UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CIVIL NO. 14-4726 (MJD/LIB)

WHITE EARTH NATION, ET AL.,

Plaintiffs,

v.

JOHN KERRY AND UNITED STATES DEPARTMENT OF STATE,

Defendants,

and

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Intervenor-Defendant.

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO OF PLAINTIFFS' FIRST AMENDED COMPLAINT

Hearing date: September 10, 2015
Time: 9:30 a.m.

INTRODUCTION

Plaintiffs claim that the State Department violated the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") by sending letters to Enbridge clarifying the scope of existing Presidential permits for Enbridge's pipelines and the extent of the U.S. Department of State's ("State Department") jurisdiction over the pipelines. Plaintiffs' claims lack merit for three principal reasons. First, the State Department did not approve any actions by Enbridge and did not authorize any increase in the amount of oil imported across the border. Second, the construction and operation of pipelines outside of the border area is outside of the State Department's jurisdiction. And third, all of the actions that the State Department takes with respect to oil pipelines are pursuant to the inherent constitutional authority of the President and therefore are not reviewable under the Administrative Procedure Act ("APA"). Accordingly, for the reasons discussed below, summary judgment should be granted for Defendants.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' NEPA and NHPA Claims

A. The State Department's Letters Are Not Final Agency Actions and Therefore Are Not Reviewable Under the APA

1. The State Department Did Not Issue Any New Approval for Line 3

Plaintiffs erroneously insist that the State Department "approved" the construction of a new Line 3 pipeline that could be operated simultaneously with the old Line 3, and that this "approval" was a reviewable final agency action under the APA. *See* Pl. Opp. at

4.[1] Plaintiffs do not point to any language in the State Department's letters to Enbridge giving such approval, and they cannot. The State Department found that "the replacement of the border segment of Line 3 [was] consistent with the authorization in the existing Presidential permit . . . ." AR 43. Accordingly, the Department concluded that no new authorization was needed, and that determination is entitled to deference. *See Employers Ins. of Wassau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995). That permit specifically requires Enbridge to "maintain [the pipeline facilities] in a condition of good repair for their safe operation." AR 9. The State Department acknowledged Enbridge's representation that the old pipe was in "a condition where industry practice suggests that replacement of the pipe [was] the better option to maintain its safety." AR 43. It also noted that the replacement pipe in the border segment would have the same diameter as the old pipe, and would be placed within the same right of way. AR 23.

Plaintiffs do not attempt to refute any of these points. Instead, Plaintiffs argue that Enbridge is not "replacing" the pipeline at Line 3 so much as it is building a "new" pipeline, which may one day operate in tandem with the old one. However, the old Line 3 is being deactivated. AR 23. Even assuming the old pipe could one day be reactivated, Enbridge would need a new Presidential permit to operate it, as Plaintiffs agree. Pl. Opp. at 5-6. Enbridge has not sought, much less obtained, any such authorization. Further, there is nothing in the record to support the notion that pipe originally installed over 50

[1] "Pl. Opp." refers to Plaintiffs' opposition brief (ECF No. 102), and "Pl. Mem." refers to their opening brief (ECF No. 71). "Def. Mem." refers to Defendants' opening summary judgment brief (ECF No. 94).

years ago, *see* AR 22, which has been operated at reduced capacity for safety reasons, *see* AR 23, could simply spring back into service.[2] It cannot be placed back into service without complying with applicable Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations as well as the requirements of state regulatory agencies, such as the Minnesota Public Utilities Commission.[3]

2. The State Department Did Not Authorize an Increase in the Amount of Oil Permitted to Cross the Border on Line 3

Plaintiffs are incorrect that the State Department approved an increase in the amount of oil that may be imported across the border on Line 3. *See* Pl. Opp. at 6. Plaintiffs concede that the permit itself contains no volume limit. *See id.*; AR 6-10. Yet they argue that the State Department's purported "authorization" of the maintenance-driven replacement of the Line 3 border segment "was explicitly conditioned on its historical capacity of 760,000 bpd." Pl. Opp. at 6. This simply misstates the record.

The State Department's letter did not modify the existing permit. In responding to Enbridge's inquiry regarding its maintenance plans for Line 3, the State Department

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[2] Plaintiffs rely on *Wade v. Lewis*, 561 F. Supp. 913, 937 (N.D. Ill. 1983). That case is inapplicable because it involved the interpretation of Federal Highway Administration regulations governing "replacement" bridges for funding purposes. *See id.* at 936. Those regulations do not apply here. Moreover, the undisputed evidence in that case was that the bridge being replaced could be used "for at least another twenty years." *Id.* That is not true of the old Line 3.

[3] Plaintiffs argue that the 2009 Final Environmental Impact Statement ("FEIS") discussed an alternative involving the construction of a larger diameter pipeline, which included removal of an old pipe. *See* Pl. Opp. at 4-5 (citing AR 373). While the FEIS discussed this as a potential alternative, it did not suggest that removal was required for a pipeline to be deactivated. PHMSA regulations allow a pipeline to be deactivated and remain in place. 49 C.F.R. §§ 195.59, 195.402(c).

recounted details provided by Enbridge, noting among other things that "the line's barrels-per-day volume will be in the same range (roughly 760,000 bpd) as the volume that Line 3 transported in 1991 when the existing Presidential Permit was issued." AR 44. Nowhere is any volume given as a limit. Indeed, the language used by the State Department (*e.g.*, "in the same range," "roughly") indicates that no limit was intended. And since there never has been a capacity limit on the Line 3 border segment, the State Department's letter addressing Enbridge's planned interconnections did not authorize an increase from 760,000 to 800,000 bpd on the Line 3 border segment. *See* Pl. Opp. at 6. Even if the State Department had intended to establish a limit in its June 24, 2014 letter (which it did not), 800,000 bpd clearly is "in the same range" as 760,000 bpd, AR 44, and is below levels at which the line was operated at times in the past. AR 33 & n.2. In short, there is no capacity limit in the Line 3 Presidential Permit, and the Plaintiffs' attempts to establish one based on the State Department's correspondence are baseless.

3. The State Department Did Not Authorize an Increase in the Amount of Oil Permitted to Cross the Border on Line 67

The State Department also did not authorize Enbridge to operate the Line 67 border segment at a higher volume. *See* Pl. Opp. at 7, 10-11. Plaintiffs argue that, due to the interconnections, the "practical effect is that Enbridge may now operate Line 67 at 800,000 bpd." *Id.* at 7. That may be the case on segments of the pipe outside of the border segment, but it is not true as to the border segment of Line 67. Because the limit on the existing Presidential Permit for Line 67 has not changed, Enbridge cannot increase

the flow of oil across the border on Line 67 unless and until its application for the Expansion Project is granted. *See* AR 131; 78 Fed. Reg. 16,565, 16,566 (Mar. 15, 2013).

Plaintiffs also now claim that the State Department has already approved an increase from 450,000 bpd to 500,000 bpd on the border segment of Line 67. Pl. Opp. at 11-12. As Plaintiffs are well aware, there is a difference between oil volumes when described as an annual average versus design capacity. *See* Pl. Mem. at 4 n.1. In the FEIS for the Alberta Clipper Pipeline, the State Department analyzed a design capacity of 500,000 bpd, which corresponds to an approximate annual average of 450,000 bpd (roughly 90% of the design capacity). *See* AR 317 ("The design capacity of the Alberta Clipper Pipeline would be 500,000 bpd based on the proposed pipeline design and pumping capacity."). The State Department's reference to the annual average figure of "approximately 450,000" in the Record of Decision for the Alberta Clipper Pipeline permit, AR 196, corresponds to a 500,000 bpd design capacity, as clearly stated in the FEIS. AR 317. Thus, no increase above the amount analyzed in the FEIS has been authorized.

4. There Is No Legal Authority Giving the State Department the Ability to Regulate Pipelines Outside of the Border Segments

Plaintiffs argue that the interconnections and, indeed, the entire lengths of Enbridge's pipelines are within the State Department's permitting jurisdiction. *See* Pl. Opp. at 7. To the contrary, the only applicable legal authority clearly limits the State Department's authority to oil pipelines and related facilities "at the borders of the United States." Exec. Order 13337 § 1(a), 69 Fed. Reg. 25,299, 25,299 (Apr. 30, 2004). The

State Department has interpreted this quoted language to mean that it may issue permits for the "border segment" of the pipe between the international border and the "first mainline shutoff valve or pumping station in the United States." AR 102. This interpretation is entitled to "great deference." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1042 (9th Cir. 2013) (citations omitted). Plaintiffs have offered no valid arguments for departing from the agency's interpretation.

First, Plaintiffs claim that the State Department's jurisdiction extends beyond the scope of the Line 67 permit (which is explicitly limited to the border segment). *See* Pl. Opp. at 8. They rely on a brief filed by the government in a case involving the U.S. Army Corps of Engineers ("Corps"). *See id.* (citing Fed. Defs' Reply in 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)). That brief recognized that Executive Order 13337 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." *Id.* at 4. But the brief went on to assert, incorrectly, that the "facility" being considered for a permit under E.O 13337 in the case of pipelines is the *entire* pipeline, *id.* at 5. The government has notified the court in the District of Columbia that the statement was erroneous. *See* Notice of Correction, *Sierra Club v. Bostick*, No. 1:13-cv-1239 (D.D.C. Feb. 10, 2014), ECF No. 100, Def. Ex. 3.[4] Notwithstanding this error in a

[4] "Def. Ex." refers to the exhibits to the Second Declaration of Luther L. Hajek.

separate case involving other federal agencies, the State Department has interpreted its permitting authority under Executive Order 13337 as limited to the border area.

In fact, in litigation involving the Alberta Clipper Pipeline, the plaintiffs, including many of the same parties in this case (Sierra Club, National Wildlife Federation, and Indigenous Environmental Network) argued that the State Department had *no* authority over oil pipelines because the President's inherent constitutional authority did not allow him to approve cross-border pipelines, an argument that the court rejected. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162-63 (D. Minn. 2010). In response to the plaintiffs' arguments, the government stated, as it does here, that "[t]he State Department's authority to regulate the pipeline extends only to 'the first mainline shut-off valve or pumping station in the United States.'" Defs' Reply in Supp. of Mot. to Dismiss Pls' First Am. Compl. at 19, *Sierra Club v. Clinton*, Civ. No. 09-2622 (D. Minn.), ECF No. 157 (citing Presidential Permit for Line 67).

Second, Plaintiffs argue that the State Department recognized in a Federal Register notice that the precise extent of its authority in issuing Presidential permits is unclear. *See* Pl. Opp. at 8 (citing 72 Fed. Reg. 61,416 (Oct. 30, 2007)). As described in the notice, the State Department sought to develop guidance to define "U.S. facilities at the borders of the United States" in connection with international oil pipelines. 72 Fed. Reg. at 61,417. Although the State Department did not develop the guidance, the notice shows that the State Department considers its authority to be limited to the border area.

To a certain extent, the delineation of the "border segment" of an international oil pipeline may vary from one pipeline to another pipeline based on practical

considerations, such as the location of the first mainline shutoff valve in the United States. *See* Pl. Opp. at 9. But the fact that the State Department may take practical considerations into account in delineating the specific border segment of a particular pipeline does not mean that its authority extends beyond the defined border segment. Here, the permit for Line 67 defines the border segment as extending only until the first mainline shutoff valve, AR 102, and the interconnections near mile marker 16 are outside of its scope. AR 134-35; AR 193.

Third, Plaintiffs argue that the State Department's description of the Line 3 permit shows that the State Department's authority is "malleable." Pl. Opp. at 9. Based on the fact that the Line 3 permit referred only to a "pipeline on the borders of the United States in Pembina County, North Dakota," the State Department stated that it was "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." AR 44; *see also* AR 6. The valve at mile 16 is the first mainline shutoff valve in the United States. AR 22-23. Thus, consistent with other permits, including the permit for Line 67, the State Department interpreted the scope of the permit as extending to the first mainline shutoff valve. *See* AR 102. This interpretation is entitled to deference, and Plaintiffs have offered no basis for overturning it. *See Wassau*, 52 F.3d at 666; *cf. Rain & Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp.*, 426 F.3d 976, 979 (8th Cir. 2005) (agency's interpretation of its own bulletin was entitled to deference).

Finally, Plaintiffs argue that the State Department's decision to analyze the environmental impacts of the entire Alberta Clipper Pipeline in the FEIS prepared as part

of the Line 67 permitting process shows that the State Department has jurisdiction over the whole pipeline. This is incorrect. The State Department analyzed impacts along the whole pipeline, not because it has authority over the whole pipeline, but because such impacts would be indirect and cumulative impacts of authorizing the construction of the border facilities. *See* AR 206. The implementing regulations for NEPA provide that such impacts should be analyzed even though they may be later in time, further removed in distance, or attributable to non-federal entities. *See* 40 C.F.R. §§ 1508.7, 1508.8(b). While the array of impacts analyzed in an FEIS are broader than the impacts directly caused by an agency's action, NEPA cannot not expand an agency's jurisdiction. *See Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980).

Similarly, the fact that the State Department incorporated into its Presidential Permit for Line 67 the mitigation set forth in the FEIS does not demonstrate that the State Department has authority over the whole line. *See* Pl. Opp. at 10. The permit itself clearly defines the scope of the permit as the segment from the border to the first mainline shutoff valve in the United States. AR 72. Further, as explained in the FEIS, "[o]ther federal, state, and local agencies with jurisdiction over various aspects of the Alberta Clipper Project participated in the EIS process," and the project required approvals from those other agencies. AR 297; *see also* AR 298-304. The enforcement of particular aspects of mitigation within the jurisdiction of other agencies would fall to those other agencies, not the State Department.

5. There Is No Legal Support for Plaintiffs' Argument that the Interpretation of an Existing Permit is a Final Agency Action

Plaintiffs cite no cases holding that an agency's letter to a company interpreting the requirements of an existing permit is a final agency action under the APA. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) is inapposite because it involved EPA letters that promulgated new effluent limitations under the Clean Water Act. *See id.* at 865. Here, in contrast, the State Department merely provided an interpretation of two existing permits. *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1002 (8th Cir. 2015) also does not aid Plaintiffs because it involved a jurisdictional statement by the Corps that "alter[ed] and affect[ed] appellants' rights to use their property in conducting a lawful business activity." *Id.* at 1001. No such action is at issue here.

Plaintiffs attempt to distinguish the cases cited by Defendants and Enbridge on the basis that they involved different types of letters – *e.g.*, letters interpreting agency regulations or providing guidance or warnings to the regulated community. *See* Pl. Opp. at 13-15. But the burden to show that a reviewable agency action exists is theirs, and they point to no cases finding that an agency's interpretation of an existing permit is a final agency action. Moreover, they ignore the fundamental point that these cases stand for, which is that many communications from an agency to industry are not final agency actions subject to review. Finding otherwise "would quickly muzzle any informal communications between agencies and their regulated agencies." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004).

B. The State Department's Actions Are Presidential in Nature and Therefore Are Not Reviewable Under the APA

Plaintiffs argue that the State Department's exercise of the President's delegated constitutional authority is reviewable just like typical agency actions. *See* Pl. Opp. at 15. Where the President delegates a constitutional executive function to a cabinet level official, however, the action is no less Presidential in nature and is not reviewable under the APA. *See Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975) ("For purposes of this appeal the Secretary's actions are those of the President, and therefore by the terms of the APA the approval of the regulation at issue here is not reviewable."); *see also Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009); *Sisseton Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D. S.D. 2009). Plaintiffs make no effort to distinguish *Jensen*, *Natural Resources Defense Council*, or *Sisseton Wahpeton Oyate*.

Plaintiffs argue that Judge Frank rejected this argument when he denied, in part, the State Department's motion to dismiss in *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010). Pl. Opp. at 15-16. But Judge Frank did not directly decide the issue and instead found that "the State Department's FEIS constitutes a final agency action reviewable by the Court under the APA." *Sierra Club*, 689 F. Supp. 2d at 1157.[5] Defendants respectfully disagree that an EIS, standing alone, is a final agency action, and

[5] Plaintiffs also rely on *Protect Our Communities Found. v. Chu*, No. 12-cv-3062, 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014). In that case, the court found that a NEPA challenge involving a Presidential permit issued by the U.S. Department of Energy for cross-border electrical lines was reviewable under the APA. *Id.* at *6. Although the court's analysis is unclear, it refers to the decision in *Sierra Club v. Clinton*. *See id.*

in any event, there was no EIS in this case. *See* Def. Mem. at 20-21 n.17. Although, as Plaintiffs note, they may allege a failure to prepare an EIS, there must be an agency action that allegedly requires the preparation of an EIS. *See* Pl. Opp. at 15 n.9. In the case that Plaintiffs cite, *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283 (8th Cir. 1990), that action was a notice of interim trail use. *See id.* at 1285. Absent an underlying reviewable action, simply alleging that a NEPA analysis was required does not create a reviewable claim under the APA.

Plaintiffs also argue that *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994), are distinguishable because the President made the final decision in those cases. *See* Pl. Opp. at 17. But the important point is that "[o]ut of respect for the separation of powers," an action by the President is not reviewable under the APA. *Franklin*, 505 U.S. at 800-01. That same principle applies even where the President delegates his authority. *See Natural Res. Def. Council*, 658 F. Supp. 2d at 111 ("To expose permitting decisions, which are unreviewable if exercised by the President himself, to judicial review under the APA just because the President assigned this power to a subordinate agency would run afoul of the separation of powers concerns that underlie the Supreme Court's decisions in *Franklin* and *Dalton*.").

Plaintiffs also argue that the State Department's regulations apply to "Presidential permitting activities." Pl. Opp. at 20. But the regulation they reference merely states that the State Department would "normally" prepare an environmental assessment ("EA") for permits for international pipelines. 22 C.F.R. § 161.7(c)(1). Thus, the regulation does not expressly require EAs in such circumstances and is not an indication that the State

Department believes an EA is required by NEPA. NEPA does not apply to actions of the President. Def. Mem. at 21. And contrary to Plaintiffs' assertions, agencies may prepare NEPA analyses as a matter of policy. *See Olmstead Citizens for a Better Cmty v. United States*, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (the fact that an agency chooses to do a NEPA analysis does not mean that one was required).

C. Plaintiffs Are Seeking to Judicially Enforce Executive Order 13337

Plaintiffs argue that they are not attempting to judicially enforce Executive Order 13337, *see* Pl. Opp. at 18, but in fact they are. They argue that the existing permit for Line 3 (issued pursuant to the executive order) does not allow Enbridge to replace a deteriorating border segment or transport certain amounts of oil. *See* Pl. Opp. at 4-7. They also argue that the State Department's authority to issue and administer permits for oil pipelines under the executive order extends to entire pipelines, despite the limitation in the order to facilities "at the borders of the United States," Exec. Order 13337 § 1(a). *See* Pl. Opp. at 7-10. These arguments relate directly to the State Department's authority under the executive order and, therefore, are attempts to judicially interpret and enforce it. *See, e.g., Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-35 (8th Cir. 1975) (an allegation that an agency failed "to comply with the mandate" of an executive order was an attempt to enforce it). As explained in our opening brief, Executive Order 13337 is not enforceable and therefore provides no basis for a claim under the APA. *See* Def. Mem. at 21-22.

D. Plaintiffs' Claims Are Not Redressable

Plaintiffs misunderstand the government's argument regarding redressability. *See* Pl. Opp. at 18. Those arguments are not predicated on the assumption that Defendants will prevail on the merits. Rather, Defendants argue that Plaintiffs' claims are not redressable because the relief Plaintiffs seek, a vacatur of the State Department's actions, would not redress their alleged injuries. *See* Def. Mem. at 23. The letters might be vacated if Plaintiffs prevail, but because the letters did not approve any action by Enbridge and Enbridge did not require any approval, there would be no effect on Enbridge's operation of Lines 3 and 67 or the interconnections between those lines.

Plaintiffs, moreover, could not obtain an injunction regardless of whether they prevail on the merits, because any injunction disrupting the flow of oil on Line 3 would interfere with an authorization first granted by President Johnson in 1968. AR 5. And if the Court were to enjoin Enbridge's construction or operation of Lines 3 or 67 or the interconnections outside of the border segments absent some further action by the State Department, it would contradict the President's direction to the State Department to issue permits only for facilities "at the borders of the United States." Exec. Order 13337 §1(a); *see also* Def. Mem. at 24. The Court should not take these drastic actions because doing so would violate the separation of powers, and therefore Plaintiffs' injuries are not redressable. *See Ctr. for Biological Diversity v. Hagel*, No. C-03-4350 EMC, 2015 WL 1568838, at *18-*21 (N.D. Cal. 2015).

II. Plaintiffs' NEPA and NHPA Claims Fail on the Merits

The State Department was not required to prepare a NEPA analysis because it took no major federal action. *See* Def. Mem. at 25-29. Plaintiffs essentially argue that because the State Department's letters are final agency action (which, as shown above, they are not), they are also major federal actions under NEPA. *See* Pl. Opp. at 22. This overlooks a whole body of case law cited by the government which offers compelling grounds to find that no major federal action occurred. *See, e.g.*, *N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 416 (3d Cir. 1994) (holding that where a non-federal entity informs an agency of its intended actions in order to ensure compliance with applicable laws and the agency responds, that is not a major federal action).[6]

In addition, contrary to Plaintiffs' assertions, the State Department did not violate 40 C.F.R. § 1506.1. *See* Pl. Opp. at 23. Plaintiffs' concede, as they must, that the regulation only applies to actions by non-federal entities that are within an agency's jurisdiction. *See id.* at 24. They claim (as they do in the context of final agency action) that the State Department's jurisdiction is broader than the scope of individual permits. But they offer nothing to refute that the agency's jurisdiction is limited to facilities "at the borders of the United States," Exec. Order 13337 § 1(a), or to undermine the agency's

[6] Plaintiffs attempt to distinguish *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) on the basis that the State Department has "direct authority over international crude oil pipelines." Pl. Opp. at 23. As discussed above, however, the State Department only has authority over the border segments of pipelines, and it did not approve any action regarding the border segments of the pipelines.

interpretation of that phrase, which is entitled to great deference, to encompass only the border segment up to the first mainline shutoff valve in the United States. AR 102.

Finally, regarding the NHPA claim, Plaintiffs argue, again, that the Fifth Circuit's decision in *Vieux Carre Property Owners, Residents & Associate's, Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991), applies here. *See* Pl. Opp. As explained in the government's opening brief, because the State Department did not issue any new approval for Line 3 or the interconnections, there is no "ongoing Federal action[]" requiring a Section 106 consultation process. *Vieux Carre*, 948 F.2d at 1444-45; *see also* Def. Mem. at 34-35.

CONCLUSION

For the foregoing reasons and the reasons stated in Defendants' opening brief, summary judgment should be granted to Defendants on Claims One and Two of Plaintiffs' First Amended Complaint.

Dated: June 19, 2015

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