UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

WHITE EARTH NATION, HONOR THE EARTH, INDIGENOUS ENVIRONMENTAL NETWORK, MINNESOTA CONSERVATION FEDERATION, MN350, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and NATIONAL WILDLIFE FEDERATION,

Plaintiffs,

vs.

JOHN KERRY, in his official capacity as Secretary of State, and the UNITED STATES DEPARTMENT OF STATE,

Defendants,

ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Intervenor Defendant.

Case No. 0:14-cv-04726 (MJD/LIB)

PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS JOHN KERRY AND U.S. DEPARTMENT OF STATE AND INTERVENOR ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S RESPONSES TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTIONS FOR SUMMARY JUDGMENT

Hon. Michael J. Davis
U.S. District Judge

Hearing Date: September 10, 2015
Time: 9:30 am

INTRODUCTION

Plaintiffs have brought this case asking the Court to hold Federal Defendants accountable for authorizing two major pipeline projects without first complying with the National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA"). Despite the fact that Enbridge emerged from closed-door meetings with the ability to circumvent an ongoing NEPA review and construct an entirely new pipeline, Federal Defendants claim they left the world as they found it and therefore took no action that is subject to judicial review. Their claims fail because the statutes at issue here do not allow the State Department's actions to escape judicial review. The Administrative Procedure Act ("APA") casts a wide net over all forms of agency action, including agency letters like the ones at issue here. Courts applying the APA consider the practical effects of an agency's action, not the self-serving labels and characterizations that defendant agencies attach. NEPA, like the APA, also casts a wide net. Its strict environmental mandate applies to all federal agencies to the fullest extent possible.

Respectfully, this Court should reject Defendants'[1] claims and grant Plaintiffs' Motion for Partial Summary Judgment.

[1] "Defendants" is used herein in reference to both Defendants and Intervenor collectively.

ARGUMENT

I. THE STATE DEPARTMENT'S FAILURE TO COMPLY WITH NEPA AND NHPA REQUIREMENTS IS JUDICIALLY ENFORCEABLE

Defendants John Kerry and the U.S. Department of State (collectively "State Department" or "Federal Defendants") and Intervenor Enbridge Energy, Limited Partnership ("Enbridge") claim that the State Department took no action authorizing the two major pipeline projects at issue. Further, Defendants argue that even if the State Department took action, those claims would not be judicially reviewable or enforceable. For the reasons set out below, Defendants' claims are incorrect. The State Department's letters at issue in this case (AR Docs. 19 and 33) are final agency actions that are subject to judicial review.

A. The State Department's Letters are Final Agency Action

Courts "consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014). "It is the effect of the action and not its label that must be considered." *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) (citing *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987)).

Congress defined the term "agency action" expansively in the APA, but not exhaustively. It intended the definition "to assure the complete coverage of *every form* of agency power, proceeding, action, or inaction. In that respect, the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the

action or inaction." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 38 (D.D.C. 2002) (citing S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946) (emphasis added). Consistent with Congress's intent, courts take a pragmatic view when resolving disputes over the existence of an "agency action." *See Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1002 (8th Cir. 2015).

Final agency actions can come in many forms, including agency letters. For example, in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the Eighth Circuit held that two letters from the EPA to Senator Grassley were "agency actions" within the meaning of the APA. *See id*. at 860 (recognizing the letters as "*[a]gency actions* made reviewable by statute") (emphasis added).[2] There, the EPA tried to avoid judicial review by claiming its letters "merely discuss existing regulatory requirements," *Id*. at 854, and by "coyly" insisting one of the letters was the "consummation of nothing." *Id*. at 864. The court rejected these arguments and held that the letters "promulgated" new rules without first proceeding through the APA's notice and comment rulemaking procedures. *Id*.

[2] The State Department argues *Iowa League of Cities* does not apply here because "the court distinguished the requirements for review under the [Clean Water Act] from the review requirements of the APA." Defs.' Memo. (ECF No. 94) at 16 n.15 ("Defs.' Memo."). Yet in *Iowa*, the court merely noted that there was no "finality" requirement implicit in the APA's waiver of sovereign immunity for "[a]gency action made reviewable by statute." *Iowa League of Cities*, 711 F.3d at 863 n.12. EPA argued unsuccessfully that its letters were not "final" and therefore the court lacked jurisdiction over the plaintiffs' claims. Nevertheless, the court remarked that "analyzing whether an agency pronouncement is binding evokes consideration of finality. However, they arise not from the APA, but rather from the conditions placed on the [Clean Water Act's] grant of direct appellate jurisdiction." *Id*. at 863 n.12.

The State Department contends its April and July 2014 letters (AR Docs. 19 and 33) do not constitute "agency action" or "final agency action" with respect to either pipeline projects at issue. Like the EPA in *Iowa League of Cities*, the State Department essentially claims its letters were the "consummation of nothing." However, the Administrative Record shows Enbridge gained authority to construct an entirely new pipeline as a "replacement," operate the "replacement" pipeline above its historical capacity, and operate Line 67 at capacities that never received environmental review.

1. Enbridge Gained Authority to Construct an Entirely New Pipeline

Defendants argue that replacing the Line 3 pipeline with an entirely new pipeline is not a final agency action. However, the New Pipeline is not a "replacement." The plain meaning of the word "replace" means "to put something in the place of something else." *See Wade v. Dole*, 561 F. Supp. 913, 937 (N.D. Ill. 1983). Fundamentally, replacing a pipeline means the "replaced" pipeline cannot be brought back into service. The State Department acknowledged as much in the 2009 Final Environmental Impact Statement ("FEIS") for the Alberta Clipper pipeline project (now Line 67). There, the Department's alternatives analysis considered replacing one of Enbridge's then existing pipelines with a larger diameter pipeline to transport its then current volumes of heavy crude oil in addition to the 450,000 barrel per day ("bpd")[3] served by the Alberta Clipper pipeline. AR Doc. 38 at 0373. In rejecting this alternative, the State Department noted that "replacing the pipe would require accessing, excavating, spoil handling, *removal of the old pipe*, and installation of the new pipe without impacting the other petroleum

[3] All references to bpd are annual averages unless otherwise noted.

pipelines on either side of the pipe being replaced." *Id*. (emphasis added). Here, the Administrative Record shows that the "replaced" Line 3 pipeline, including the "border segment," will be "deactivated and continuously maintained in place . . . ." AR Doc. 7 at 0023.

Enbridge's responds by arguing the New Pipeline is a "replacement" because it has "no plans" to put the old Line 3 pipeline back in service. Enbridge Memo. at 10 n. 5. Likewise, Enbridge claims it has removed sections of the old Line 3 border segment and Canadian sections of the pipeline. *Id*. However, these "facts" are not in the Administrative Record or supported by competent evidence. Enbridge also claims it advised the State Department that the existing Line 3 "would be *permanently* 'deactivated and continuously maintained in place.'" Enbridge. Memo. at 9 (emphasis added). The quotation marks tell the full story. Enbridge never advised the State Department that Line 3 would be "permanently" deactivated, only that it would be "deactivated and continuously maintained in place." AR Doc 7 at 0023. Likewise, Enbridge never advised the State Department that any portion of Line 3 had or would be removed in the future. The Court should disregard Enbridge's unsupported assertions that appear nowhere in the Administrative Record.

Both Enbridge and the State Department also respond by arguing that if Enbridge were to bring the old Line 3 back into service it would need a new Presidential permit. Defs.' Memo. at 6 n.7; Enbridge. Memo. at 10 n.5. But this is exactly the point. If, as

the State Department and Enbridge admit, the "replaced" Line 3 could operate alongside its "replacement," this "replacement" is in fact a new pipeline.[4]

2. Enbridge Gained Authority to Operate Line 3 Above Line 3's Historical Capacity

Enbridge and the State Department argue the "replacement" Line 3 pipeline will operate under existing authority and therefore the April and July 2014 letters were not final agency action. They claim that the 1991 Permit does not restrict capacity and that Line 3's historical capacities are irrelevant.[5] However, the Administrative Record shows that although the Line 3 Presidential Permit does not restrict capacity on its face, the "replacement" Line 3's authorization was explicitly conditioned on its historical capacity of 760,000 bpd. AR Doc. 19 at 0044 (the "replacement" Line 3 will operate in the "same range (roughly 760,000 bpd) as the volume that Line 3 transported in 1991 when the existing Presidential Permit was issued."). When Enbridge later revealed its intention to operate the New Pipeline at 800,000 bpd as part of the Bypass Project, a 40,000 bpd increase, the State Department issued another letter explaining that no further authorization from the State Department was needed. AR Doc. 33 at 0193. A 40,000 bpd volume increase is not insignificant. It amounts to an additional 14.6 million barrels of oil per year.

[4] Enbridge also claimed it had no plans to expand Line 67 from 450,000 bpd to 800,000 bpd in the *Sierra Club v. Clinton* litigation.

[5] Neither the Line 3 nor Line 67 Presidential permits includes a capacity restriction. However, the State Department limits Line 67's capacity to 450,000 bpd.

The State Department and Enbridge claim that even if the Line 3 Permit contains an implicit capacity limitation, because Enbridge operated Line 3 above 800,000 bpd at times in the past, Line 3's historical capacity exceeds 760,000 bpd. This argument is a post hoc rationalization that directly contradicts the Administrative Record. As shown above, the State Department determined that Line 3's historical capacity in 1991 was in the range of 760,000 bpd. At the time the State Department made this decision, it had information from Enbridge that Line 3 operated as high as 960,000 bpd of light crude oil. Nonetheless, it ultimately concluded that Line 3 operated at 760,000 bpd historically.[6]

3. Enbridge Gained Authority to Operate Line 67 Above the 450,000 bpd

The State Department and Enbridge argue that the Bypass Project is outside the State Department's jurisdiction and therefore the Department's July 2014 Letter (AR Doc. 33) is not a final agency action. However, the interconnections at issue are within the State Department's jurisdiction. Defendants claim the State Department did not take any action because it left the world as they found it. However, the practical effect is that Enbridge may now operate Line 67 at 800,000 bpd despite the fact that the Supplemental Environmental Impact Statement ("SEIS") for the Line 67 Expansion Project is ongoing and the Department never considered the impacts from operating the pipeline at 800,000 bpd.

[6] The State Department incorrectly states that Enbridge operated Line 3 at 760,000 bpd "in recent years." Defs.' Memo. at 28. Enbridge operated Line 3 at this volume "when the Presidential Permit was issued in 1991. . . ." AR Doc. 12 at 0033. Enbridge has operated Line 3 at 390,000 bpd since 2012. *Id*.

Defendants' litigation briefs reference supposed limitations on the State Department's "jurisdiction," but they point to no policy or decision that in fact limits the State Department's "jurisdiction" to the "border segment." Instead, their claims conflate the "scope" of the Presidential permits at issue in this case with the Department's "jurisdiction." The Department's jurisdiction extends beyond the "scope" of the permit. This is evident from the face of the Line 67 Presidential Permit itself, which limits the "scope" of the permit to the "first mainline shut-off valve *or* pumping station in the United States." AR Doc. 21 at 0072. Moreover, in other litigation the Department affirmatively *claimed* authority over an entire cross-border pipeline:

> The pertinent Executive Order for international pipelines delegates to the Secretary of State power to receive applications for permits for the construction of "facilities for the exportation . . . of petroleum . . . to or from a foreign country" and to determine whether those facilities are in the national interest. Executive Order 13337 §1(a), 69 Fed. Reg. 25,299 (April 30, 2004). *In the case of oil pipelines under the Executive Order, the "facility" is the entire proposed pipeline.*

Federal Defs.' Reply Supp. Cross-Mot. Summ. J. at 4–5, Sierra Club v. Bostick, No. 1:13-cv-1239 (D.D.C. Feb. 10, 2014) ECF No. 76, 2014 WL 1909540 (hereinafter "Bostick Brief").

The scope of a Presidential permit is flexible. The Department recognized that the scope of its permits was not clearly defined and set out to clarify its authority by rule. *See* Presidential Permits Concerning Pipeline Facilities on the International Boundaries of the United States, 72 Fed. Reg. 61,416 (Oct. 30, 2007) ("The Department intends to focus in particular on what portion of an international pipeline should be considered to

constitute 'facilities at the borders of the United States' for these purposes."). However, it never published a decision. *See id.* ("The Department's final decision and guidelines, if any, on this issue will be published in the Federal Register.").

Here, the Department limited the scope of the Line 67 Presidential Permit based on its understanding of the pipeline configuration at the time. The State Department determined it could control the entire Line 67 pipeline at the first cut-off valve at the border. AR Doc. 34 at 0220 ("the State Department does not believe that the scope of the permit it issues in this case should extend any further than necessary . . . ."). The scope of the permit was based on a practical understanding of the pipeline configuration, not the Department's jurisdiction.

Moreover, its actions with respect to the Line 3 "replacement" illustrate the scope of a permit is malleable. Unlike the Line 67 Presidential Permit, the Line 3 permit is not limited to the border segment. It applies to the "pipeline on the borders of the United States in Pembina County, North Dakota." AR Doc. 2 at 0006. Enbridge asked the State Department to "confirm" that this language limits the scope of the permit to the first mainline valve. AR Doc. 19 at 0043. The State Department determined that under the circumstances presented, it is "comfortable *interpreting* the Permit description of the covered U.S. facilities" as extending only to the border segment. AR Doc. 19 at 0044 (emphasis added).

The State Department's jurisdiction extends beyond the border segments of these pipelines. The Department's Presidential permitting decisions demonstrate the State Department considered the Bypass Project within its jurisdiction. The Department's

2009 Record of Decision for the Alberta Clipper Project considered the entire pipeline in its permitting decision. The project description encompasses the entire length of Line 67 from the border to Enbridge's terminal facilities in Superior, Wisconsin. AR Doc. 34 at 0196. Indeed, mitigation measures from the FEIS are incorporated into the Presidential permit by reference. AR Doc. 21 at 0073. The State Department can act on violations of these conditions whether they take place in the border segment or further down the pipeline. As noted above, the Department affirmatively *claimed* authority over an entire cross-border pipeline in other litigation. Bostick Brief, 2014 WL 1909540. Thus, while the State Department asserts the scope of the permit applies to the border segment, its jurisdiction extends beyond that point.

The State Department's decision to consider the Bypass Project outside of its authority was an action that violated NEPA and NHPA. Defendants claim that this was not an action, but NEPA does not allow parties to avoid NEPA through sleight of hand. In 2009, several plaintiffs challenged the State Department's issuance of the Line 67 Presidential Permit.[7] The plaintiffs argued the State Department's 2009 FEIS for the Line 67 pipeline was flawed because, among other things, it failed to consider "the reasonably foreseeable future expansion of the [Line 67] pipeline capacity from 450,000 to 800,000 [barrels per day] bpd."[8] *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1159 (D. Minn. 2010). The court rejected the argument based in part on its understanding that

[7] Line 67 was known as the "Alberta Clipper" during its development phase. Consequently, any reference to the Alberta Clipper is a reference to what is now known as Line 67.

[8] Unless otherwise indicated, all bpd values are expressed as annual averages.

any proposal to "increase the capacity of the Project in the future . . . would be reviewed by the appropriate federal . . . agencies, including a review of potential environmental impacts." *Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1137 (D. Minn. 2010) (quoting the FEIS at 2-50); *see also* AR Doc. 38 at 0365. Thus, the State Department never reviewed the environmental impacts of operating the Line 67 pipeline at 800,000 bpd, nor did it require additional mitigation measures to address the additional impacts.

As the plaintiffs predicted in *Sierra Club v. Clinton*, Enbridge sought authority to increase Line 67's capacity to 800,000 bpd in 2012. AR Doc. 23. The State Department initiated an SEIS to take a hard look at the environmental impacts from running Line 67 above 450,000 bpd before deciding whether to authorize the expansion. Notice of Intent To Prepare a Supplemental Environmental Impact Statement, 78 Fed. Reg. 16,565, 16,566 (Mar. 15, 2013).

Despite promising not to authorize Enbridge to operate Line 67 above 450,000 bpd without first completing the SEIS, the State Department met with Enbridge behind closed doors in 2014 to evaluate a "new approach to the proposed Line 67 capacity expansion project." AR Doc. 7 at 0022; AR Doc. 33 at 0193. Enbridge emerged soon after with authority to operate Line 67 at 800,000 bpd having escaped NEPA review for this expansion in both the 2009 Alberta Clipper FEIS and the Line 67 Expansion SEIS. AR Doc. 19.

The State Department has already allowed Enbridge to exceed the 450,000 bpd limitation without any additional review. The State Department's litigation memorandum states that the Line 67 Presidential Permit authorizes an annual average of

500,000 bpd on Line 67, not the 450,000 bpd average analyzed in the FEIS and referenced throughout the *Sierra Club v. Clinton* litigation. *See* Defs.' Memo. at 7; *see also* Enbridge Memo. (ECF No. 90) at 6 ("Enbridge Memo."); *compare with* AR Doc. 23 at 0106–7. The State Department represented to this Court in 2009 that "if [an expansion from 450,000 bpd] were proposed in the future, it would be subject to further environmental reviews." Defs.' Opp. to Plfs.' Mot. for Prelim. Inj. at 22, Sierra Club v. Clinton, No. 09-2622 (D. Minn. Oct. 16, 2009), 2009 WL 7171402, ECF No. 82. This additional authorization apparently took place between November 11, 2012, when Enbridge submitted its application for the Line 67 Expansion Project, and June 16, 2014, when Enbridge provided supplemental information in support of its application. *Compare* AR Doc. 23 at 106–7 *with* AR. Doc. 29 at 0181. However, there is no evidence in the Administrative Record that the State Department conducted "further environmental review" before allowing this capacity expansion.

The State Department's brief avers "the analysis in the [2009] FEIS was based on an annual average volume of 450,000 bpd, . . . which reflects a design capacity of 500,000 bpd. Therefore, 500,000 bpd is the current limit for the border segment of Line 67." Defs.' Memo. at 7. However, its citations to the Administrative Record do not support its claim. The Department references a letter from Enbridge's attorneys claiming that the Line 67 Presidential Permit authorizes an annual average of 500,000 bpd. Defs.' Memo (ECF No. 94) at 7 (referencing AR 0129). The Department further claims this letter explains that the "use of a drag reducing agent allows Enbridge to approach the design capacity on a consistent basis and therefore it refers to the 500,000 bpd limit as an

annual average." *Id*. at 7 n.9. There is no mention of a "drag reducing agent" or any decision by the State Department to expand Line 67's capacity from an annual average of 450,000 bpd to its 500,000 bpd.

4. Defendants' Arguments Do Not Warrant a Different Conclusion

Defendants and Enbridge argue that the State Department did not take final agency action but merely confirmed existing authority by relying on several cases with different facts. The cases fit into two general categories. The first category involves a plaintiff's attempt to receive pre-enforcement judicial review having received a warning letter or similar communication. The other category involves a plaintiff's attempt to seek judicial review of a purported agency rulemaking. Neither situation applies here. Plaintiffs are challenging the State Department's failure to comply with NEPA and NHPA requirements before authorizing new pipeline projects.

In *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), the plaintiff sought concurrence from EPA on its interpretation of longstanding emissions regulations for "nonroad engines." *Id*. at 421. However, EPA did not concur. *Id*. The plaintiffs filed a petition claiming the letter substantively amended EPA regulation without notice or comment as required by the APA. *Id*. The court rejected the claim having found that EPA's letter "neither announced a new interpretation of the regulations nor effected a change in the regulations themselves." *Id*. at 427.

Here, in contrast, the State Department made a new interpretation of its permit. AR Doc. 19 at 0044 ("[W]e are comfortable interpreting the Permit description of the covered U.S. facilities as applying to the segment of the pipe extending from the border

to the valve at mile 16."). Here too, as explained above, Enbridge emerged with new authority.

Industrial Safety Equipment Association, Inc. v. EPA, 837 F.2d 1115 (D.C. Cir. 1988), is also distinguishable because there, the plaintiffs challenged an agency guidance document on asbestos respirators. The plaintiffs argued the guidance document was a "disapproval of eleven lawful devices [that] amount[ed] to agency rulemaking, subject to review under the APA, because the action effectively 'decertifie[d]' the existing respirators marketed or used by appellants." *Id*. at 1117. The court disagreed, finding that "[i]n and of itself, the Guide does not deny any rights to the appellants." *Id*. at 1121. In fact, the guide did not decertify the respirators as the plaintiffs claimed. *Id*.

Defendants attempt to analogize the Department's letters to the "informal and advisory" warning letters at issue in *Holistic Candlers and Consumers Association v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012). There, the court held the FDA's warning labels failed both prongs of the *Bennett v. Spear* test for final agency action. *Id*. The letter was not the consummation of the FDA's decision-making process because the letter was replete with conditional language and references to future actions that may or may not be taken. *Id.* Likewise, there were no legal consequences attached to the letter since it did not compel the recipient to do anything. *Id.* In contrast, here the State Department's letters indicate finality and authorize Enbridge to proceed with its projects.

The other cases are not any more relevant to or supportive of Defendants' claims. *Sabella v. U.S.*, 863 F. Supp. 1 (D.D.C. 1994) (pre-enforcement review of fishing activities); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th

Cir. 2008) (pre-enforcement judicial review of Army Corps of Engineers wetlands jurisdictional determination); *Save Our Springs Alliance v. Norton*, No. A-05-CA-683-SS, 2007 WL 958173 (W.D. Tex. Feb. 20, 2007) (agency letter did not alter Endangered Species Act legal requirements); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426 (4th Cir. 2010) (reference guide was not new rule); *Ariz. Mining Ass'n v. Jackson*, 708 F. Supp. 2d 33 (D.D.C. 2010) (EPA letters did not create new rule); *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1169 (N.D. Okla. 2002) (advisory letter did not initiate or threaten enforcement).

B. The State Department's Letters Are Not Presidential Actions that Preclude Judicial Review

Defendants attempt to escape judicial review by converting the State Department's actions at issue here into Presidential actions. This argument is not new. Judge Frank rejected it in *Sierra Club v. Clinton*, holding that the plaintiffs' claims were redressable and reviewable under the APA. *Clinton*, 689 F. Supp. 2d at 1155-57. Like Plaintiffs here, the plaintiffs in *Sierra Club v. Clinton* alleged violations that stemmed from the State Department's failure to comply with NEPA.[9]

The court in *Protect Our Communities Foundation. v. Chu*, No. 12CV3062, 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014) also rejected this "Presidential action" argument. There, the Department of Energy claimed its issuance of a Presidential permit was not

[9] Defendants try to distinguish *Sierra Club v. Clinton* because the State Department did not prepare an EIS here. However, the failure to comply with NEPA in the first place is also reviewable under the APA. *See, e.g.*, *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990) (reviewing Interstate Commerce Commission's decision not to apply NEPA).

enforceable because it exercised Presidential authority delegated by executive order. In rejecting this claim, the court held that adopting this theory would allow the agency to "shield itself from judicial review under the APA for any action by arguing that it was 'Presidential,' no matter how far removed from the decision the President actually was." *Id*. at *6. Consequently, Plaintiffs do not suffer from lack of standing or jurisdiction, and the Court is empowered to enjoin the State Department for failing to comply with NEPA and NHPA.

Fundamentally, the State Department's obligation to study the environmental impacts of its decisions does not stem from the foreign relations power. Rather, the obligation comes from NEPA—Congress's mandate that all federal agencies prepare a detailed environmental analysis of all "major federal actions." 42 U.S.C. § 4332(C); *see also Clinton*, 689 F. Supp. 2d at 1157 (holding the State Department's decision whether or not to prepare an EIS separate and distinguishable from the agency's authority to issue presidential permits). The Department's NHPA duties likewise flow from a congressional mandate. Pub. L. No. 113-287 §§ 300380, 306108, 128 Stat. 3094, 3189–3227 (2014) (to be codified at 54 U.S.C. §§ 300308, 306108). The State Department conflates the "presidential" authority to decide whether international pipeline projects serve the national interest, Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (1968), *as amended by* Exec. Order 13,337, 69 Fed. Reg. 25,299 (2004), with the congressional command that all agencies comply with NEPA and NHPA.

Defendants rely on Supreme Court precedent holding the President is not an "agency" within the meaning of the APA to insulate the State Department from judicial

review. *Franklin,* 505 U.S. 788, 796 (1992); *Dalton,* 511 U.S. 462, 469-70 (1994). However, this Court has rejected the notion that *Franklin* and *Dalton* render it powerless to enforce the State Department's NEPA obligations. *Clinton*, 689 F. Supp. 2d at 1157 ("That the [Line 67] Pipeline Permit allows for the border crossing . . . does not insulate the State Department's analysis (or alleged lack thereof) of the environmental impacts of the entire pipeline project from judicial review under the APA.").

Indeed, *Franklin* and *Dalton* both stand for the narrow proposition that final actions by the President *himself* are not reviewable under the APA. In both cases, the Supreme Court refused to hear claims challenging preliminary agency reports completed *before* the President acted because the reports were not "final agency action" as required by the APA. *Franklin,* 505 U.S. at 796; *Dalton,* 511 U.S. at 469-70. Because the President—not the agency—made the final decision, APA review was not available. *Franklin,* 505 U.S. at 796; *Dalton,* 511 U.S. at 469-70 ("What is crucial is the fact that '[t]he President, not the [agency], takes the final action."); *see also Public Citizen v. U.S. Trade Representative,* 5 F.3d 549, 552 (D.C. Cir. 1993) ("*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."). Because this case concerns final State Department actions rather than those of the President, *Franklin* and *Dalton* are inapposite.

In sum, the State Department's authority to make national interest determinations does not imbue the Department with such overwhelming "presidential" character that that it can disregard a statutory mandate. The State Department authorized two major

pipeline projects without any consideration of environmental impacts or historic properties. Its actions therefore amount to "uninformed . . . agency action" and violate two duly enacted Congressional commands. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). This court therefore has the power to hold the State Department accountable.

The State Department next argues that Executive Order 13337 is not judicially enforceable. Again, it misses the mark. Plaintiffs are not seeking enforcement of the Executive Order. Rather, Plaintiffs are seeking enforcement of NEPA and NHPA. Judge Frank recognized this distinction in *Clinton*, noting that "[i]f the Court finds that the State Department *violated NEPA* and thus requires the *State Department* to comply *with NEPA* before deciding whether to issue a permit, it is likely that Plaintiffs' injury will be redressed." *Clinton*, 689 F. Supp. 2d at 1155 (emphasis added). This quote also explains that Plaintiffs' claims are redressable because they are based on federal statutes the violation of which can be redressed by enjoining the State Department. The Department's concern over having this Court "instruct the President" is misplaced. Defs.' Memo. at 24.

Federal Defendants also argue that Plaintiffs' claims are not redressable because the court will not render a decision favorable to Plaintiffs. *See* Defs.' Memo at 23. However, the redressability inquiry *assumes* Plaintiffs receive a favorable decision. *See* Defs.' Memo at 23 (Plaintiffs must demonstrate they "will likely be redressed by a favorable decision."). The State Department dismisses the possibility of a favorable decision based on its incorrect and post hoc rationalization of the Administrative Record.

C. The State Department Must Comply with NEPA

The State Department contends that its compliance with NEPA is optional or merely a "matter of policy." *See* Defs.' Memo at 31 n. 21 ("The State Department required a new permit and decided, *as a policy matter*, to prepare an analysis consistent with NEPA for the Expansion Project . . . .") (emphasis added). However, NEPA compliance is not discretionary.

NEPA creates a broad national commitment to protecting the environment and promoting environmental quality. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To accomplish these goals, NEPA requires *all* Federal agencies to comply with its requirements to the "fullest extent possible." *Id*. (citing NEPA § 102). NEPA does not confer any discretionary authority to federal agencies to choose when to follow its requirements. *Minnesota Pub. Interest Research Grp. v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974).

The landmark NEPA case *Calvert Cliffs'* held that "NEPA . . . makes environmental protection a part of the mandate of every federal agency and department." *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis in original). Further, it explained that "[p]erhaps the greatest importance of NEPA is to require . . . agencies to *consider* environmental issues just as they consider other matters within their mandates." *Id.* NEPA ensures agencies consider the environment and make a "fully informed and well-considered decision," whatever that final decision may be. *Sierra Club v. Kimbell*, 623 F.3d 549, 559 (8th Cir. 2010) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435

U.S. 519, 558 (1978)). It does not prohibit agencies from taking environmentally harmful actions "so long as the adverse environmental effects of the proposed action are adequately identified and evaluated. . . ." *Id*. (internal citations omitted). It is the agency's exercise of its substantive discretion that NEPA's requirements are supposed to inform. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991).

The State Department is not exempted from these requirements. In fact, the State Department's regulations acknowledge that NEPA applies to its Presidential permitting activities. In 1980, the State Department promulgated regulations to ensure that "environmental considerations are included in the Department's decisionsmaking process" under NEPA. 45 Fed. Reg. 59,553, 59,553 (Sep. 10, 1980). In promulgating its rules, the State Department explicitly recognized NEPA's application to cross border crude oil pipeline projects authorized by executive order. *Id*. at 59,556; *see also* 22 C.F.R. § 161.7(c)(1) (permitting decisions under E.O. 11423 for international crude oil pipelines normally require an environmental assessment).

Likewise, as this Court noted in *Clinton*, the State Department "recognized that issuing the [Line 67] Presidential Permit to Enbridge would constitute a 'major federal action' under NEPA . . . and took on the role as 'lead agency,' and exercised its authority to prepare and issue the FEIS for the [Line 67] Pipeline." *Clinton*, 689 F. Supp. 2d at 1157 (referencing the State Department's Notice of Intent to Prepare an EIS). The State Department now appears to rewrite history to turn NEPA compliance into a "policy

choice" to escape judicial review altogether. However, compliance with NEPA is mandatory.

II. THE STATE DEPARTMENT VIOLATED NEPA

A. The State Department May Not Circumvent NEPA Through Segmentation, Piecemealing, or Similar Means

Enbridge suggests that the State Department is entitled to "great deference" with respect to the interpretation of its permits. Enbridge Memo. at 22. However, any deference afforded to the State Department is limited by NEPA. For example, agencies cannot circumvent NEPA by improperly segmenting or piecemealing projects. This "occurs when an action is divided into component parts, each involving action with less significant environmental effects." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (agency took "too-circumscribed view of the 'project'"). In the classic "segmentation" case, the agency breaks up a project into multiple segments or pieces to avoid reviewing the entire project's impacts at once. By doing so, the agency can make a "finding of no significant impact" and thereby avoid the need for an EIS.

Like segmentation, the State Department's actions here allow it to avoid NEPA through similar means. The Department avoided NEPA review for the New Pipeline in two ways: 1) by labeling it a "replacement" pipeline, even though Enbridge can bring the "replaced" pipeline back into service; and 2) by arbitrarily ignoring the capacity limitation on the Line 3. Similarly, the State Department circumvented the ongoing SEIS for the Line 67 Expansion Project by arbitrarily determining that Enbridge's interconnections fall outside its jurisdiction.

B. The Line 3 "Replacement" Pipeline is a Major Federal Action

Defendants contend there was no "major Federal action" to trigger NEPA review. Their argument follows the same flawed reasoning for claiming there was no "final agency action." However, Plaintiffs have shown above that the Department's letters represent "final agency action" that granted Enbridge new authority to construct an entirely new pipeline. For the same reasons, the Department's letters are "major Federal actions" under NEPA.

Ultimately, the State Department authorized a new pipeline without considering any of the environmental impacts. This new pipeline is different in several ways from the original Line 3 pipeline, which also did not undergo NEPA review. It will follow a different route and therefore place different environmental resources at risk during its construction and operational phases. It will carry substantially more oil than the old Line 3 pipeline did historically – an additional 14.6 million barrels per year. The State Department never considered any of these issues before authorizing this "replacement" pipeline. Consequently, it violated NEPA's cardinal rule that requires all federal agencies to make fully informed decisions.

Enbridge's references to two Eighth Circuit cases are unavailing. In *Minnesota Pesticide Information & Education, Inc. v. Espy*, a pesticide trade group sued the U.S. Department of Agriculture, the U.S. Forest Service, and various individuals claiming the Forest Service violated NEPA by not preparing an EIS before deciding to stop spraying pesticides in a national forest. M*innesota Pesticide Info. & Educ., Inc. v. Espy*, 29 F.3d 442, 442 (8th Cir. 1994). The court held NEPA was not triggered because the Forest

Service decided to stop an activity that affected the environment. *Id*. at 443. However, the court noted that NEPA could apply when the agency decided on an alternative method. *Id*. at 443. Here, in contrast, the State Department's decisions lead to significant environmental impacts.

In *Ringsred v. State of Minnesota*, the court held that an EIS was not required when a federal agency approved a contract between an Indian tribe and a city for a parking ramp project. *Ringsred v. City of Duluth, a Minnesota Home-Rule Charter City*, 828 F.2d 1305, 1308 (8th Cir. 1987). The agency reviewed the contract per its statutory duty to "protect the Indians from improvident and unconscionable contracts." *Id.* at 1308. However, that was the extent of the agency's authority. It had no authority or veto power over the project. *Id*. The court held the agency's "actions relating to the parking ramp project were so incidental that the project does not constitute part of a major federal action." *Id*. In contrast, here the State Department's authority is substantial. It has direct authority over international crude oil pipelines.

C. The Bypass Project Violates NEPA's Limitations on Actions During an Ongoing Environmental Review

NEPA regulations place limits on agency actions until the NEPA review is complete. 40 C.F.R. § 1506.1. Until an agency issues a record of decision on an EIS, NEPA requires that "no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). Similarly:

> If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action

> within the agency's jurisdiction *that would meet either of the [§ 1506.1(a) criteria]*, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

Id. § 1506.1(b) (emphasis added); *see also* AR Doc. 27 at 0131 (Enbridge acknowledges 1506.1(b) "require[s] an agency to notify an applicant to cease construction of a proposed action under the agency's jurisdiction until the NEPA process has been completed.") (emphasis removed).

Defendants' principal claim is that these limits do not apply to the Bypass Project because the interconnections are outside the State Department's jurisdiction. However, this claim is incorrect. As shown above, Defendants conflate the State Department's "jurisdiction" with the "scope" of the Presidential permits. Thus, Enbridge's claim that the Department "lacks authority to require Enbridge to cease construction or operation of the Interconnections" is incorrect. Enbridge Memo. at 30.

The State Department's argument on the §1506.1 violation relies exclusively on its "jurisdiction" claim. Although it contends the Bypass Project does not limit its choice of reasonable alternatives, it does not address whether the Bypass Project "concerns" the Line 67 Expansion SEIS, or whether it will have an "adverse environmental impact." By not addressing these issues, the Department concedes that § 1506.1 applies if the Court finds the Bypass Project is within the State Department's jurisdiction.

Enbridge, however, claims that the Bypass Project does not "concern" the Line 67 Expansion Project SEIS. However, it does so without addressing the relevant evidence in Administrative Record. AR Doc. 33 at 0193 (the Bypass project is a "new approach to

the proposed Line 67 capacity expansion project"); *see also* Amended Notice of Intent To Prepare an SEIS, 79 Fed. Reg. 48,817, 48,817 (Aug. 18, 2014) (the Bypass Project "changes [the Line 67 Expansion] project description"). Instead, Enbridge claims that the projects do not "concern" one another by conflating Plaintiffs' argument.

Enbridge argues that Bypass Project do not "concern" the ongoing SEIS because Enbridge could "use rail or trucks to transport crude to the same destination served by Line 67 . . . ." Enbridge Memo. at 31. Those options would have the same purpose and effect as the Bypass Project. *Id*. Likewise, it argues "there are many options available to Enbridge for importing oil into this country, such as increasing the throughput on other pipelines that have no capacity limits in their permits, or using rail or trucks." *Id*. at 31.[10] The fact that these alternatives exist does not lessen the connection between the Bypass Project and the Line 67 Expansion Project. The projects are *identical* except for the border segment.

Enbridge also argues the Bypass Project did not allow it to avoid NEPA. Enbridge Memo. at 32. Enbridge's argument is simply incorrect. Enbridge implicitly acknowledges that the Bypass Project interferes with the SEIS. It notes that the project "establish[es] a new baseline of conditions occurring from existing operations . . . [that] would be reflected in the SEIS. . . ." Enbridge Memo. at 12–13. Likewise, the Bypass Project allows Enbridge to operate Line 67 at 800,000 bpd even if the State Department rejects the Line 67 Expansion Project. As noted earlier, the Department never considered

[10] These are the kinds of considerations the State Department should evaluate in an EIS before deciding whether to approve either project.

the impacts from operating Line 67 at 800,000 because Enbridge claimed it had no such plans. Thus, it will have avoided NEPA.

Enbridge also argues that the Bypass Project does not limit the choice of reasonable alternatives. Even assuming the inevitable operation of Line 67 at 800,000 bpd does not create a *fait accompli*; Enbridge fails to address the alternative grounds for halting the Bypass Project – that is has an "adverse environmental impact." 40 C.F.R. § 1506.1(a)(1). Here, because the projects are identical except for the border segment, Bypass Project implicates the same "adverse environmental impact[s]" as the Line 67 Expansion Project. The Bypass Project "concerns" the ongoing SEIS, is within the State Department's jurisdiction, and has an "adverse environmental impact."

Even if Enbridge's arguments were persuasive, they are merely post hoc rationalizations. NEPA requires the *agency* to consider whether a project violates § 1506.1. *Sensible Traffic Alts. & Res., Ltd. v. Fed. Transit Admin. of the U.S. Dep't of Transp.*, 307 F.Supp.2d 1149, 1166 (D. Haw. 2004). There is no evidence in the Administrative Record that the State Department considered this issue.

Finally, Enbridge contends that the State Department was not required to consider the requirements of § 1506.1 "once it determined no action on its part was required." Enbridge Memo. at 30 n.13. However, Enbridge's argument misses the point. Section 1506.1 applies to projects within the State Department's "jurisdiction." 40 C.F.R. § 1506.1(b). As noted above, Defendants conflate "jurisdiction" with the "scope" of the Presidential permits at issue. The Department's jurisdiction extends beyond the border segments. Consequently, the State Department violated NEPA.

III. THE STATE DEPARTMENT VIOLATED NHPA

The State Department and Enbridge argue that there was no NHPA "undertaking" for the same reasons they claim there was no "final agency action" or "major Federal action." Plaintiffs have addressed those issues above and will not repeat them here. However, the State Department also argues that *Vieux Carre Property Owners, Residents and Associates, Inc.* does not apply. Defs.' Memo. at 34. There, the Fifth Circuit held that a project remains a "federal undertaking" and requires NHPA review so long as "the project is under [a] federal license and the [agency] has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals . . . ." *Vieux Carre Prop. Owners, Residents & Associates, Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991).

The Department tries to distinguish the case by arguing that unlike the federal agency in *Vieux Carre*, the State Department has no jurisdiction over the "replacement" of Line 3. Defs.' Memo. at 34 ("The issue in *Vieux Carre* was not whether the agency was required to conduct a Section 106 process for a non-federal project over which it lacked jurisdiction."). However, this argument is completely at odds with the Department's claim that Enbridge is authorized to "replace" the Line 3 border segment under the 1991 Presidential Permit. The State Department cannot have it both ways. The Court should adopt the holding in *Vieux Carre* and require the State Department to comply with NHPA.

CONCLUSION

For the foregoing reasons, the State Department violated NEPA and NHPA. Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment as to liability on Plaintiffs' First and Second Claims for Relief in Plaintiffs' First Amended Complaint.

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Respectfully submitted,

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