UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

v.

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. 14-cv-4726 (MJD/LIB)

ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S REPLY TO PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO FEDERAL DEFENDANTS' AND ENBRIDGE'S RESPONSES TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hon. Michael J. Davis

U.S. District Judge

Hearing Date: September 10, 2015

Time: 9:30 am

Plaintiffs fail to demonstrate that the U.S. Department of State ("Department") engaged in reviewable final agency action in concurring that Enbridge Energy, Limited Partnership ("Enbridge") may proceed to: (1) maintain the Line 3 Border Segment through pipe replacement; and (2) construct and utilize Interconnections under existing Presidential Permits without further Department authorization. Because Plaintiffs have failed to demonstrate that the Department did anything more than concur that Enbridge already possessed the necessary authorizations, Plaintiffs have failed to demonstrate that the requirements under the National Environmental Policy Act ("NEPA") or National Historic Preservation Act ("NHPA") were triggered. The Department's conclusion that Enbridge required no new authorization for these activities is well "within the bounds of reasoned decision making." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

I. The Department Did Not Take Any "Final Agency Action"

Plaintiffs assert that the Department engaged in final agency action that is reviewable by this Court because the Department's April 24 and July 24, 2014 letters had the "practical effect" of authorizing Enbridge to: (1) construct an "entirely new pipeline"; (2) operate Line 3 above and alleged capacity limit imposed by the Department; and (3) operate Line 67, at a point within the Department's jurisdiction, in excess of its permitted capacity. *See* Plaintiffs' Summary Judgment Opposition, at 2-15 ("Pl. Opp.") [Doc. 102].

Plaintiffs, however, misconstrue the applicable legal standard for final agency action and fail to acknowledge that the only "effect" of the Department's letters was to confirm that Enbridge already possessed the necessary authorizations to engage in the

challenged activities. It is undisputed that the Department's letters explicitly state that "the replacement of the border segment of Line 3 is authorized by the existing 1991 Presidential Permit," AR0044, and the Interconnections "do not require authorization from the U.S. Department of State." AR0193. In fact, the Department previously agreed that Enbridge could replace the older Border Segment for another pipeline, Line 6B, with newer pipe as part of a maintenance program undertaken in accordance with the terms of the existing Presidential Permit for that line. AR 0023. The Department thus broke no new ground here by simply concurring that Enbridge was already permitted to replace the existing Line 3 Border Segment with new pipe, and that it has no jurisdiction beyond the Border Segment.

As opposed to reviewable final agency action, the Department's letters at issue here were confirmatory only and did not "require[] an immediate and significant change in" the "conduct of [Enbridge's] affairs with serious penalties attached to noncompliance." *Abbott Labs v. Gardner*, 387 U.S. 136, 153 (1967). While Plaintiffs attempt to recast the letters as having the "practical effect" of conferring new rights on Enbridge, "if the *practical effect* of the agency action is not a *certain* change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (emphasis added). Here, the Department's letters do not change any legal obligations or convey any new rights. *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 18 (D.C. Cir. 2006) (if the 'final agency action' requirement is not met, "the action is not reviewable.").

Iowa League of Cities v. EPA, 711 F.3d 844 (8th Cir. 2013) is not to the contrary. There, the court determined that EPA's letters constituted reviewable "promulgations" because they had "a binding effect on regulated entities." *Id.* at 863. The first letter prohibited permittees from using bacteria mixing zones in waters designed for primary contact recreation, and required states to "reject" any permit applications "inconsistent with this policy." The second letter required authorities to follow a 2005 draft policy in drafting permit conditions. Both letters thus required permittees and states to change their behavior. Here, the Department's letters merely confirmed Enbridge already possessed the necessary authorization, and did not promulgate new binding requirements.

Plaintiffs have also failed to distinguish the cases cited in Enbridge's Brief.[1] Plaintiffs argue only that the cases are inapplicable because "Plaintiffs are challenging the State Department's failure to comply with NEPA and NHPA before authorizing new pipeline projects" and the cases cited by Enbridge do not concern NEPA. Pl. Opp., at 13-15. Plaintiffs, however, fail to acknowledge that they must first identify reviewable final agency action under the APA before they may assert NEPA/NHPA claims. *See Karst Environmental Educ. and Prot., Inc. v. EPA*, 475 F. 3d 1291, 1295 (D.C. Cir. 2007) (NEPA claims cannot be maintained where plaintiff failed to identify any final agency action). The cases cited in Enbridge's Brief hold that agency interpretive letters do not

[1] *See* Doc. 90, at 17-23 (citing *Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012 (D.N.D. 1993), *aff'd sub nom. Bottineau Cnty. Water Res. Dist. Bd. of Managers v. Niedfelt*, 48 F.3d 1223 (8th Cir. 1995); *see also Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)).

constitute final agency action where no new rights and/or obligations are established, a proposition that is fully applicable here. Plaintiffs have thus failed to demonstrate that the Department's interpretive letters constitute final agency action, and their NEPA/NHPA claims accordingly fail.

Moreover, for the additional reasons set forth below, the Department did not engage in any final agency action and its conclusion that Enbridge required no further authorization was reasonable and is entitled to deference.[2]

A. The Department Did Not Authorize A New Pipeline

Plaintiffs argue that the Department engaged in final agency action by providing Enbridge with authorization to construct "an entirely new pipeline." Pl. Opp., at 4. The entire basis for Plaintiffs' argument is that the replaced Line 3 Border Segment constitutes a newly-authorized crossing because the old Line 3 pipe, which has been permanently deactivated in place, may be brought back into service. *Id*.

It is undisputed that the old Line 3 Border Segment has been deactivated, is not in service, and that Enbridge has no intention to return that segment to service. AR0023. Also, the old Line 3 pipe located immediately at the border has since been removed and could not be replaced without a new Presidential Permit. Further, the replaced Line 3

[2] Plaintiffs mistakenly argue that any deference owed to the Department with respect to its conclusions that it need not act are limited by NEPA. Pl. Opp., at 21. However, the Department's conclusions regarding whether Enbridge possesses the necessary authorizations to engage in the activities at issue is judged under the arbitrary and capricious standard of the APA, and not NEPA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (an agency's decision not to act is judged under the arbitrary and capricious standard of the APA).

Border Segment is already connected to and in use with the remainder of Line 3 pending replacement/deactivation of the remaining Non-border Segments. Doc. 90, n. 5. The altogether new, unauthorized pipeline that Plaintiffs have hypothesized simply does not exist. Nor does their mere speculation that a new pipeline might come into being at some future time establish that there was any final agency action authorizing such a pipeline here. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1237 (11th Cir. 2003) (final agency action does not exist on the "contingency of future administrative action").

Plaintiffs also argue that Enbridge has not "replaced" Line 3 because it has deactivated the old Line 3 pipe in place without removal. Plaintiffs, however, fail to acknowledge that: (i) the non-removal of a deactivated pipeline is common practice in the United States, as contemplated by PHMSA regulations (*see* 49 C.F.R. § 195.402(c)(10)); and (ii) this practice avoids the significant environmental impacts that would result from digging up the deactivated pipe. The fact that the old Line 3 pipe will remain in-ground (other than the immediate border section that has been removed) proves only that Enbridge adheres to industry practice and regulatory policy; it does not support Plaintiffs' suggestion that Enbridge intends to reactivate the same integrity-challenged pipe that required replacement.[3]

In sum, the Department took no agency action here: (i) the old Line 3 pipe at the border suffered from integrity-related anomalies that required ongoing inspection, maintenance, and repair; (ii) the pipe was consequently "maintained" in accordance with

[3] The case cited by Plaintiffs, *Wade v. Lewis*, 561 F. Supp. 913 (N.D. Ill. 1983), which concerns a domestic bridge project, does not suggest otherwise.

the Permit through the replacement of the existing pipe; and (iii) use of the old Line 3 pipe at the border has been permanently discontinued. AR Doc. 19. Plaintiffs' misguided assertion that the Department engaged in final agency action because Enbridge is now authorized to operate two Line 3 pipelines is simply not supported by the record.

B. The Department Did Not Authorize An Increase In The Line 3 Capacity

Plaintiffs argue that the Department engaged in final agency action because the Department's letters authorized Enbridge to operate the Line 3 Border Segment at a higher level than its historical capacity. Pl. Opp. at 6-7. In support, Plaintiffs cite to the Department's April 24 letter which they contend was conditioned on Line 3's alleged historical capacity in 1991 of "roughly 760,000" barrels per day ("bpd"). *Id.* at 6. Plaintiffs also cite the Department's July 24 letter, which states that "no further authorization" from the Department is needed for Enbridge to effectuate the plans set forth in Enbridge's June 16 letter, including use of the Line 3 Border Segment and Interconnections to transport up to 800,000 bpd. *Id*. Plaintiffs argue that the Department thereby authorized Enbridge to operate Line 3 at 800,000 bpd, which is 40,000 bpd higher than the alleged permitted capacity of the line.

Plaintiffs' argument does not hold together. Plaintiffs correctly acknowledge that the 1991 Line 3 Permit issued to Enbridge "does not restrict capacity on its face." Pl. Opp., at 6. Indeed, no capacity limitation was established at the time the Department issued that Permit. Nor did the Department's letters create any new capacity limitation. Plaintiffs allege that the Department's April 24 letter establishes a capacity restriction of

760,000 bpd, which the Department later increased to 800,000 bpd in its July 24 letter. However, by its own terms, the April 24 letter merely recites Enbridge's plans to operate Line 3 "after a full replacement" at "roughly 760,000 bpd", a volume the Department noted was within the operating range of the Line in 1991. AR0044. This historical operating level was mentioned only as a factor in support of Enbridge's view that replacement of the Line 3 Border Segment was authorized maintenance. The Department never asserted that any use of the pipeline to transport in excess of "roughly 760,000 bpd" would be impermissible. In fact, the Department was well aware that Enbridge has operated Line 3 as high as 960,000 bpd, well above the 800,000 bpd contemplated in Enbridge's June 16, 2014 letter. AR0135.

In sum, because the 1991 Line 3 Permit authorizes Enbridge to operate Line 3 without any capacity limit, no Department action was required or occurred to authorize Enbridge to operate the replaced Line 3 Border Segment at 800,000 bpd or any other level.

C. The Department Did Not Authorize An Increase In Capacity On Line 67

Plaintiffs also argue that the Department engaged in reviewable final agency action because Enbridge allegedly "gained authority" to operate Line 67 above 450,000 bpd. Pl. Opp., at 7-13. Central to their argument, Plaintiffs allege that the Interconnections are within the Department's jurisdiction and their operation above 450,000 bpd constitutes new final agency action. *Id*. at 8. Plaintiffs thus directly contest the Department's assertion that its own jurisdiction under E.O. 13337, on which the

Presidential delegation of authority to issue cross-border Permits is based, is limited to the Border Segment of a cross-border pipeline.

The Department's authority derives from the President's inherent constitutional authority over foreign affairs, which is limited to authorizing "any physical connection" between any foreign country and the United States. 30 Op. Att'y Gen. 217, 221 (1913). E.O. 13337 underscores the Department's limited role over pipelines: the Order designates the Department to receive applications for crude oil pipelines "*at the borders of the United States*." E.O. 13337, Section 1(a) (emphasis added). Accordingly, the Department has reasonably interpreted its delegated authority as extending only to that portion of a cross-border facility that is in proximity to the border "connection" with a foreign nation.

Consistent with the scope of the Department's jurisdiction, the Line 67 Permit (like all other Presidential Permits in recent years) is <u>expressly</u> limited to the Border Segment. Entirely domestic activities in the United States outside of the Border Segment are therefore not subject to the Permit or the Department's jurisdiction. AR Doc. 21. After all, the Department is a foreign affairs agency and not a pipeline regulatory agency. It has neither the expertise nor capability of addressing pipeline operations or facilities other than with respect to the national interests associated with international border connections. And, its view of the limits of its jurisdiction has been applied consistently. *See, e.g.*, AR0023 (noting that Enbridge replaced another cross-border pipeline without needing Department approval for the non-border area portions).

While Plaintiffs attempt to distinguish the "scope" of the Permit from the Department's "jurisdiction" (*see* Pl. Opp., at 8), the Department has reasonably concluded that they are one and the same. *See Udall v. Tallman*, 380 U.S. 1, 16-18 (1965) (substantial deference is owed to an agency's interpretation of its authority under an executive order); *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (2004) (same). Neither does Plaintiffs' unsupported contention that the Department's jurisdiction may be "malleable" demonstrate that the Department's jurisdiction should be applied more broadly than is allowed under the delegation of constitutional authority by the President.

Plaintiffs cite to a brief filed by the U.S. Department of Justice ("DOJ") in another case which appears to state that the Department's authority extends to an entire proposed cross-border pipeline. *Sierra Club v. Bostick*, No. 1:13-cv-1239 (D.D.C. Feb. 10, 2014). However, not only was the Department not a party to that case (which concerned a NEPA challenge to other federal agencies' approvals for a domestic pipeline), but DOJ recently filed a notice to correct the quoted excerpt, clarifying that it was "incorrect because the State Department does not issue a permit covering an entire pipeline project," and instead it "issues a permit only for the border segment." Doc. 104-1, at 2.

Plaintiffs also contend that the Department has jurisdiction over the entire Line 67 because the prior Line 67 Environmental Impact Statement ("EIS") assessed impacts for the entire Line. However, while a NEPA review can extend beyond the jurisdiction of

the reviewing agency,[4] the scope of that NEPA review, including any mitigation measures identified in an EIS, cannot expand the scope of the federal agency's authority. *Winnebago Tribe v. Ray*, 621 F.2d 269, 272-73 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980) (NEPA does not broaden an agency's substantive powers); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (recognizing that a NEPA review may identify mitigation measures that are outside a federal agency's statutory jurisdiction).

In sum, the Department did not take any final agency action here to expand or contract its jurisdiction or Enbridge's rights under the Line 67 Presidential Permit when it acknowledged Enbridge's plans to build the Interconnections outside of the jurisdictional Border Segment.

II. The Department's Letters Are Unreviewable Executive Action

For the reasons stated in Enbridge's Brief and the Department's Briefs, any steps undertaken by the Department pursuant to the delegation of foreign affairs powers under E.O. 13337 are undertaken on behalf of the President and are not reviewable by this Court.

In arguing that the Department has instead acted as an agency, Plaintiffs (*see* Pl. Opp., at 15-18) fail to distinguish, or even acknowledge, the *Sisseton* and *NRDC* cases. This Court should conclude – as those courts did – that if any agency action was

[4] *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (holding that agency's NEPA review was required to extend across the entire project, and not be limited to only waters under the agency's jurisdiction).

undertaken by the Department under E.O. 13337, it is unreviewable Presidential action. Indeed, when the Department merely confirmed that Enbridge's actions were already authorized under existing Permits, it was speaking on the President's behalf.

The case cited by Plaintiffs, *Protect Our Communities Foundation v. Chu*, 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014), is inapplicable to the facts here just as is *Sierra Club v. Clinton*. In both cases, the federal agency had prepared an EIS that was challenged on judicial review. By contrast, there is no EIS under review here. The question here only concerns whether Enbridge's Presidential Permits authorize or do not prohibit the activities now being challenged by Plaintiffs, and the Department's letters on those issues implicate executive matters beyond the scope of judicial review.

III. There Was No NEPA Violation

A. The Line 3 Replacement Does Not Constitute A "Major Federal Action"

The trigger for NEPA is whether a "major federal action" has occurred. When an agency is not required to issue any authorization to allow a private project to proceed, NEPA does not apply. *See Ringsred v. State of Minnesota*, 828 F.2d 1305, 1308 (8th Cir. 1987). In this case, Enbridge replaced the existing Line 3 Border Segment to resolve integrity-related issues, thereby returning that Segment to its original operating condition. AR Docs. 7, 12. The Department agreed that the replacement was previously authorized under the existing Line 3 Permit, which requires Enbridge to maintain the Border Segment in "good working condition." AR Doc. 19. Because the Department did not provide Enbridge with any new rights, and did not alter the status quo, the Department

did not engage in a "major federal action" that triggers NEPA. *See Ringsred*, 828 F.2d at 1308.

Plaintiffs attempt to distinguish *Ringsred* by arguing that the agency "had no authority or veto power over the project" in that case. Pl. Opp., at 23. However, the *Ringsred* court found that the agency's action (approval of a contract) gave the agency "factual veto power" over the parking ramp at issue, but nonetheless found the agency's action too incidental to trigger NEPA. *Ringsred*, 828 F.2d at 1308. Thus, the agency in *Ringsred* actually had more authority over the project at issue than in this case, where the Department had *no* "veto power" over the Line 3 replacement or the interconnections.[5] *Ringsred* therefore fully supports the Department's position that no NEPA requirements were triggered by the Line 3 replacement.

Plaintiffs argue that the Department effectively authorized a new pipeline because the Line 3 replacement will follow new routing in Minnesota. Pl. Opp., at 22-23. However, as discussed above, the Department only has permitting authority over the Border Segment, not the entire pipeline. *See* E.O. 13337 § 1(a); AR Doc. 6. Therefore, decisions on how best to route the replaced pipeline outside the Border Segment are beyond the scope of the Presidential Permit and require no approval or review by the Department. Moreover, the new routing for Line 3 is a decision that will be made by the Minnesota Public Utilities Commission, in a proceeding yet to be concluded.

[5] Plaintiffs also argue that the Department's authority in this case is substantial, because the Department "has direct authority over international crude oil pipelines." Pl. Opp., at 23. However, as discussed above, the Department's presidential permitting authority is limited to Border Segments.

The capacity of the replaced Line 3 also does not transform the Department's March 24 letter into a major federal action. As discussed above, the Line 3 Permit does not limit the amount of oil that can be transported on the Border Segment. *See* AR 6-10. Plaintiffs' argument that the replacement "will carry substantially more oil" than Line 3 did historically is also incorrect, as discussed above. Pl. Opp., at 22.[6] The fact is that the Department was not required to take (nor did it take) any action to approve Enbridge's plans regarding the replacement line or its operation. In sum, the Department did not engage in – nor was it required to engage in – any "major federal action" to allow the Line 3 Border Segment replacement to proceed, consistent with Enbridge's obligation under its Permit to maintain its pipe. NEPA was accordingly not triggered.

B. The Department Did Not Violate Section 1506.1

As discussed more fully in Enbridge's Brief, the CEQ regulation on which Plaintiffs rely to argue that the Department has allowed impermissible interference with the on-going Line 67 Supplemental Environmental Impact Statement ("SEIS") process, 40 C.F.R. §1506.1, is inapplicable to the Interconnections. Section 1506.1 applies only to actions that: (i) concern the proposal that is under consideration in an EIS, (ii) are within the agency's jurisdiction, and (iii) would cause adverse impacts or limit alternatives.

[6] Plaintiffs argue that Enbridge can bring the "replaced" pipeline back into service, and that therefore NEPA review of the "new" Line 3 was required. Pl. Opp., at 21. However, as described above, the old Line 3 Border Segment has been deactivated, is not in service, the pipe immediately at the border has been removed, and Enbridge has no intention of returning that segment to service. Therefore, the new Line 3 is indeed a replacement, and Enbridge will not be operating both the old and new Line 3 pipelines.

Here, the Interconnections were constructed outside of the Border Segments on Lines 3 and 67, and their operation increases the throughput only on the Non-Border Segments of Line 67, all of which are activities outside the Department's jurisdiction. The Department therefore lacked authority to require Enbridge to cease construction or operation of the Interconnections. *See Southwest Williamson v. Slater*, 243 F.3d 270 (6th Cir. 2001).

Plaintiffs argue that the Department "avoided NEPA" by "arbitrarily" determining that the Interconnections fall outside its jurisdiction. Pl. Opp., at 21. However, as discussed above, the Department's determination that its jurisdiction lies only with the Border Segment of Line 3 is well-founded in law and precedent, and therefore is far from "arbitrary." As also discussed above, the Department is entitled to great deference with respect to interpreting the scope of its authority. Doc. 90, at 22-23.

Section 1506.1 is also inapplicable because the Interconnections do not "concern" the Line 67 Border Segment expansion. Plaintiffs argue that the Department erred in acting on the Interconnections before concluding the SEIS process for the Line 67 Border Segment because the projects are "identical *except for the border segment.*" Pl. Opp., at 25 (emphasis added). But the use of Line 3 with the Interconnections is not identical to the planned use of the Line 67 Border Segment for the simple reason that Line 3 and Line 67 each operate under different Presidential Permits governing different border segments. The only "proposal" being addressed in the SEIS is the narrow one of whether to approve the capacity expansion on the Line 67 *Border Segment*. The Interconnections do not

"concern" that question.[7] The pendency of the SEIS, in other words, does not somehow inhibit Enbridge's ability to use other pipelines consistent with the existing Permits governing those pipelines.

Plaintiffs misleadingly state that "Enbridge implicitly acknowledges" that the Interconnections "interfere" with the SEIS. Enbridge, however, only acknowledged that the Interconnections will be considered as part of the baseline conditions in the SEIS. In other words, because the Interconnections are already constructed, they are part of the existing environment, or "baseline," that will be described in the SEIS. The fact that the Interconnections will be discussed as existing infrastructure in the SEIS in no way "interferes" with the environmental review of the proposed increase in Line 67 throughput at the border, nor triggers any requirements under Section 1506.1. *Cf. North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991) ("because FERC's responsibility is limited to overseeing only [a] portion of [the project], it follows that FERC's NEPA review … should have a preclusive effect only on that portion, even if FERC opts to analyze … portions …beyond its control.").

Plaintiffs accuse Enbridge of skirting NEPA because the Interconnections will allow Enbridge to "operate Line 67 at 800,000 bpd." Pl. Opp., at 25. However, the federal action that triggered the SEIS is whether to allow the capacity *at the border*

[7] Plaintiffs point to isolated statements in the administrative record to attempt to argue that the Interconnections "concern" Line 67. Pl. Opp., at 24-25. However, the "project changes" referred to in those documents are changes to Enbridge's infrastructure outside the border area, not changes to the federal action that triggered the SEIS (whether to approve a capacity increase at the Line 67 Border Segment).

segment of Line 67 to increase. This increase will not occur until the SEIS is complete and only then if a new Permit is issued. The Interconnections do not change the amount of oil transported across the border segment of Line 67, but only provide an alternative means to import increased volumes of oil across the separate Line 3 Border Segment. The Department retains its full discretion regarding whether to authorize increased capacity at the Line 67 Border Segment; its ability to make a national interest determination under E.O. 13337 is uninhibited. Further, the alternative actions that can be addressed in the SEIS, including a "no action" alternative (where a new Permit for the Line 67 Border Segment is not issued), have not been limited in any way. Therefore, the Department has no basis for requiring Enbridge to cease use of the Interconnections until the Line 67 SEIS is complete.[8]

In sum, the Interconnections do not trigger any requirements under Section 1506.1 because they are not within the Department's jurisdiction, they do not "concern" the potential increased capacity of the Line 67 Border Segment, and they will not impact the alternatives that can be considered in the SEIS.

[8] Plaintiffs assert that Enbridge failed to address the other prong of 1506.1, whether the Interconnections have adverse environmental impacts. Enbridge did not address that prong in its opening brief because the NEPA cases have focused on "the basic principle that non-federal action should not be permitted to limit the applicable federal agencies' choice of reasonable alternatives," rather than whether the action would have environmental impacts. *Southwest Williamson*, 243 F.3d at 281; *see also North Carolina*, 951 F.2d at 603.

IV. There Was No NHPA Violation

Plaintiffs argue that the Department's letters constitute "undertakings" under Section 106 of the NHPA for the same reason that the letters constitute reviewable final agency action. Pl. Opp., 27. However, the Department merely concurred that there was no action for it to take because Enbridge already possessed the necessary authorizations. There was accordingly no "undertaking" here to trigger the Section 106 process. *Ringsred*, 828 F.2d at 1309.

Plaintiffs cite *Vieux Carre v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991), in which the Fifth Circuit concluded that the district court erred in dismissing the plaintiffs' claims on mootness grounds because a Section 106 claim could proceed even after the project had been fully constructed. *See also Vieux Carre*, No. CIV. A. 87-3700, 1993 WL 86222, at *3 (E.D. La. Mar. 15, 1993) (on remand, concluding Corps had complied with Section 106), *aff'd sub nom.*, 40 F.3d 112, 115 (5th Cir. 1994). *Vieux Carre* arose in the circumstance where an agency authorized activities pursuant to a new permit and the agency's compliance with Section 106 was being challenged following completion of the project. The holding does not apply where, as here, the agency has not engaged in any federal undertaking triggering Section 106 in the first place.

CONCLUSION

For the reasons stated above, Enbridge's cross-motion for summary judgment should be granted and Plaintiffs' motion for summary judgment denied.

Dated: June 19, 2015

Respectfully submitted,

/s/ Todd Wind

Todd Wind (MN #196514)
Joseph J. Cassioppi (MN #388238)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Telephone: (612) 492-7000
Facsimile: (612) 492-7077
twind@fredlaw.com
jcassioppi@fredlaw.com

David H. Coburn (pro hac vice)
(DC #241901)
Cynthia Taub (pro hac vice)
(DC #445906)
Joshua Runyan (pro hac vice)
(DC #977664)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
dcoburn@steptoe.com
ctaub@steptoe.com
jrunyan@steptoe.com

Attorneys for Enbridge Energy, Limited Partnership