureau of Land Management should not have segmented its analysis of an oil pipeline without confirming the applicant's claim that it had dissolved a partnership with an oil supplier).

15830-32 (air quality); AR 1245 at 15894-95 (cumulative impacts). The State Department also explained that, “The identity of other refineries where Keystone crude oil would be sent varies depending on market conditions, availability of imports from other countries, weather conditions, etc. . . . Some of these refineries may elect to install upgrades similar to those approved for Wood River but they are speculative at this time. . . .” AR 1249 at 15993. In response to NRDC’s suggestion that the EIS insufficiently analyzed the cumulative impacts of producing and refining tar sands oil, the State Department explained that: “The scope of the EIS is necessarily limited to the scope of the proposed project and does not extend to the supply of crude oil to the transportation system or the operation of refineries that are supplied by it.” *Id.* at 15995. As explained in Sections II.A.3. & II.B., *infra*, this response was entirely appropriate. Thus, the requirement to respond to comments has been met.

2. The State Department’s Analysis in the EIS of the Potential Impacts of the Wood River Refinery on Air and Water Quality Satisfies NEPA

NRDC argues that the State Department’s analysis of the potential impacts on air and water quality of refining Keystone Oil was inadequate. Plf. Mem. at 25-30. As explained in Section II.A.3, *infra*, the State Department’s analysis of the impacts of refining Keystone Oil exceeds the requirements of NEPA and cannot serve as a basis for finding the EIS to be inadequate. Even assuming, however, that the State Department was required to analyze the impacts to air and water quality, its analysis was adequate.

In the EIS, the State Department analyzed the impacts of the CORE expansion project at the Wood River Facility on air and water quality. With respect to air quality, the State Department noted that, in order for the CORE project to go forward at the Wood River Refinery, ConocoPhillips was required to receive permits from the Illinois EPA. AR 1243 at 15830. In its

permit applications, ConocoPhillips informed the Illinois EPA that total crude processing would increase at the refinery and that the percentage of heavier crude processed also would increase because of the increased volume of heavy Canadian crude delivered from the Keystone Pipeline. Id. The Illinois EPA issued the air emissions permit to ConocoPhillips. Id. Net emissions of NO_x, SO₂, PM₁₀ and PM 2.5 are not expected to increase at the Wood River Refinery as a result of the CORE project. Id. at 15831. The CORE project will, however, result in potential increased emissions of CO and VOC, which triggers the New Source Review (“NSR”) and Prevention of Significant Deterioration (“PSD”) requirements of the CAA are triggered. Id. The PSD component requires that new and modified units that would contribute to increases in the CO emissions undergo Best Available Control Technology (“BACT”) analysis. Id. The NSR component requires that new and modified units that would contribute to increased VOC emissions undergo a Lowest Available Emission Rate (“LAER”) analysis. Id. In addition, because the St. Louis/Metro-East is an ozone non-attainment area under the National Ambient Air Quality Standards (“NAAQS”), ConocoPhillips must obtain emission offsets for VOC emissions from the CORE project. Id. The permit requires that ConocoPhillips obtain the offsets within 90 days of the issuance of the permit. Id.

With respect to water quality, the State Department’s EIS indicated that wastewater discharge from the Wood River Refinery would increase at two discharge points from 7.93 and 7.78 million gallons per day (“mgd”) to 10.97 and 10.82 mgd, respectively. AR 1234 at 15408. At six other points, discharges of primarily storm water would remain unchanged. Id. The wastewater treatment plant at the refinery would be upgraded to accommodate the increased volume. Id. The discharges are into the Mississippi River and an unidentified ditch, and all of the discharge points are in locations classified as General Use streams and contain no threatened

or endangered species. Id. The discharge locations are identified in the CWA Section 303(d) list of impaired waterbodies based on the presence of PCBs, manganese, and fecal coliform. Id. An antidegradation assessment was conducted pursuant to the applicable Illinois Pollution Control Board regulation, 35 Ill. Adm. Code § 302.105. Id. That analysis found that phosphorous and nitrogen discharges would increase, and that biological oxygen demand would not increase. Id. at 15409. Sulfate and chloride discharges are expected to increase, but they would quickly be diluted to below the water quality standard. Id. The State Department concluded that the CORE project would not result in any violations of any applicable water quality standards and that existing uses of surface water bodies would be fully protected. Id.

The State Department's reliance on the Wood River Refinery's compliance with CAA and CWA standards and permitting requirements in its analysis of environmental effects under NEPA was appropriate. See Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) ("The fact that the EIS acknowledges that the project will be forced to comply with pollution permitting requirements is not, by itself, arbitrary or capricious."). In addition, NRDC is incorrect to assert that the State Department has implied that air and water pollution "will be regulated into insignificance." Plf. Mem. at 28. Here, the State Department has conducted an EIS analyzing all of the potential significant impacts of issuing the Presidential Permit, and, therefore, has not taken the position that such effects are insignificant. Nevertheless, the cases cited by NRDC actually support the proposition that an agency may rely on compliance with applicable environmental laws to determine that a certain impact is not significant. See Public Citizen v. National Highway Traffic Safety Admin., 848 F.2d 256, 268 (D.C. Cir. 1988) ("[W]e decline to indict as arbitrary and capricious the agency's decision, made in view of time and resource constraints, to ignore in this case possible increases in emissions *within* the Clean Air

Act limits.”) (emphasis in original); see also Maryland-National Capital Park & Planning Comm’n v. United States, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973) (a construction project’s compliance with local zoning requirements supports a finding that the project’s effects will not be significant). Accordingly, it was appropriate for the State Department to rely on the agencies with expertise in analyzing air and water quality impacts in the EIS.

NRDC further argues, relying entirely on the extra-record declarations that it submitted, that the EIS overlooks certain potential environmental effects, such as flaring, venting, and fugitive emissions, which “are either unaddressed or poorly controlled by permitting.” Plf. Mem. at 28. The Court should not consider this argument because it is based solely on extra-record materials and, by failing to forcefully present these issues during the NEPA process, NRDC has waived the right to make such arguments in litigation. See Def. Extra-Record Opp. at 7-13. But, even if this argument is considered, it only serves to demonstrate NRDC’s lack of familiarity with the stringent permitting requirements for oil refineries and NRDC’s pattern of raising matters in litigation that it did not raise in the appropriate forum during the administrative process. As noted in the EIS, separate environmental groups challenged the CAA permit issued by the Illinois EPA. AR 1243 at 15830. Many of the same issues now raised by NRDC, including flaring and greenhouse gas emissions were raised in the challenge, which was brought before the Environmental Appeals Board of the U.S. EPA. See In re ConocoPhillips, Co., PSD Appeal No. 07-02 (U.S. EPA Env’tl. App. Bd. June 2, 2008) Declaration of Luther L. Hajek Exhibit (“Ex.”) 1. The Board remanded the permit to the Illinois EPA with instructions to explain the changes in the permit that resulted from the comment period and to provide a BACT analysis for CO emissions from flaring and to more fully explain how it will ensure enforcement of the CO BACT provisions. Id. at 25, 35, 43, 51. The matter has now been resolved and a new

permit has been issued to ConocoPhillips. See CAA Permit, Ex. 2. Accordingly, the State Department considered air quality impacts and appropriately relied on the U.S. EPA and Illinois EPA pollution controls implemented through the air permitting process.

NRDC also argues that additional analysis was required based on Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003). See Plf. Mem. at 28-30. In that case, the court found that the Surface Transportation Board was required to analyze the impacts to air quality of approving a new rail line for the purpose of transporting coal from mines in Wyoming to coal-fired power plants in the mid-west. See Mid-States, 345 F.3d at 548-50. For the reasons set forth in Section II.A.3., infra, the court's analysis was incorrect in light of the Supreme Court's subsequent decision in Public Citizen and therefore does not support an argument that the State Department was required to analyze refinery impacts. But, even if the Court were to find that an analysis of refinery impacts was required, Mid-States does not support NRDC's arguments here. Following the Eighth Circuit's opinion, the Board conducted an analysis of air impacts and concluded that, "on both national and regional levels, projected air emissions for [the relevant pollutants] associated with the small increase in additional coal usage would be less than 1%." Mayo Found. v. Surface Transp. Bd., 472 F.3d 545, 555 (8th Cir. 2006). But, the Board explained that its analysis "could not be used to model these impacts at a local level," and that in order to access such impacts, it would need to know which power plants would use the rail line and also "whether they would otherwise not burn [Powder River Basin] coal, not burn as much coal, or burn a different mix of coal." Id. at 555-56. The Board concluded that impacts on air quality of the project would be "small" and the potential impacts on local air quality would be "speculative" and "ultimately unforeseeable." Id. at 556. The court upheld this analysis. See id.

Similarly, in this case, the State Department explained that, “The capacity of the Keystone Pipeline represents only about 2% of daily domestic oil consumption.” AR 1249 at 15993. In addition, “The identity of other refineries where Keystone crude oil would be sent varies depending on market conditions, availability of from other countries, weather conditions, etc.” *Id.* Thus, as in Mid-States, the additional environmental impacts associated with the pipeline would be very small on a national scale. And, it would be entirely speculative for the State Department to attempt to quantify the particular air and water quality impacts at particular refineries without knowing the amounts of oil that these refineries will receive, how much oil they would refine in the absence of Keystone oil, and whether they will process heavy crude oil other than Keystone oil. See 472 F.3d at 555-56. In the absence of such information, it was reasonable for the State Department not to attempt to quantify such impacts because the additional analysis would not have provided useful information. See Public Citizen, 541 U.S. at 767 (the reasonableness of conducting additional analysis depends upon “the usefulness of any new potential information to the decisionmaking process”).

Accordingly, NRDC has not demonstrated that the State Department’s analysis of air and water impacts of the Wood River Refinery are inadequate under NEPA.

3. The Potential Environmental Impacts of Refining Oil Transported Through the Keystone Pipeline Are Outside the Scope of Impacts that Were Required to Be Analyzed in the State Department’s EIS

Even though the State Department chose to analyze refinery impacts in the EIS, it was not required to do so. The Supreme Court has established that, “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.” Public Citizen, 541 U.S. at 767. Rather, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Id.* (quoting

Metro. Edison, 460 U.S. at 774). In determining whether a particular effect is reasonably connected to an agency's action such that NEPA analysis is required, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that make an actor responsible for an effect and those that do not." Metro. Edison, 460 U.S. at 774 n.7. "Also, inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." Public Citizen, 541 U.S. at 767 (citing Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373-74 (1989)). Moreover, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." Id. at 770.

In this case, the issuance of the Presidential Permit cannot be considered to be the "legally relevant cause" of potential environmental effects caused by the operation of oil refineries. The Secretary of State is authorized by the President to approve the construction "at the borders of the United States" of "facilities for the exportation or importation of petroleum products." Exec. Order 13337 § 1(a). Pursuant to that authority, the State Department issued the Presidential Permit to Keystone authorizing it "to construct, connect, operate, and maintain pipeline facilities at the border of the United States and Canada at Cavalier County, North Dakota, for the transport of crude oil and other hydrocarbons between the United States and Canada." AR 567 (Permit) at 4449. The State Department's analysis under NEPA is limited by its regulatory role, which was the approval of the border crossing. See Metro. Edison, 460 U.S. at 776 (quoting Vermont Yankee, 453 U.S. at 551) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision'

is to be accomplished.”). Requiring the State Department, based on its approval of a border crossing, to analyze all potential impacts of refinery operations would be unmanageable and would require the State Department to “expend considerable resources developing . . . expertise that is not otherwise relevant to [its] congressionally assigned functions.” Id. at 776.

The State Department has no regulatory control whatsoever over such refineries and no authority to limit their actions in any way. The private companies who own and operate those refineries (who are not subject to the Presidential Permit and are not parties to this litigation) may expand, modify, and operate their refineries without any approval from the State Department. Even the CORE project at the Wood River Refinery (which also is owned by a company, ConocoPhillips, that is not a party to this litigation) is not subject to any approval or regulatory review by the State Department and may go forward regardless of the issuance of the Presidential Permit. Accordingly, because the State Department has no authority (not even veto authority) over the construction or operation of refineries that would receive oil from the Keystone Pipeline, the issuance of the Presidential Permit cannot be considered to be a “legally relevant cause” of the potential environmental effects of operating the refineries.

With respect to the proper scope of the State Department’s EIS, NRDC’s reliance on Mid-States is misplaced. See Plf. Mem. at 29-30. The Eighth Circuit’s decision predates the Supreme Court’s Public Citizen opinion and contains no analysis of whether the approval of the rail line was a “legally relevant cause” of the emissions from coal-fired power plants. 541 U.S. at 770. Instead, the court only analyzed whether the impacts to air quality were too speculative to be considered under NEPA, which is an entirely separate inquiry. See Mid-States, 345 F.3d at 549-50. Accordingly, the failure of the court in Mid-States to analyze whether the approval of the rail line was a legally relevant cause of the potential environmental impacts to air quality

renders the decision invalid after Public Citizen.^{3/}

The conclusion that refinery impacts are outside the scope of the State Department's EIS is bolstered by the well-recognized principle that, if an agency has no control over the actions of a private entity, those actions do not constitute a "major federal action," triggering the obligation to analyze the effects of such actions in a NEPA document. See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1116-18 (9th Cir. 2000) (upholding Corps' NEPA analysis, which analyzed only the effects of fill activity requiring a permit and not the entire development project); Winnebago Tribe of Neb. v. Ray, 621 F. 2d 269 (8th Cir. 1980) (holding that the fact that a federal permit was required to run power lines over two-mile stretch of river does not federalize private project to run sixty-seven miles of power lines between Nebraska and Iowa); Save the Bay, Inc. v. U.S. Army Corps of Eng'rs, 610 F.2d 322 (5th Cir. 1980) (holding that NEPA did not require the Corps to consider a chemical plant when issuing a permit allowing construction of a wastewater pipeline from the plant even though plant could not be constructed without the wastewater pipeline).

Thus, an agency "may limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist

^{3/} Although not cited by NRDC, Border Power Plant Working Group v. Dep't of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003) likewise is no longer valid following Public Citizen and is distinguishable. There, the court applied a "but for" causation standard in determining that the Department of Energy ("DOE") was required to analyze the potential environmental impacts of a power plant in Mexico that would connect to electrical transmission lines crossing the U.S. border. See id. at 1016. The application of a "but for" standard without considering whether DOE's permit was a legally relevant cause of the potential impacts of the power plants is invalid. See Public Citizen, 541 U.S. at 770. Moreover, the court placed significant weight on the fact that the cross-border power line was "the only current means evidenced by the record through which [the power company] could transmit its power" and, therefore, the power line "was a but-for cause of the generation of power." Id. at 1017. The same is not true of refineries that will process oil transported through the Keystone Pipeline, which will process oil from many sources.

independently of each other.” Wetlands Action Network, 222 F.3d at 1116. In determining the appropriate scope of the agency’s NEPA review, the Court may also consider “the degree of federal funding or supervision over a project” and “whether the federal and non-federal activity are sufficiently interrelated to constitute a ‘federal action’ for NEPA purposes.” Id. (citations and internal quotations omitted). Another factor to be considered is whether the agency possesses any regulatory authority or a veto power over the parts of the project that fall outside its jurisdiction. North Carolina v. City of Virginia Beach, 951 F.2d 596, 604 (4th Cir. 1992) (holding that the Federal Energy Regulatory Commission’s NEPA review was limited to those aspects of the project over which it had control). “Simply put, NEPA requires agencies of the federal government, not private actors or states and municipalities, to consider the potential effects upon the environment of their proposed actions.” Id.

Like the cases discussed in the preceding paragraphs, the State Department has no regulatory control over wholly private actions (in this case, the actions of refineries) which will occur independently of the regulated activity. As in Wetlands Action Network, the pipeline and the various refineries exist and operate independently of each other. See 222 F.3d at 1116. Indeed, a refinery expansion project at anyone of the dozens of refineries that may receive oil from the Keystone Pipeline “*could* proceed without [State Department approval],” and such projects are “currently proceeding” without State Department approval. Id. at 1117 (emphasis in original). Furthermore, the construction of the pipeline itself is a wholly private endeavor and is not funded by the federal government. See id.; see also Hammond v. Norton, 370 F. Supp. 2d 226, 256 (D.D.C. 2005) (“[T]he Holly pipeline expansion appears to have been an entirely private endeavor involving no federal ‘action’ which might have required an environmental analysis under NEPA.”).

Moreover, the operation of refineries is subject to entirely separate legal requirements overseen primarily by the U.S. EPA and state equivalents (discussed in Section II.A.2., supra), which further weighs against requiring the State Department, which has no expertise in such matters, to analyze those effects. See North Carolina, 951 F.2d at 605 (holding that FERC’s NEPA review appropriately limited due to the independent permit and NEPA analysis issued by the Corps); Wetlands Action Network, 222 F.3d at 1117 (noting that the “[t]he project has also been subjected to extensive state environmental review”); Sylvester v. U.S. Army Corps of Eng’rs, 884 F.2d 394, 401 (9th Cir. 1989) (“We, finally, draw comfort from the fact that ordinary notions of efficiency suggest a federal environmental review should not duplicate competently performed state environmental analyses.”).

The D.C. Circuit upheld a similar approach in Nat’l Comm. for the New River v. FERC, 373 F.3d 1323 (D.C. Cir. 2004). In that case, the plaintiffs challenged the Federal Energy Regulatory Commission’s (“FERC”) approval of a roughly 100-mile pipeline extension which would extend to power plants in Virginia and North Carolina. Id. at 1325. The plaintiffs argued, among other things, that FERC’s NEPA analysis was inadequate because FERC failed to consider the environmental impacts associated with the operation of power plants connected to the pipeline, including a proposed new power plant. Id. at 1333. Applying the factors set forth in FERC’s regulations for determining whether non-jurisdictional activity must be analyzed under NEPA, the Court held that, “the Commission’s determination that there was insufficient federal control to warrant the Commission’s environmental review of the DENA Wythe Power Plant is entitled to deference.” Id. at 1334.^{4/} Although the court did not rely on the Supreme

^{4/} The four factors in FERC’s regulations are: “(1) whether the regulated activity comprises
(continued...) ”

Court's decision in Public Citizen (which was issued a month earlier), the court similarly rejected the "but-for" approach argued by the plaintiffs in favor of a "balancing of the federal interest against counter-balancing factors." Id. Likewise, the State Department's determination that impacts from refineries (which are not within the State Department's jurisdiction) are outside the required scope of its NEPA analysis was reasonable and should be upheld.

Because the State Department's analysis of the potential environmental impacts of the Wood River Refinery exceeded its NEPA responsibility, the alleged inadequacy of that analysis cannot be a basis for finding a NEPA violation. See Biodiversity Cons. Alliance v. BLM, 404 F. Supp. 2d 212, 218 (D.D.C. 2005) (Leon, J.) ("The EA is not rendered unlawful simply because the BLM *could* have considered more impacts.") (emphasis in original); Olmsted Citizens For A Better Comty. v. U.S., 793 F.2d 201, 208 n.9 (8th Cir. 1986)("[The] government's preparation here of a putative environmental impact statement means that environmental factors were given even greater consideration . . . than required by the NEPA."); Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981) ("Because we hold that no EIS was necessary, we need not consider whether the EIS actually prepared by the

^{4/}(...continued)

'merely a link' in a corridor type project; (2) whether there are aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity that uniquely determine the location and configuration of the regulated activity; (3) the extent to which the entire project will be within the Commission's jurisdiction; and (4) the extent of cumulative federal control and responsibility." Nat'l Comm. for the New River, 373 F.3d at 1333-34 (citing 18 C.F.R. § 380.12(c)(2)(ii)). Although the State Department has no comparable regulations, the application of these factors is appropriate because they are based on the case law discussed above, *e.g.*, Winnebago, Save the Bay, Sylvester. See 373 F.3d at 1333 (noting that FERC adopted the four-factor test set forth in Algonquin Gas Transmission Co., 59, FERC ¶ 61255, 61934-35 (June 2, 1992)). It is reasonable to apply these factors to the State Department's analogous decision to issue a Presidential Permit for an oil pipeline, especially because the State Department has far less regulatory control over oil pipelines than FERC does over natural gas pipelines.

FAA was adequate . . .”).

Finally, this Court should see this lawsuit for what it is – a policy challenge to the State Department’s decision to issue a Presidential Permit for the Keystone Pipeline. NRDC betrayed this intent when it stated in its comments on the DEIS that, “We do not think that granting a permit for the proposed Transcanada Keystone pipeline is in the national interest.” Nakagawa Decl. Ex. C at 2 (Docket No. 22-12). However, pursuing disagreements over policy is not a valid objective under NEPA. “Neither the language nor the history of NEPA suggest that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.” Metro. Edison, 460 U.S. at 777. Accordingly, although NRDC may disagree with the State Department’s issuance of the Presidential Permit on policy grounds, that is an insufficient basis for a NEPA claim.

Accordingly, the Court should hold that an analysis of the potential impacts of refining Keystone oil are outside the scope of the State Department’s EIS and should reject NRDC’s arguments that additional analysis of the impacts of oil refining was required.

B. The State Department Appropriately Analyzed Cumulative Impacts, Including the Potential Impacts of Greenhouse Gases Emissions

The State Department analyzed the cumulative impacts of issuing a Presidential Permit for the Keystone Pipeline. AR 1245 at 15886-96. Included in the State Department’s cumulative impacts analysis is an analysis of the impacts of greenhouse gas emissions and climate change. Id. at 15894-95. Although NRDC’s brief contains two separate sections arguing that the EIS did not sufficiently address greenhouse gas emissions and cumulative impacts, both sections challenge the sufficiency of the State Department’s analysis of climate

change. See Plf. Mem. at 30-36. NRDC's essential contention is that the State Department's analysis of cumulative impacts is inadequate under NEPA because the State Department did not quantify the expected greenhouse gas emissions of refineries that would process Keystone oil. This contention is without merit because the State Department adequately explained in the EIS that an attempt to quantify greenhouse gas emissions and the potential effects on climate change would be based solely on speculation and would not have provided useful data to inform its decision about whether to issue the permit.

An analysis of cumulative impacts requires an agency to consider the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Id. Thus, NEPA requires an agency to provide "a realistic evaluation of the total impacts and cannot isolate a proposed project." Grand Canyon Trust v. FAA, 290 F.3d 339, 342 (D.C. Cir. 2002); see also Biodiversity Conservation, 404 F. Supp. 2d at 218. The State Department has properly analyzed the cumulative environmental impacts that could be realistically predicted based on the information before it.

In its EIS, the State Department analyzed the potential effects of greenhouse gas emissions and global warming due to the construction and operation of the Keystone Pipeline. AR 1245 at 15894-95. In its analysis, the State Department recognized that "the construction and operation of the Project would incrementally increase the cumulative impact of greenhouse gas emissions." Id. at 15895. The State Department noted, however, that the pipeline did not create the demand for Canadian oil, and the "construction and operation of the pipeline would

offset potential emissions associated with other methodologies for meeting the demand for imported crude oil, such as delivery of crude oil by tanker from alternative international sources.” Id. The State Department concluded that, “the incremental contribution to greenhouse gas emissions associated with construction and operation of the proposed Keystone [pipeline] is likely to be relatively small compared to the nationwide production of greenhouse gases on an annual basis.” Id. NRDC argues that the State Department’s analysis was insufficient because the State Department did not quantify the greenhouse gas emissions from refineries that will process Keystone Oil. Plf. Mem. at 30-33. For the reasons explained below, NRDC’s arguments are without merit.

First, NRDC contends that the Supreme Court’s decision in Massachusetts v. EPA, 127 S.Ct. 1438 (2007) requires the State Department to analyze greenhouse gas emissions from refineries in its EIS. Plf. Mem. at 31-32. Contrary to NRDC’s assertions, the Massachusetts case does not bear on the question of whether an agency must analyze greenhouse gas emissions from a particular source in its EIS. Rather, the Supreme Court held that the U.S. EPA is authorized to regulate greenhouse gas emissions under the CAA and that it should exercise that authority. Massachusetts, 127 S.Ct. at 1459-63. The case says nothing about the appropriate scope of an agency’s NEPA review. As explained in Section II.A.3, supra, the impacts of refining oil transported through the Keystone Pipeline were not required to be analyzed by the State Department in its EIS. But, even if analysis of refinery impacts were required, the State Department was not required to analyze impacts that are highly speculative. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 751 F.2d 1287, 1300 & n.63 (D.C. Cir. 1984), vacated on other grounds, 760 F.2d 1320 (D.C. Cir. 1985) (EIS need not address “remote and highly speculative consequences”); see also Hammond, 370 F. Supp. 2d at 246 (same).

Analysis of the greenhouse emissions from refineries that may refine Keystone oil and the potential impact on climate change would be a highly speculative endeavor, dependent on which refineries processed Keystone oil, other alternative sources of crude oil, the nature of the crude oil being processed, and other factors.

Second, NRDC argues that the lack of regulations governing the emission of greenhouse gasses is not an impediment to the State Department's analysis of such impacts under NEPA. Plf. Mem. at 32-33. Indeed, the State Department correctly explained in the EIS that "no rules or regulations have been promulgated by any federal or state agency to define as 'significant' any source of greenhouse gas emissions." AR 1245 at 15894. The lack of regulation in this area was a perfectly valid reason for not conducting additional analyses of greenhouse gas emissions. See Audubon Naturalist Soc'y of the Cent. Atlantic States, Inc. v. U.S. DOT, 524 F. Supp. 2d 642, 708 (D. Md. 2007) (upholding the Federal Highway Administration's decision not to analyze climate change impacts for a highway project on the basis that there are "no national regulatory thresholds for greenhouse gas emissions or concentrations that have been established through law or regulation").⁵⁷ NRDC fails to explain how the State Department, whose primary area of expertise is in the area of foreign affairs, could effectively evaluate the significance of greenhouse gas emissions when agencies with the most expertise, like the U.S. EPA, have not issued any standards governing such emissions. NEPA does not require analyses that will not provide useful information to the decisionmaker. See Public Citizen, 541 U.S. at 767-68.

⁵⁷ NRDC also relies on Mid-States for the proposition that an analysis of climate change was required. Plf. Mem. at 33. Although carbon dioxide emissions were analyzed in the Board's subsequent EIS, the Board noted that there "were no Federal standards for carbon dioxide," and the Court did not specifically require an analysis of greenhouse gas emissions or climate change. Mayo Found., 472 F.3d at 555.

Third, NRDC argues that it would have been possible for the State Department to conduct further analysis of greenhouse gas emissions even with the limited information available. Plf. Mem. at 32-33. The Court should not consider this argument because it is based entirely on purported expert declarations which the D.C. Circuit has ruled are not permissible in APA cases. See Def. Extra-Record Opp. at 7-11; Envtl. Def. Fund v. Costle, 657 F.2d 275, 286 (D.C. Cir. 1981) (rejecting “the creation of an exception which would enable challenging parties to submit affidavits addressing the merits and propriety of the agency decision”). Moreover, NRDC has waived the opportunity to make this argument because it failed to forcefully present it during the administrative process. Def. Extra-Record Opp. at 11-13; Vermont Yankee, 435 U.S. at 553-54. NRDC’s comment letter contains one paragraph discussing the potential global warming impacts related to tar sands oil. Id. at 9-10. In the minimal discussion of the issue, NRDC focused on the impacts from the *production* of tar sands oil, not the refining process.⁹ Id. With its comments, NRDC did not submit any of its purported analysis of the impacts on global warming from refining tar sands oils contained in the Karas Declaration. Because NRDC never brought its scientific analysis to the attention of the State Department, it should not be permitted to rely on it in litigation to argue that the State Department’s analysis of the issue was inadequate. See Public Citizen, 541 U.S. at 764.

Finally, NRDC appears to also suggest that the State Department’s cumulative impacts

⁹ NRDC has not argued in this case that the State Department was required to analyze the potential environmental impacts of *producing* oil from tar sands in Canada. Indeed, the State Department was not required to do so because such impacts (to the extent that they could be considered to have been caused by the pipeline) are beyond the extra-territorial reach of NEPA. See, e.g., Basel Action Network v. Maritime Admin., 370 F. Supp. 2d 57, 71-72 (D.D.C. 2005) (the Maritime Administration was not required by NEPA to consider the environmental effects on international waters of towing defunct naval vessels containing toxic substances).

was also insufficient with respect to refinery pollutants other than greenhouse gasses. Plf. Mem. at 33-34. As explained above, the State Department analyzed the non-speculative refinery upgrade projects that would occur as a result of the Keystone Pipeline. See Section II.A.1, supra. And, in any case, an analysis of refinery pollutants is outside the scope of the State Department's EIS. See Section II.A.3., supra. Accordingly, the State Department's consideration of cumulative impacts complied with NEPA.

C. The State Department Analyzed an Appropriate Range of Mitigation

The State Department's EIS contains a thorough analysis of the mitigation measures that Keystone will employ to avoid environmental harm during the construction and operation of the pipeline. See, e.g., AR 1233 at 15375-78 (soils and sediments), AR 1234 at 15402-06 (water resources), AR 1235 at 15417-30 (wetlands), AR 1236 at 15454-66 (terrestrial vegetation), AR 1237 at 15490-91 (wildlife), AR 1238 at 15505-14 (fisheries), AR 1239 at 15534-79 & 15589-613 (threatened and endangered species), AR 1247 at 15915 (additional mitigation), AR 1250 (Construction Mitigation and Reclamation Plans). Accordingly, the State Department has met NEPA's requirement that an agency include in an EIS "'appropriate mitigation measure[s] not already included in the proposal or alternatives.'" Natural Res. Def. Council v. Kempthorne, 525 F. Supp. 2d 115, 121 (D.D.C. 2007) (quoting 40 C.F.R. § 1502.14(f)); see also Citizens Against Burlington, 938 F.2d at 206 (quoting Robertson, 490 U.S. at 352) (an agency must consider a "reasonably complete discussion of possible mitigation measures").

NRDC argues that the State Department should have considered additional mitigation to reduce the pollution from refining Keystone oil, such as "reducing the total volume of oil supplied through the pipeline for refining in the United States" or "additional pollution controls or making other operational adjustments at refineries likely to process Keystone oil." Plf. Mem.

at 36. Contrary to NRDC's apparent perception, the State Department does not regulate the flow of oil through pipelines and has no authority to regulate refinery emissions. Therefore, it would serve no purpose for the State Department to analyze mitigation measures over which it has no control. See Public Citizen, 541 U.S. at 767. Indeed, NRDC's claim underscores that the analysis of refining impacts truly is outside the scope of the State Department's EIS.

III. EVEN IF THE COURT FINDS THAT THE STATE DEPARTMENT'S EIS IS INADEQUATE, THE COURT SHOULD NOT VACATE THE PERMIT

Even if the Court finds that it has jurisdiction over NRDC's challenge to the Presidential Permit and decides that the State Department's NEPA analysis was inadequate, the Court should not vacate the Presidential Permit. Contrary to NRDC's assertions, violations of environmental laws do not displace the Court's balancing of equitable factors in determining whether an injunction is an appropriate remedy. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982). As the Supreme Court recently emphasized in a NEPA case, "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." Winter v. Natural Res. Def. Council, 129 S.Ct. 365, 381 (2008) (quoting Weinberger, 456 U.S. at 313).⁷ In order to obtain a permanent injunction vacating the Presidential Permit, NRDC must demonstrate that: (1) it has suffered an irreparable injury; (2) remedies available at law, such as money damages, are inadequate; (3) the balance of the hardships weighs in favor of the plaintiff; and (4) the public interest weighs in favor of the requested injunction. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). A balance of these factors in this case does

⁷ The Supreme Court's decision was issued at the preliminary injunction stage, but the Court also stated that, "what we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after a final decision on the merits, along the same lines as the preliminary injunction." NRDC, 129 S.Ct. at 381.

not weigh in favor of vacating the Presidential Permit.

First, NRDC has not shown that it or its members will suffer an irreparable injury if the Presidential Permit is not vacated. Relying entirely on its alleged procedural injury, NRDC suggests that irreparable harm should be presumed in this case. See Plf. Mem. at 37-39. NRDC is mistaken – irreparable harm is not presumed in NEPA cases. Rather, “[w]hat is called for, in each case, is a ‘particularized analysis’ of the violations that have occurred, of the possibilities for relief, and of any countervailing considerations of public interest.” NRDC v. U.S. Nuclear Regulatory Comm’n, 606 F.2d 1261, 1272 (D.C. Cir. 1979) (quoting Alaska v. Andrus, 580 F.2d 465, 485, vacated in part on other grounds sub nom. W. Oil & Gas Assoc. v. Alaska, 439 U.S. 922 (1978)); see also Manitoba v. Norton, 398 F. Supp. 2d 41, 66, 67 (D.D.C. 2005) (same). In *dicta*, the D.C. Circuit has stated that, “Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.” Realty Income Trust v. Eckert, 564 F.2d 447, 457 (D.C. Cir. 1977). Any suggestion that a presumption of *irreparable harm* applies in NEPA cases cannot be squared with Supreme Court precedent. See Winter, 129 S.Ct. at 381 (“A court concluding that the [agency] is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the [agency’s activity] in the interim.”); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544-545 (1987) (rejecting assertion that irreparable harm may be presumed under traditional equitable principles). Accordingly, NRDC cannot rely on a presumption to demonstrate irreparable harm and therefore has failed to show irreparable harm.

Furthermore, the harms mentioned by NRDC in its brief do not constitute irreparable harm warranting the extraordinary remedy of an injunction. NRDC argues that an injunction is

warranted because “the refining of Keystone oil will result in substantial air and water pollution – including greenhouse gas pollution – wherever it occurs.” Plf. Mem. at 39. While approval of the Presidential Permit may result in incremental increases in refinery activity, and consequently pollution, NRDC has not shown that such activity will result in irreparable harm to the environment. Refineries are subject to applicable state and federal permitting requirements for the purpose of preventing air and water pollution. NRDC has not demonstrated that the safeguards already in place are insufficient to protect the environment, should the Court require additional analyses under NEPA.

Second, a balancing of the equities and the public interest weigh in favor of denying a permanent injunction pending further NEPA review by the State Department. The public interest prong is a significant factor which the Court must weigh in determining whether injunctive relief is appropriate. See Winter, 129 S.Ct. at 376-77 (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”) (quoting Weinberger, 456 U.S. at 312). The Presidential Permit at issue in this case was issued based on a finding by the State Department that it “would serve the national interest.” See AR 564 (ROD) at 4438-39; Exec. Order 13337 ¶ 1(g). The State Department concluded that the “national interest” would be served by the issuance of the permit to Keystone because the pipeline would: (1) increase the diversity of oil supplies available to the United States, (2) shorten the transportation pathway for a portion of crude oil imports, (3) increase oil supplies from a stable and reliable trading partner, and (4) provide additional sources of crude oil to make up for declines in imports from other suppliers. AR 564 (ROD) at 4438.

NRDC has not attempted to rebut any of these very significant considerations. Indeed,

at the pleading stage, NRDC stated, “NRDC does not challenge DOS’s determination that issuing a Permit to Keystone was in the ‘national interest’ pursuant to the Order, nor does NRDC challenge DOS’s application of any other part of the Order.” Plf. Mem. In Opp. to Motions to Dismiss of Def. and Def.-Intervenor at 20 (Docket No. 36). Accordingly, because the State Department has shown that very significant considerations bearing on the interests of the nation support the issuance of the Presidential Permit and NRDC does not dispute that determination, the Court should deny the requested injunctive relief. See Border Power Plant Working Group v. Dep’t of Energy, Case No. 02-cv-513, slip op. at 27-32 (S.D. Cal. July 8, 2003) (denying the plaintiff’s request to enjoin operation of cross-border electrical transmission lines pending further NEPA review based, in part, on consideration of the public interest), Ex. 3.

Finally, the relief requested by NRDC is outside the scope of any relief that could have been ordered by the State Department. See Plf. Mem. at 41. NRDC asks the Court to “set aside DOS’ Presidential Permit, and enjoin Keystone’s construction pending adequate NEPA review.” Id. If the Court were to issue an injunction, it could set aside the Presidential Permit pending further NEPA review, which would redress NRDC’s alleged procedural injury. But, Keystone’s compliance with other federal and state laws in constructing the domestic portion of the pipeline has not been challenged in this case. Therefore, it would seem inequitable to enjoin Keystone from *any* activity related to the pipeline, even activity that is not squarely before the Court, where the State Department could not have prevented such activity in the first instance. See North Carolina, 951 F.2d at 604 (“NEPA review in this case should have a preclusive effect only on that portion” of the project under the regulatory control of the agency).

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant Defendants' motion for summary judgment and deny Plaintiff's motion for summary judgment.

Respectfully submitted this 22nd day of December, 2008.

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