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)

MEMORANDUM IN SUPPORT OF ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hon. Michael J. Davis

U.S. District Judge

Hearing Date: September 10, 2015

Time: 9:30 am

INTRODUCTION

At issue in this case is the transmission of two letters by the U.S. Department of State ("Department") that, respectively, confirm that: (1) the Line 3 Presidential Permit held by Enbridge Energy, Limited Partnership ("Enbridge") allows it to replace an approximate 16-mile segment of 50-year-old pipe between the international boundary and the first U.S. mainline valve (the "Line 3 Border Segment") with new pipe as part of a maintenance program; and (2) Enbridge's Presidential Permits do not preclude it from connecting Line 3 and the adjacent Line 67 with very short new pipes ("Interconnections") at a point outside the Border Segment of each pipeline. Enbridge advised the Department that it took this latter action to allow oil to flow between these two major pipelines, similar to actions it has taken to connect other pipelines in its system, in order to enhance the operational flexibility and reliability of its lines, and to provide the capability to transport the volume of oil needed to meet shipper demands.

Plaintiffs' challenge the letters on the grounds that the Department failed to comply with the National Environmental Policy Act ("NEPA"), and Section 106 of the National Historic Preservation Act ("NHPA"). Their challenge fails for several reasons. Because the Department's letters concern cross-border infrastructure that were issued pursuant to a delegation of the President's constitutional authority over foreign affairs, they are Presidential activities that are beyond the scope of permissible judicial review. Further, the Department's two letters informally confirming Enbridge's view of permissible activities relative to its cross-border pipelines do not constitute "final agency action," a predicate for judicial review under the Administrative Procedure Act ("APA"),

5 U.S.C. §§ 551, *et seq*. However, even if the Department's letters were subject to judicial review under the APA, they are far from the sort of "major federal action" that triggers the environmental review requirements under the NEPA or the Section 106 consultation requirements under the NHPA. Plaintiffs thus have no actionable claims against the Department.

In challenging Enbridge's actions to replace the existing Line 3 Border Segment pipe with new pipe, Plaintiffs' apparent underlying goal is to inhibit the flow of Alberta "oil sands" crude oil (which they assert poses greater environmental risks) into the United States from Canada. However, Enbridge's activities that are at issue here were designed to resolve the integrity-related issues associated with the existing Line 3 pipe by installing new pipe and by routing the heavy crude off an older pipeline and on to a newer one. It is beyond dispute that Enbridge's actions are safety-enhancing, thereby decreasing the already small potential risk of a spill. This Court should reject Plaintiffs' efforts to expand NEPA well beyond its bounds as a means to undermine or delay Enbridge's ability to implement these improvements and operational changes, especially in light of their safety-enhancing nature.

FACTUAL BACKGROUND

I. The Department's Limited Authority Over Cross-Border Pipelines

The Department is not a regulator of interstate crude oil pipelines, and its authority over such pipelines is extremely limited. Thus, Enbridge, which operates the largest system of common carrier pipelines in North America, does not consult with the Department or seek any form of Department approval when it makes operational changes

to the thousands of miles of pipelines it operates in the United States or when it constructs new pipeline or replaces existing pipelines at points not proximate to the U.S.-Canada border.

To the limited extent that the Department has permitting authority over Enbridge's pipelines, that authority is restricted to the Border Segments of Enbridge's cross-border pipelines. Such authority arises solely as a result of the President's inherent constitutional authority over foreign affairs to authorize – based on an assessment of national interest – the construction, operation, and maintenance of cross-border pipeline facilities that "connect[] the United States with a foreign country." Executive Order ("E.O.") 13337, at 1, 69 Fed. Reg. 25299 (April 30, 2004), amending E.O. 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968). The President's approval or permitting authority over international border infrastructure, as now delegated to the Department,[1] has roots that date back to the initial telegraph lines that linked the United States with foreign nations.[2]

The Department has reasonably interpreted the scope of this delegation of authority, at least with respect to cross-border pipelines, as applying only to the pipeline Border Segments, the very discrete section of a cross-border pipeline that extends from

[1] E.O. 13337, at Sec. 1(a) states that, "… the Secretary of State is hereby *designated* and *empowered* to receive all applications for Presidential permits, as referred to in Executive Order 11423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country." (emphasis added).

[2] *See* 30 Op. Att'y Gen. 217, 221 (1913) (discussing the history of President's plenary power to control physical connections between foreign countries and the United States).

the U.S.-Canada border to the first mainline valve located in the United States. *See* AR Doc. 19, at 0044. This limitation on the scope of the Department's authority under E.O. 13337 is reflected in Presidential Permits issued by the Department, including the 2009 Line 67 Presidential Permit ("Line 67 Permit") allowing Enbridge to construct, operate and maintain the border segment of that 1,000 mile pipeline. *See* AR Doc. 21, at 0072; *see also Sierra Club, et seq. v. Clinton, et seq*., 09-cv-2622, Doc. 157, at 19 (D. Minn. 2009) (the Department asserting that its "authority to regulate the pipeline extends only to the 'first mainline shut-off valve or pumping station in the United States'"). This limitation is also reflected in the Department's correspondence with Enbridge concerning Line 3. *See* AR Doc. 19, at 0044 ("when evaluating whether the pipeline facilities are consistent with the terms of the existing Permit, the Department of State would focus only on the pipe used from the Canadian border to the first mainline valve in the United States …"). Any exertion of authority by the Department beyond the Border Segment would exceed the scope of the President's constitutional foreign affairs authority, which concerns only the immediate connections of facilities with foreign nations. *See* 30 Op. Att'y Gen. at 221 (the President has plenary power to prevent "any physical connection" between any foreign country and the United States); *United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 Fed. 495 (C.C. N.Y. 1896) (no one "has any right to establish a physical connection" between the U.S. and another country without the consent of the President).

Thus, in stark contrast to an energy regulatory agency like the Federal Energy Regulatory Commission ("FERC"), which has been delegated broad authority by statute

to regulate the siting of interstate *natural gas* pipelines in their entirety (*see, e.g.*, 15 U.S.C. § 717f), the Department is not a pipeline regulatory agency and lacks both statutory and constitutional authority to regulate the routing or operations of crude oil pipelines beyond the border areas. As noted, Enbridge may therefore – and frequently does – conduct activities even on its cross-border pipelines, such as maintenance or replacement, outside of the Border Segments of those pipelines without seeking any approval from the Department and without informing the Department of activities unrelated to the Border Segments of its pipelines.

While no federal agency has been delegated authority to regulate the routing of crude oil pipelines, the Pipeline and Hazardous Materials Administration ("PHMSA") is the federal agency responsible for regulating the *safety* of crude pipelines, which it does intensively under the Pipeline Safety Act. *See* 49 U.S.C. §§ 60101, *et seq*. PHMSA, as the federal agency with expertise over the design and safety of pipelines, has promulgated extensive regulations that set forth design, leak detection, control room, integrity, and emergency response requirements that are applicable to interstate crude oil pipelines, including establishing safe operating pressures and monitoring the integrity of pipelines to guard against spills. *See* 49 C.F.R. Part 195. Enbridge's pipelines, including Lines 3 and 67, are operated and maintained pursuant to these regulations – for example, Enbridge implements sophisticated leak detection measures, control room procedures/equipment, integrity programs, and emergency response planning to minimize the occurrence and extent of any leaks on its pipeline system. AR Doc. 23, at 0118-21.

II. The Proposed Line 67 Border Segment Capacity Increase

As noted, even though Line 67 is approximately 1,000-miles long, the Line 67 Permit, coincident with the Department's authority over that pipeline, applies only to the 3-mile segment located near the U.S.-Canada border, and not to the "Non-Border Segments" of the Line. *See* AR. Doc. 21, at 0072; AR Doc. 19, at 0044. Enbridge constructed Line 67 in 2010 and operates the Border Segment in accordance with the terms incorporated by reference into the Line 67 Permit by limiting the volume of crude oil transported on that Segment into the United States from Canada to an annual average of 500,000 barrels per day ("bpd"). AR Doc. 29, at 0135.

In 2012, Enbridge determined that customer demands dictate that the operational capacity of Line 67 be increased beyond the 500,000 bpd level, initially up to an annual average of 570,000 bpd, and eventually up to an annual average of 800,000 bpd. AR Doc. 23, at 0106. To increase the capacity of Line 67 to these levels, no modifications were required to be made to any portion of the existing Line 67 pipe itself, since it was originally designed and constructed to transport these greater volumes. *Id*. at 0110. However, upgrades to seven pump station facilities in Minnesota ("Pump Upgrades") are required to provide the necessary horsepower to achieve the overall capacity increase on the pipeline. *Id*. at 0110-13. Such Pump Upgrades occur far south of the Border Segment, and thus require no authorization from the Department.

Following informal consultations with the Department concerning Enbridge's plans to increase the capacity of the pipeline through the installation of the Pump Upgrades, the Department determined that a new Presidential Permit must be issued to

authorize Enbridge to operate the Line 67 Border Segment at a capacity above 500,000 bpd. In accordance with the Department's determination, Enbridge submitted an application in November, 2012 requesting that a new Presidential Permit be issued to authorize Enbridge to operate the Line 67 Border Segment up to an annual average capacity of 800,000 bpd ("Application"). AR Doc. 23. That Application seeks no authorization from the Department with respect to the operation, construction, and/or maintenance of the Non-Border Segments, including the Pump Upgrades, since such activities are located outside the scope of the Permit and the Department's limited border-area authority over the pipeline. *Id*. at 0105, 0111.

Following receipt of Enbridge's Application, the Department decided to prepare a Supplemental EIS ("SEIS") to assess the potential environmental impacts that may result from the operation of the Line 67 Border Segment at an annual average capacity of 800,000 bpd. *See* 78 Fed. Reg. 16565 (March 15, 2013). The Department has sought public comments on the scope of that SEIS, including Enbridge's plans to operate Lines 3 and 67 via Interconnections, as discussed below at Section IV. *See* 78 Fed. Reg. 16565. In response, many of the Plaintiffs submitted comments to the Department, raising many of the same issues that they now raise in their Amended Complaint. Plaintiffs will also have an ample opportunity to comment on a Draft SEIS once it is issued.[3]

[3] Enbridge has obtained the approvals from the only two agencies with jurisdiction over the construction and/or operation of the Pump Upgrades located on the Non-Border Segments of Line 67 – the Minnesota Public Utilities Commission ("MPUC") and the U.S. Army Corps of Engineers ("Corps"). The MPUC has issued two certificates of need authorizing Enbridge to install and operate the Pump Upgrades, recognizing that the

III. The Line 3 Border Segment Replacement

Line 3 is a 34-inch diameter crude oil pipeline that was constructed between Alberta and Wisconsin in the 1960's pursuant to a Presidential Permit originally granted by President Johnson on January 22, 1968. AR Doc. 1. On December 12, 1991, following the President's delegation of his authority over cross-border pipelines to the Department under E.O. 11423, the Department issued a new Presidential Permit to transfer the 1968 Permit to a new entity. AR Doc. 2. Line 3 is currently operated and maintained pursuant to the terms of the 1991 Permit ("Line 3 Permit"). AR Doc. 7, at 0022.

The Line 3 Permit does not contain any language, express or incorporated, that limits the operating capacity of the Line 3 Border Segment. *See* AR Doc. 2. The Permit broadly authorizes the transport of "liquid hydrocarbons," and does not restrict the types or capacities of particular crudes that may be transported on the Line 3 Border Segment. *Id*. at 0006. Enbridge may therefore transport any type of liquid hydrocarbon (*e.g.*, light or heavy "oil sands" crude) through its 34-inch diameter pipe, which is the diameter authorized under the existing Permit. *Id*.

Over the decades, the condition of Line 3 has deteriorated and Enbridge's pipeline maintenance program has become increasingly complex to properly manage the integrity

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current capacity of Line 67 "is not sufficient to meet current and expected peak demand for crude oil shipments." AR Doc. 29, at 0155. The Corps issued a Letter of Permission authorizing Enbridge to engage in minor wetland impacts resulting from the construction of three of the Pump Upgrades. The first phase of the Pump Upgrades is operational, and provides Enbridge with the capability to transport up to 570,000 bpd on Line 67 in Minnesota. Construction of the second phase of the Pump Upgrades began in November 2014, and is expected to be completed in the coming months.

of the Line. AR Doc. 12, at 0033. In 2012, Enbridge voluntarily derated the pipeline's maximum operating pressure, thereby reducing the capacity of the pipeline to 390,000 bpd, well below the full design capacity for the pipeline. *Id.* Line 3 continues to require a high level of integrity monitoring and an on-going integrity dig program to inspect and repair the high number of integrity-related anomalies that exist on the pipeline. Due to the extent of the integrity digs forecasted over the coming years, as well as the associated impacts of ongoing integrity digs on landowners and the environment, Enbridge concluded that the replacement of Line 3 is the optimal solution to maintain Line 3. AR Doc. 12.

Among the initial segments to be replaced under the maintenance program was the 16-mile Line 3 Border Segment. Replacement of that segment was undertaken pursuant to the existing Line 3 Permit, which authorizes Enbridge to "maintain" the Line 3 Border Segment and requires Enbridge to "maintain the United States facilities and every part thereof in a condition of good repair for their safe operation." AR Doc. 2, at 0006, 0009.[4] In early 2014, Enbridge notified the Department of its plans to replace the existing Line 3 Border Segment with new 34-inch pipe. *See* AR Docs. 7, 12. Because "that diameter pipe is not in common use," Enbridge undertook to have new 34-inch pipe "specially manufactured." *Id*. Enbridge also advised the Department that, consistent with U.S.-pipeline practices, the existing pipe would be permanently "deactivated and continuously

[4] For similar maintenance reasons, Enbridge also replaced a 1.5-mile segment of pipe north of the border in Canada to ensure the safe operation of that portion, as well as a 13-mile segment near Cromer, Manitoba. AR Doc. 7, at 0024.

maintained in place." AR Doc. 7, at 0023.[5] Further, Enbridge advised that the expected annual average capacity of 760,000 bpd that would occur upon replacement of the entire Line 3 was within the historical operating range of the pipeline, and that Line 3 had been operated at various ranges in the past, including in the range of 960,000 bpd. AR Doc. 12, at 0033.[6]

This is not the first time that Enbridge has replaced one of its cross-border pipelines under the terms of an existing Presidential Permit. In 2011, Enbridge replaced the cross-border section of its Line 6B pipeline that extends between Michigan and Ontario with new pipe. AR Doc. 7, at 0023. Upon notification to the Department by Enbridge of that Line 6B replacement, the Department concurred that the replacement was an appropriate maintenance project that could proceed under the terms of the existing Presidential Permit and that no further authorization from the Department, including environmental review, was required. *Id.*

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[5] In fact, pursuant to Canadian requirements, the old Line 3 pipe has been removed in its entirety in Canada, and approximately 100 feet of pipe extending from the international boundary into the United States has also been removed to allow Enbridge to cap the existing, deactivated pipe. Were Enbridge to restore the old Line 3 to service across the U.S.-Canada border – which it has no plans to do – it would need a new Presidential Permit.

[6] Plaintiffs have impermissibly attached a number of extra-record materials to their Brief, including the Declaration of Richard Kuprewicz. *See* Docs. 81, 83. Their goal seems to be to make this case appear more complex than it is, and to offer speculation on how Enbridge may use its pipelines. The Kuprewicz Declaration, at ¶ 32, for example, includes a lengthy discussion of operating pressures, none of which is part of the record or relevant to the issues before this Court.

In response to Enbridge's communications on Line 3's Border Segment replacement, the Department sent Enbridge an April 24, 2014 letter concurring with Enbridge's notifications that "the replacement of the border segment of Line 3 is authorized by the existing 1991 Presidential Permit," and that no authorization from the Department beyond the Permit was required. AR Doc. 19, at 0043. The Department indicated that "because Line 3 is an old pipeline, and [Enbridge] stated that it can no longer sustain operations (*e.g.*, volume and pressure) that it was originally designed and authorized to handle" that "Article 9 of the Line 3 Presidential Permit mandates Enbridge to maintain the pipeline 'in a condition of good repair for [its] safe operation." *Id*.

Enbridge initiated the replacement of the Line 3 Border Segment in June 2014, and completed the replacement in mid-September 2014. Enbridge has applied for the necessary approvals from the relevant federal and state agencies to replace the remaining sections of Line 3, which again are outside of the scope of the Line 3 Presidential Permit and do not require any approvals from the Department.

IV. The Interconnections and Related Operational Changes

Enbridge decided during the summer of 2014 to optimize its existing pipeline system by connecting Lines 3 and 67. *See* AR Docs. 29, 31. These Interconnections provide the flexibility, reliability, and efficiency needed to transport increased volumes of crude oil from Canada into the United States. *Id*. During a June 3, 2014 meeting and in follow-up written communications, Enbridge notified the Department of its plans to construct the Interconnections between Lines 3 and 67 both in Canada and the U.S. to allow oil to: (1) move on Line 67 in Canada; (2) be transferred to the Line 3 Border

Segment approximately 1.5 miles north of the U.S.-Canada border; (3) cross the U.S.-Canada border on the Line 3 Border Segment; and (4) then be transferred back to Line 67 at a point approximately 16 miles south of both Border Segments for further delivery to Superior, WI on the Non-Border Segments of Line 67. AR Doc. 29, at 0134-35.[7] Enbridge advised the Department that interconnections of this sort are regularly utilized to optimize the operability and reliability of an existing pipeline system. *See* AR Doc. 31. Enbridge's communications were informational only and requested no authorization from the Department – Enbridge notified the Department of activities occurring near the international boundary, albeit not within the Border Segments of either pipeline, and supplemented information about planned operation of the Interconnections in order to allow the Department to incorporate such information, as necessary, into its ongoing Line 67 SEIS. AR Doc. 29.

In response, the Department sent a July 24, 2014 letter to Enbridge concurring with Enbridge that the Interconnections are beyond the scope of the Line 3 and Line 67 Permits, and as a result, "Enbridge's intended changes to the operation of the pipeline outside of the border segment *do not require authorization from the U.S. Department of State*." AR Doc. 33, at 0193 (emphasis added). The Department noted that NEPA did not apply to and/or prohibit Enbridge from engaging in such activities. The Department also observed that these activities – which establish a new baseline of environmental

[7] A map that more accurately depicts the Interconnections than the map embedded in Plaintiffs' brief is found at AR Doc. 25.

conditions occurring from existing operations – would be reflected in the SEIS that it was preparing with respect to Enbridge's Application. *See id*. at 0194.

The Interconnections were constructed in September 2014, and together with the first phase of the Pump Upgrades, provide Enbridge with the current capability to transport up to 570,000 bpd on the Non-Border Segments of Line 67 by transporting this volume across the U.S.-Canada border on the Line 3 Border Segment. AR Doc. 29, at 0135.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). "In the context of summary judgment, an agency action is entitled to great deference." *Hall v. U.S. Army Corps of Eng'rs*, No. 08-cv-278, 2008 WL 5058986, *7 (E.D. Ark. 2008) (citing *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, *1246 (11th Cir. 1996)). A reviewing court must therefore defer to the agency's decision "so long as it is not arbitrary, capricious, an abuse of discretion, or otherwise not supported by law." *State of Minnesota v. Apfel*, 151 F.3d 742, 745 (8th Cir. 1998) (internal citation omitted).

In reviewing the agency's decision, the court must not substitute its judgment for that of the agency. *Citizen to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Where a dispute is primarily factual and "requires a high level of technical expertise,"

resolution of the dispute "is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

II. Plaintiffs' Claims Are Not Reviewable By This Court

Plaintiffs assert that their claims are reviewable under the APA. *See* Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, at 9-10 (hereinafter "Pl. Brief"). However, their claims are not reviewable because: (1) the Department's letters concern unreviewable matters within the ambit of Presidential prerogative under E.O. 13337; and (2) the Department has not engaged in, or been called upon to engage in, any "final agency action" within the meaning of the APA.

i. Plaintiffs' Claims Concern Unreviewable Presidential Action, Not Agency Action

There was no "agency action" by the Department here because the challenged "action", i.e., the April and July letters confirming the permissibility of Enbridge's activities under the existing Presidential Permits, were prepared by the Department acting on behalf of the President in his constitutional role and not in the Department's capacity as an agency implementing a statutory requirement that could make its actions subject to judicial review under the APA. Specifically, with respect to Presidential Permit matters, the Department does not act under any statute investing it with traditional agency powers, but instead under a delegation from the President of his inherent constitutional authority over foreign affairs. *See* E.O. 13337. Because the views expressed by the Department in the challenged letters concern the Presidential Permits issued under E.O. 13337 and the

President's powers over foreign affairs, those letters are not subject to judicial review under the APA.[8]

It is well settled that actions taken by the President are not agency actions subject to judicial review under the APA. *See, e.g., Dalton v. Specter*, 511 U.S. 462, 476-477 (1994) (actions of the President cannot be reviewed under the APA); *see also Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) (dismissing a NEPA claim "because NEPA requires agency action, and the action in question is an extension of the President's action").

On the basis that there was no "judicially remedial right," two courts dismissed claims challenging the Department's decision to issue a Presidential Permit for the original Keystone pipeline. *See NRDC*, 658 F. Supp. 2d at 113; *Sisseton Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009). The *Sisseton* court held that the APA did not allow for judicial review of the plaintiffs' NEPA claims because the action at issue was taken by the President (acting through powers that he delegated to the Department) and not by an agency subject to the APA. *Sisseton*, 659 F. Supp. 2d at 1079. The *Sisseton* court thus concluded that, "the actions taken pursuant to Executive Order 13337 are presidential," and the plaintiffs' APA and NEPA claims "must fail." *Id*. at 1082. Similarly, in *NRDC*, the court determined that the plaintiffs' NEPA claims could not be maintained because the Department's issuance of a Presidential Permit was based

[8] E.O. 13337, itself, also does not provide a private right of action. *See* E.O. 13337, at Sec. 6; *Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) ("*NRDC*").

on "the President's inherent constitutional authority over foreign affairs [was] tantamount to an action by the President himself," which "is not subject to judicial review under [the APA]." *NRDC*, 658 F. Supp. 2d at 109. The court also observed that "[n]ot even the EIS requirement of NEPA applies to the President." *Id*. at 112.[9]

The fact that the two letters at issue here were not sent expressly in the name of, or signed by, the President does not change the outcome. Agency activities conducted on behalf of the President under delegated authority are unreviewable under the APA, just as would be action undertaken directly by the President. *See, e.g.*, *Ancient Coin Collectors Guild v. U.S. Customs and Border Prot., Dept. of Homeland Sec.*, 801 F. Supp. 2d 383, 401-05 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1645 (2013). In that case, the District Court dismissed plaintiff's challenge to the Department's forfeiture of Chinese coins because, while the actions were "not actions directly undertaken by the President," they were undertaken by the Department on "behalf of the President," and thus, "not reviewable under the APA." *Ancient Coin*

[9] While Judge Frank concluded that the Department's Presidential Permit actions were reviewable in prior litigation concerning Enbridge's Line 67, that holding is inapplicable to the facts at hand and, we note respectfully, inconsistent with other relevant law. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010). Judge Frank found that the plaintiffs in that action could challenge the Department's compliance with NEPA under the APA because the Department had issued a Final EIS, on the basis of which the Department had made a final decision to issue a new Presidential Permit. *Id*. at 1157. Judge Frank's opinion was thus based on the fact that the Department had acted under NEPA by issuing an EIS, and his opinion did not concern the reviewability of the Department's actions where, as is the case here, no EIS has been issued, nor has any action triggering NEPA been taken. As explained below in Sections III and IV, the Department has not issued – and is not required to issue – any EIS upon which judicial review by this Court may be based.

Collectors, 801 F. Supp. 2d at 402. On appeal, the Fourth Circuit assumed (without deciding the issue) that the Department acted as an agency under a possibly applicable statute, but found its actions not to be arbitrary and capricious under the APA, recognizing the broad deference due to the Department in the area of foreign relations. Here, no such statute exists; the Department's actions were based exclusively on its delegation from the President to administer the Presidential Permit program consistent with the foreign affairs interests of the United States. In this setting, such review is not available and Plaintiffs' First and Second Claims should be dismissed.

ii. The Department Has Not Engaged In Any Final Agency Action To Allow For Judicial Review Under The APA

Even if Plaintiffs' Claims could be classified as some form of agency action, their claims are not reviewable because the Department has not engaged in any "*final* agency action" as required under the APA.

The APA creates a cause of action for a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where, as here, no other statute provides a private right of action, the "agency action" complained of must be *final* agency action, meaning that it must be a final agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). This requirement is equally applicable to NEPA claims, where such claims must "allege final agency action" that has been or is required to be undertaken pursuant to a

substantive statute other than NEPA. *Karst Envtl. Educ. & Prot. Inc. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007).

Here, Plaintiffs challenge the expression of Department's informal views confirming that the activities Enbridge planned to undertake are authorized under the existing Permits. Such informal expressions, however, do not constitute reviewable final agency action under the APA. *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012). Only when an agency interpretation "requires an immediate and significant change in … conduct of affairs with serious penalties attached to noncompliance" is APA judicial review of such interpretations permitted. *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967). Thus, "the overwhelming majority of agency responses to inquiries will not be appropriate for review" under the APA because they do not establish any rights or obligations, nor are they interpretations from which legal consequences will flow. *Sabella v. U.S.*, 863 F. Supp. 1 (D.D.C. 1994); *Cheyenne-Arapaho Gaming Comm'n v. National Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1169 (N.D. Okla. 2002) ("To consider [advisory opinions] final agency actions would be to muzzle the agency from serving in an advisory role with those that they inherently serve as a government entity.").

For example, in *Holistic Candlers*, 664 F.3d at 944-45, the D.C. Circuit concluded that Food and Drug Administration ("FDA") warning letters did not constitute reviewable final agency action because they merely informed the recipients the extent to which the agency believed that their actions were compliant or in violation of applicable law. Although the warning letters "communicate[d] the agency's position on a matter, [they

were] only informal and advisory" and did not compel "action by neither the recipient nor the agency." *Id*. at 944 (internal citation omitted). Accordingly, the court concluded that, "like other agency advice letters that [it had] reviewed over the years, FDA warning letters do not represent final agency action subject to judicial review." *Id*. at 944-45; *see also Bd. of Managers, Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012 (D.N.D. 1993) (letter deeming activities to be noncompliant with Clean Water Act was not final agency action since enforcement was not initiated), *aff'd sub nom. Bottineau Cnty. Water Res. Dist. Bd. of Managers v. Niedfelt*, 48 F.3d 1223 (8th Cir. 1995); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (holding that an EPA advice letter that "had no binding effect whatsoever—not on the agency and not on the regulated community"—was not final agency action because it was "purely informational in nature.").

The same holds true with respect to the Department's April 24 and July 24 letters – such letters were informal statements setting forth the Department's views with respect to the Line 3 replacement and the Interconnections, respectively. Enbridge merely "engaged in forward planning" and decided to "obtain informal predictions" from the Department that such activities did not require further authorization. *Sabella v. U.S.*, 863 F. Supp. 1 (D.D.C. 1994). The Department's letters thus merely responded to Enbridge's views that the planned activities were consistent with the existing Permits and the scope of the Department's authority over the pipelines. They broke no new ground and served only as "a bare statement of [its] opinion" that the activities described in Enbridge's notifications were covered by the existing Permits. *Fairbanks N. Star*

Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 593-594 (9th Cir. 2008) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–40 (1980)). The letters do not command Enbridge "to do or forbear from anything" nor subject Enbridge to "immediate compliance" or enforcement for "defiance." *Id*. In fact, Enbridge and Plaintiffs are "in no different position legally after the issuance of the … letter[s] than before [their] issuance." *Save Our Springs Alliance v. Norton*, No. A-05-CA-683-SS, 2007 WL 958173 at *3 (W.D. Tex. Feb. 20, 2007). APA review is thus not available here.

The cases cited by Plaintiffs warrant no different conclusion. *See* Pl. Brief, at 10. In *Idaho Rivers United v. U.S. Forest Service*, 857 F. Supp. 2d 1020 (D. Idaho 2012), the plaintiff filed petitions with the agency, requesting that it take action to regulate mega-loads transported through forest lands. The agency responded to the petitions filed with it by determining that it had no jurisdiction to regulate such loads or act on the petitions. The court determined that the agency's response was reviewable final agency action because the APA *explicitly* defines such action to include action or denials on an "application or petition." *Id*. at 1025 (citing 5 U.S.C. § 551(11)-(13)). By contrast, Enbridge filed no "petition" with respect to the replacement of the Line 3 Border Segment or the Interconnections and thus there was no Department determination that could serve as "final agency action."

Likewise, in *Forest Service Employees for Environmental Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241 (2005), the court found that legal consequences flowed from the agency's decision to allow the use of chemical fire retardant on national forests. Here, by contrast, the Department's letters did not result in "a change of the status quo"

with respect to the ability of Enbridge to engage in the much needed replacement of Line 3 and to operate the Interconnections under its existing Permits. *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1136-37 (9th Cir. 1998).

Moreover, to the extent that Plaintiffs' claims allege inaction or failure to act, such claims are not reviewable under Section 706(1) of the APA because Plaintiffs cannot identify any discrete action that the Department is legally required to take under E.O. 13337 that might prompt NEPA review. *Norton*, 542 U.S. at 63-65 (in order for judicial review under the APA to proceed based on agency inaction, a plaintiff must identify a discrete, legally required action that the agency failed to take). The Supreme Court in *Norton* clarified that agency "inaction" or "failure to act" is "properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) [ ] defined in § 551(13)," which includes the issuance of "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton*, 542 U.S. at 62. This limitation thus "precludes judicial review of action that is not demanded by law." *Namarra v. Mayorkas*, 924 F. Supp. 2d 1058, 1062 (D. Minn. 2013).

Plaintiffs can point to no action that the Department was required to take here. E.O. 13337 states only that the Department is "empowered to receive all applications for Presidential Permits" and "shall issue or deny the permit" after conducting the inter-agency consultations set forth in Section 1(b). *See* E.O. 13337, at Section 1. Because the Department's actions relative to cross-border pipelines are conducted solely in furtherance of the President's constitutional authority over foreign affairs, no other law

exists that requires the Department to engage in any discrete agency action that triggers NEPA environmental review and/or Section 106 consultation requirements. *See Norton*, 542 U.S. at 66 (plaintiffs are precluded from using § 706(1) to order compliance with "broad statutory mandates" such as NEPA where no statute demands discrete action).

Because Plaintiffs have "identified no federal agency action at all" on the part of the Department for this Court to review under the APA, Enbridge is entitled to summary judgment with respect to Plaintiffs' First and Second Claims. *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 196 (D.C. Cir. 2003).

III. Plaintiffs Have Failed To Demonstrate That The Department Violated NEPA

Plaintiffs argue that the Department has engaged in "major federal action" that is subject to NEPA by interpreting Enbridge's existing Permits to authorize the Line 3 replacement and the Interconnections. *See, e.g.*, Pl. Brief, at 15-25. In making this argument, Plaintiffs allege only that the Department has acted arbitrarily and capriciously by failing to conduct a NEPA review for these activities, and not that it has acted arbitrarily and/or capriciously in interpreting Enbridge's existing Permits to allow such activities to occur.

Here, the Department – the agency with expertise in interpreting the scope of its permits and authority – is entitled to great deference with respect to its views that Enbridge may proceed with the Line 3 replacement and Interconnections under the terms of the existing Permits. *See, e.g., Rain & Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp.*, 426 F.3d 976, 979 (8th Cir. 2005) (deferring to agency's interpretation of bulletin it

issued). Specifically, the Department reasonably observed in its April 24 letter that the Line 3 Permit authorized Enbridge to "maintain" the Line 3 Border Segment by replacing that Segment with the same diameter (i.e., 34-inch) pipe. AR Doc. 19. This concurrence was consistent with the Department's 2011 position that Enbridge did not require a new Presidential Permit to replace its Line 6B pipeline at the Michigan-Ontario border for similar maintenance reasons. Likewise, the Department reasonably concurred with Enbridge in its July 24 letter that the existing Lines 3 and 67 Permits allow for the Interconnections to proceed because: (1) the Line 67 Border Segment will not transport oil above the 500,000 bpd capacity level limitation until a new Presidential Permit is issued by the Department; (2) the Line 3 Border Segment is not subject to a capacity limitation under the Line 3 Permit; and (3) the construction and operation of the Interconnections and Pump Upgrades outside the border areas fall outside the Department's authority under E.O. 13337. AR Doc. 33.

The NEPA argument now pressed by Plaintiffs is that the Department's informal concurrence with Enbridge reflected in the April and July letters should have triggered an environmental review. This is simply not correct where, as here, the Department has engaged in no "major federal action," which is a predicate for NEPA to apply.

i. The Line 3 Replacement Does Not Constitute A "Major Federal Action" That Triggers NEPA

Plaintiffs argue that the Department was required to conduct a NEPA review for the Line 3 replacement because it constitutes a "new pipeline" that will result in environmental impacts in the form of increased oil being transported into the United

States from Canada. *See* Pl. Brief, at 23-25. The fatal flaw with Plaintiffs' claim is that 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.[10]

"Under NEPA, an agency is required to provide an EIS only if it will be undertaking a 'major federal actio[n],' which 'significantly affect[s] the quality of the human environment.'" *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (citing 42 U.S.C. § 4332(2)(C)). The sole trigger for NEPA review is whether a "major federal action" has occurred, and not whether private activities by Enbridge may result in some environmental impacts. *See Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1133 (5th Cir. 1992) (the requirements of NEPA "apply only when the federal government's involvement in a project is sufficient to constitute 'major Federal action.'"). Thus, when an agency is not required to issue any authorization to allow a private project to proceed – as is the case here – NEPA does not apply. *Minn. Pesticide Info. & Educ. Inc. v. Espy*, 29 F.3d 442, 443 (8th Cir. 1994) (finding the U.S. Forest Service was not required to perform any NEPA review when it chose "not to do something," i.e., use herbicides, because no federal action occurred).

For example, in *Ringsred v. State of Minnesota*, 828 F.2d 1305, 1308 (8th Cir. 1987), the court found that a federal agency was not required to comply with NEPA with

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[10] Plaintiffs' NEPA claims also fail because the Department, when acting on behalf of the President, is not subject to NEPA. *See NRDC*, 658 F. Supp. 2d at 109. The NRDC court observed that "[n]ot even the EIS requirement of NEPA applies to the President." *Id*. at 112. So too is NEPA not applicable to the Department when it acts for the President, and not as a federal agency, pursuant to E.O. 13337.

respect to a parking ramp project because no approval was required to be issued by that agency to allow the project to proceed, despite the fact that environmental impacts may result. *See also, State of N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 416-418 (3d Cir. 1994) (NEPA was not triggered "[w]here a non-federal party voluntarily inform[ed] a federal agency of its intended activities to ensure that they [would] comply with law and regulation" and the agency's approval was not required for the private activities; "where federal approvals are not legal predicates to private actions, the approvals are not major federal actions entailing NEPA obligations") (citation omitted).

Here, Enbridge replaced the existing Line 3 Border Segment with new 34-inch pipe to resolve ongoing integrity-related issues associated with the existing pipeline, thereby returning that Segment to its original operating condition. AR Docs. 7, 12. The Department agreed that the replacement was previously authorized pursuant to the terms of the existing Line 3 Permit, which requires that Enbridge maintain the Border Segment in "good working condition." AR Doc. 19. Because the Department's April 24 letter did not provide Enbridge with any new rights that it did not already possess under the existing Line 3 Permit, and did not in any way alter the status quo, the Department did not engage in a "major federal action" that triggers NEPA compliance. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, at 33-34 (D.D.C. 2013) (federal action must be a "legal condition precedent" to private activities for NEPA to apply).

Plaintiffs nonetheless argue that the Department effectively authorized a new pipeline because the Line 3 replacement may follow a new routing in Minnesota and will

be replaced with larger diameter pipe than the Permit provides for outside the Border Segment. *See* Pl. Brief, at 25. However, Enbridge's decisions on how best to replace its existing pipeline outside the Border Segment are beyond the scope of the Presidential Permit and thus cannot amount to "major federal action" by the Department. Enbridge's decision to replace the rest of the pipeline outside the Border Segment with more standard and more readily available 36-inch pipe is also a private activity that does not require Department authorization. Moreover, the routing of the pipeline through Minnesota, where most of the U.S.-portion of Line 3 is located, is a matter for determination by the MPUC, and not within the control of the Department, which has no permitting control over Enbridge's routing within that state.[11] *See Weiss v. Kempthorne*, 580 F. Supp. 2d 184, 189 (D.D.C. 2008) (NEPA does not require that the environmental review obligations of agencies "go beyond the scope of [their] permitting authority to review the area over which [they have] no jurisdiction.").

Nor does the fact that the replaced Line 3 will be capable of transporting larger volumes of oil than it could have immediately prior to its replacement transform the Department's April 24 letter into a NEPA-triggering major federal action. Enbridge is

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[11] On April 24, 2015, Enbridge filed a Certificate of Need application (14-916), and a Route Permit application (15-137) with the MPUC. These applications are available at: https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={B3F4436C-C994-47DD-BCF0-49CF6F44E17E}&documentTitle=20154-109653-03; https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={F9DF4DEF-7886-46B4-92E1-A1ED815C3552}&documentTitle=20154-109661-07.

merely restoring Line 3 to capacity levels that it was able to achieve at the time the Line 3 Permit was issued. This fact hardly transforms the replacement work into the authorization of a new pipeline, particularly in light of the fact that the existing Permit does not contain any capacity limitation that restricts the volume of crude that Enbridge may transport across the border. AR Doc. 2.[12]

Plaintiffs also cite several cases upon which they argue that the Department has engaged in "major federal action" because it has allegedly "augmented" Enbridge's previously-authorized activities. Pl. Brief, at 23-24. Those cases, however, are inapplicable to the facts here – in each, the agency engaged in some action or was required by law to engage in some action to authorize the activities at issue. For example, in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), a county sought to engage in a major road improvement project. The Bureau of Land Management ("BLM") "undertook several actions to ensure that the County's construction proposed did not exceed the scope of" the county's right-of-way. The court found that the "[t]hese activities were only consistent with BLM's duty to insure that the County does not act outside its authority or beyond the boundaries of its right-of-way" and did not "constitute major federal action." *Id*. at 1090. The court, however, found that BLM's mandatory

[12] Plaintiffs also repeatedly assert that the Department has allowed Enbridge to utilize its existing pipelines at "extremely high pressures" without considering the impacts. *See, e.g.*, Pl. Brief, at 22. The pressures at which Enbridge operates its pipelines are dictated by PHMSA regulations at 49 C.F.R. Part 195, and not the Department, which has no expertise in this area. Consistent with PHMSA regulations, Enbridge has established the Maximum Operation Pressure ("MOP") for each of its pipelines, including Lines 3 and 67.

duty to prevent unnecessary degradation to wilderness study areas that may be impacted by the project did constitute major federal action triggering NEPA. *Id*.

In the other two cases cited by Plaintiffs, the federal agency issued an authorization that was a prerequisite to allow the challenged activities to proceed, thereby triggering NEPA review. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (agency granted lease extensions that "[w]ithout the affirmative re-extension of the … leases, [the leaseholder] would have retained no rights at all to the leased property and would not have been able to go forward with the [development of the land]."); *Friends of Columbia Gorge v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088 (D. Or. 2007) (agency issued a quitclaim deed that was necessary to allow logging activities).

Neither do other cases cited by Plaintiffs, *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) and *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012), suggest that the Department engaged in any action that triggers NEPA review. Pl. Brief, at 24. In *Ramsey*, the court found that the agency's issuance of an incidental take statement that allowed for a certain type of fish to be caught constituted a major federal action because, prior to its issuance, the catching of that particular fish was prohibited. *Kantor*, 96 F.3d at 444. Likewise, in *Karuk*, the court found that the Forest Service had engaged in major federal action by approving notices of intent to conduct mining activities since that approval was a condition precedent to allow such mining activities to proceed. *Karuk*, 681 F.3d at 1021.

Because the Department has engaged in no major federal action with respect to the replacement of Line 3, the environmental review requirements under NEPA are

inapplicable and Enbridge is thus entitled to summary judgment with respect to the Plaintiffs' First Claim.

ii. Plaintiffs Have Failed to Demonstrate That The Department Violated NEPA With Respect To The Interconnections

Plaintiffs argue that the Department violated Section 1506.1 of the Council on Environmental Quality's ("CEQ") regulations by "approving" the Interconnections prior to the issuance of the SEIS and a new Presidential Permit for the Line 67 Border Segment. Pl. Brief, at 16-23.

For the same reasons that the Department did not approve the Line 3 replacement, it also did not "approve" the Interconnections so as to trigger any NEPA obligations. *See Ringsred*, 828 F.2d at 1308 (NEPA is not applicable to projects that do not require federal agency approval). As noted, the Interconnections are outside the bounds of the existing Permits for both Lines 3 and 67, and their operation is consistent with the existing Line 3 and 67 Permits. Because the Department has not issued any authorization with respect to the Interconnections (and was not required to do so), it has not engaged in any "major federal action" that otherwise triggers NEPA review. *See Ringsred*, 828 F.2d at 1308.

Moreover, the CEQ regulation on which Plaintiffs rely is inapplicable to the Interconnections. Section 1506.1 provides:

> (a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), *no action concerning the proposal* shall be taken which would:
>
> (1) Have an adverse environmental impact; or
>
> (2) Limit the choice of reasonable alternatives.
>
> (b) 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 criteria in paragraph (a) of this section, 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.

(emphasis added). This regulation 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.

Here, the Interconnections were constructed outside of the Border Segments on Lines 3 and 67, and their operation increases the throughput on the Non-Border Segments of Line 67, all of which are activities that are outside the Department's jurisdiction under E.O. 13337. The Department therefore lacks authority to require Enbridge to cease construction or operation of the Interconnections. *See Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270, 284 (6th Cir. 2001) ("Because no federal agency has jurisdiction over the non-federal project, we must conclude that … the federal defendants lack sufficient control or responsibility over the state highway to influence the project's outcome.").[13]

Moreover, Section 1506.1 is also inapplicable because: (i) the Interconnections do not "concern" the Line 67 Border Segment expansion; and (ii) the Interconnections will not limit alternatives for the Line 67 Border Segment SEIS.

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[13] Plaintiffs argue the Department's action was arbitrary and capricious because the Department did not "take a hard look" at the impacts of the Interconnections before issuing its letter. Pl. Brief, at 18-19. However, as discussed above, the Department had no obligation to review the impacts of the Project under NEPA once it determined no action on its part was required.

a. The Interconnections Do Not "Concern" The Line 67 Border Segment Expansion

Plaintiffs argue that the Interconnections "concern" the Line 67 Border Segment expansion and that the Department thus erred in acting on the Interconnections before concluding the SEIS process for the Line 67 Border Segment because the projects have the same "purpose, execution and effect." Pl. Brief, at 17. However, the fact that both projects involve the same purpose – to transport Canadian crude to Superior, WI – does not mean that the Interconnections cannot proceed until the SEIS is issued. The Interconnections are merely an alternative means of transporting oil into the United States that requires no further authorization from the Department; it is not a part of or "concerning" the potential capacity expansion of the Line 67 Border Segment, which is the only proposal under review in the SEIS. For example, if Enbridge were to use rail or trucks to transport crude to the same destination served by Line 67, such an action would have the same purpose and effect as the Interconnections, yet such action unquestionably would not trigger Section 1506.1.

Plaintiffs also allege that the Interconnections and the Department's issuance of a new Permit for the Line 67 Border Segment will "have the same environmental effects" because both projects involve transporting Canadian oil to Enbridge's Superior terminal. Pl. Brief, at 21. However, even if this were true (and it bears note that oil flowing through the Interconnections does not flow across the Line 67 Border Segment and thus follows a different routing than would be the case were a new or amended Line 67 Permit issued) the relevance of this point is unclear – even if two projects have similar impacts,

that in and of itself does not trigger any requirements under NEPA, including under Section 1506.1.

Plaintiffs also accuse Enbridge of skirting NEPA by transporting Canadian oil into the United States through a different means than that under review in the SEIS. Pl. Brief, at 22-23. However, 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. These options would not trigger NEPA. To reiterate, the Department is not a regulator of oil imports and its authority over cross-border pipelines is limited only to the international Border Segments. Here, no new border-crossing was required for the Interconnections since no new connection between the U.S. and Canada was created. Moreover, Enbridge did not avoid NEPA for the Line 67 Border Segment expansion – the Department's SEIS process is underway, and the Interconnections will be considered as part of the baseline analysis in that SEIS. *See* 78 Fed. Reg. 16565. Plaintiffs, many of which have already filed extensive documents addressing the scope of the SEIS, including the impact of the interconnections, will be able to raise any further concerns regarding the Line 67 Project in the public comment period on the Draft SEIS.

b. The Interconnections Do Not Limit Alternatives For The Line 67 Border Segment Expansion SEIS

Section 1506.1 was also not triggered because the Interconnections do not limit the alternatives that may be assessed in the Department's SEIS. Plaintiffs assert that the "no action alternative" for the SEIS is no longer an option because oil is already being imported by Enbridge via the Interconnections. Pl. Brief, at 19-23. However, the "action" being considered by the Department in the Line 67 SEIS is confined to an increased flow of oil across the U.S.-Canada border through the Line 67 Border Segment. Enbridge has taken no steps to change the status quo on the Line 67 Border Segment and thus the "no action" alternative (i.e., retention of the 500,000 bpd limit on the use of the Line 67 Border Segment) can still be fully assessed in the SEIS.

Plaintiffs further argue that the Department will "inevitably be influenced" to approve the Line 67 Border Segment expansion if Enbridge is already transporting crude through the Interconnections. Pl. Brief, at 21 (citing *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042–43 (4th Cir. 1986)). In *Gilchrist*, the Fourth Circuit found that the agency would be influenced to approve a highway segment through a park if major segments of the highway were built on either side of the park. The court found that the completed segments would "stand like gun barrels pointing into the heartland of the park …." *Id*. at 1042. The theory articulated in *Gilchrist* applies when a portion of a new project is dependent on the approval of a federal agency and the applicant attempts to influence the result by constructing other parts of the project that will be proverbial "roads to nowhere" should the federal government deny its approval. Thus, *Gilchrist*

might be apt if the Department were reviewing an application for a new border crossing and Enbridge attempted to construct the pipeline right up to the border crossing.

However, no construction is at issue here – the only question before the Department is whether to authorize increased throughput for the existing Line 67 Border Segment. The Interconnections are not investments that are dependent on or could put pressure on the Department's approval of a new Permit for the Line 67 Border Segment. They instead constitute private activity that: (i) requires no approval from the Department; (ii) has been undertaken regardless of whether the Department will issue a new Line 67 Permit; and (iii) merely provides an alternative means to import increased volumes of oil across the separate Line 3 Border Segment consistent with the Line 3 Permit. The Interconnections therefore do not "stand like a gun barrel" aimed at the issuance of a new Permit for the Line 67 Border Segment.

Plaintiffs have also failed to demonstrate that the Interconnections will have any "prejudicial effect" on the Department's decision to issue a new Permit for the Line 67 Border Segment. As the court found in *State of North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991), "construction that lies beyond the boundaries of [the agency's] jurisdiction can be enjoined only when it has a direct and substantial probability of influencing [the agency's] decision." In this case, the SEIS for the Line 67 Border Segment is not a *fait accompli* – the Department retains its full discretion regarding whether to authorize the Line 67 Border Segment to be operated at an increased

capacity.[14] Therefore, the Department properly determined that it had no basis for requiring Enbridge to cease construction of the Interconnections until the Line 67 SEIS is complete. *See id.*, at 604-05 ("Because FERC's responsibility is limited to overseeing only [a] portion of [the project], it follows that FERC's NEPA review in this case should have a preclusive effect only on that portion, even if FERC opts to analyze under NEPA the environmental impact of portions … beyond its control.").

The Department has therefore not violated NEPA with respect to the Interconnections, and Enbridge is entitled summary judgment with respect to Plaintiffs' Second Claim.

IV. Plaintiffs Have Failed To Demonstrate That The Department Violated The NHPA

Plaintiffs argue that the Line 3 replacement and Interconnections constitute "undertakings" under Section 106, or at a minimum, the Department had an "opportunity" to exercise authority over these activities to modify their impacts on affected historic properties. Pl. Brief, at 29-30.

However, Section 106 is not applicable to the Line 3 replacement or the Interconnections because the Department has not engaged in any "undertaking" to approve or allow these activities to proceed. Section 106 applies only when a federal

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[14] Plaintiffs state "it is especially important" to consider prejudicial effect when the action is "identical in purpose, execution and effect." Pl. Brief, at 20. However, Plaintiffs cite no authority for this proposition, and, as described above, the Interconnections will not prejudice the Line 67 SEIS since a no-action alternative, as well as other alternatives will continue to be assessed by the Department in that NEPA document.

agency engages in an "undertaking," which is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16.

Similar to NEPA, Section 106 does not apply where an agency has not acted in any manner to authorize the private activities at issue. *See Ringsred*, 828 F.2d at 1309; *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 515 (4th Cir. 1992). For example, in *Ringsred*, the Eighth Circuit found that the construction of a parking ramp was not a federal undertaking because no approval was required to enable the project to proceed. *Id*. at 1309. Likewise, in *Sugarloaf*, the court found that the agency's certification of a proposed facility under a federal statute was not an "undertaking" because the facility could legally proceed without the certification. 959 F.2d at 515.

As discussed above, the Department has not engaged in any activity to authorize or approve the Line 3 replacement and/or the Interconnections. The Department merely informed Enbridge that it concurred that no action on the part of the Department was required. *See Grand Canyon Trust v. Williams*, No. CV-13-08045, 2015 WL 1538084 at *17 (D. Ariz. 2015) (an agency's determination that a company had valid rights to certain mineral deposits was not an "undertaking" because the determination was not legally required for the company to resume mining operations). Further, because the Department lacks authority over these activities (since they occur outside the Department's authority under E.O. 13337), the Department cannot modify their impacts on historic properties, as

Plaintiffs allege. *See Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll.*, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993) (NHPA was not triggered where the agency's ability to terminate a rail project ended after it conveyed land to a private party).

Therefore, because Enbridge is allowed to engage in its safety-enhancing pipeline replacement and other activities "without federal approval or assistance" from the Department, the Department had no obligation under Section 106 to consult and/or to modify Enbridge's activities. *Sugarloaf*, 959 F.2d at 515.

CONCLUSION

For the foregoing reasons, Enbridge respectfully requests that this Court grant Enbridge's motion for summary judgment with respect to Plaintiffs' First and Second Claims, and deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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