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

WHITE EARTH NATION, ET AL.,

Plaintiffs,

v.

JOHN KERRY AND UNITED STATES DEPARTMENT OF STATE,

Defendants,

and

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Intervenor-Defendant.

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO OF PLAINTIFFS' FIRST AMENDED COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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INTRODUCTION

Plaintiffs' arguments, and indeed their entire case, are built on the faulty premise that the U.S. Department of State ("State Department") has issued new approvals for the construction of oil pipelines, and that it has permitted an increase in the flow of oil across the border. Because this premise is false, their claims are without merit. The State Department has not approved any action by Enbridge and therefore there is no agency action that is reviewable under the Administrative Procedure Act ("APA") and no action that triggered the requirements of the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA").

Plaintiffs' claims also fail for a more fundamental reason. The State Department only engages in permitting of border crossings for oil pipelines at the direction of the President, exercising his constitutional authority over foreign affairs and national security. Through Executive Order 13337, the President authorized the State Department to receive applications for Presidential permits for oil pipeline facilities "at the borders of the United States." *See* Exec. Order 13337 § 1(a), 69 Fed. Reg. 25,299 (Apr. 30, 2004) *Id.* § 1(a). The State Department's implementation of the executive order and its interpretation of existing Presidential permits for border facilities owned by Enbridge was conducted solely based on the President's delegated authority. Thus, any actions by the State Department relating to Presidential permits for oil pipelines are Presidential actions, which cannot be reviewed under the APA. Accordingly, summary judgment should be granted to Defendants.

BACKGROUND

I. FACTUAL AND LEGAL BACKGROUND

A. The State Department's Issuance of Presidential Permits

The authority to issue a permit for a border-crossing facility derives solely from the President's constitutional authority over foreign affairs and national security. For over a century, Presidents have exercised that inherent authority to authorize border crossing facilities in the absence of applicable action by Congress. *See* Hackworth, *Digest of International Law*, Vol. IV, § 350, pp. 247-56 (1942), Def. Ex. 1;[1] *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010); *see also*, *e.g.*, 38 U.S. Op. Atty. Gen. 163 (1935) (gas pipeline); 30 U.S. Op. Atty. Gen. 217 (1913) (electrical power); 24 U.S. Op. Atty. Gen. 100 (1902) (wireless telegraphy); 22 U.S. Op. Atty. Gen. 514 (1899) (submarine cables); 22 U.S. Op. Atty. Gen. 408 (1899) (same); 22 U.S. Op. Atty. Gen. 13 (1898) (same).[2] Presidents continued to personally sign and issue permits for border crossing facilities through the 1960s, including the permit for Enbridge's Line 3 (one of the pipelines at issue in this case), which was signed by President Johnson. *See* Whiteman, *Digest of International Law*, Vol. 9, pp. 17-21 (1968), Def. Ex. 2; AR 5.[3]

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

[2] Congress has passed legislation regarding certain types of border crossing facilities, but not for oil pipelines. *See* Submarine Cable Landing Licensing Act of 1921, 47 U.S.C. § 35; International Bridge Act of 1972, 33 U.S.C. § 535b.

[3] "AR" refers to the pages in the sequentially numbered administrative record. *See* ECF Nos. 51 and 66.

In 1968, President Johnson delegated to the Secretary of State the President's inherent constitutional authority to grant or deny permits for certain types of border crossing facilities, including oil pipelines. *See* Exec. Order 11423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 16, 1968). In 2004, President Bush issued Executive Order 13337, which revised the process for the issuance of permits for cross-border pipelines that transport oil or other fuels. Executive Order 13337 is the only source of authority for the State Department's role in the permitting of international oil pipelines and authorizes the Secretary of State to receive applications "for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum . . . ." Exec. Order 13337 § 1(a). Under the executive order, the State Department's permitting authority extends only to the pipeline and associated facilities "at the borders," *id.*, which the State Department has interpreted to mean the segment of the pipe between the international border and the first mainline shutoff valve in the United States (the "border segment"). *See*, *e.g.*, AR 102 ("The Scope of the Permit Issued to Enbridge shall extend only up to and including the first mainline shut-off valve or pumping station in the United States.").[4]

The executive order provides that the Secretary of State, after considering the views of certain other agency heads, shall determine whether allowing the border crossing for purposes of transporting petroleum products would "serve the national

[4] The State Department's interpretation of an executive order that it is charged with administering is entitled to "great deference." *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1042 (9th Cir. 2013) (citations omitted).

interest" and what conditions, if any, should apply. Exec. Order 13337 § 1(g)-(h). The determination becomes final after other agency heads have had an opportunity to object and, if necessary, refer the matter to the President for final resolution. *See id.* § 1(i). Executive Order 13337 states that it does not create any rights that are "enforceable at law or in equity by any party against the United States." *Id.* § 6.

B. The Presidential Permits for Enbridge's Line 3 and Line 67 Pipelines

Enbridge owns two pipelines that are at issue in this case: Line 3 and Line 67 (also known as the Alberta Clipper Pipeline). In 1968, President Lyndon Johnson issued the Presidential Permit for Line 3, which authorized the construction, operation, and maintenance of facilities "at the international boundary line between the United States and Canada in Pembina County, North Dakota, and to connect such facilities with like facilities in the Province of Manitoba." AR 1 (1968 Presidential Permit); *see also* AR 11-15 (1967 Permit Application). The permit required that the pipeline facilities be maintained in "a condition of good repair." AR 4. The State Department issued a new Presidential permit in 1991 to new owners with substantially the same conditions as the original permit. *See* AR 6-10 (1991 Presidential Permit); AR 16-18 (1991 Permit Application).

1. The Line 3 Replacement

In early 2014, Enbridge informed the State Department that the border segment of Line 3 was in need of maintenance and that Enbridge was planning to replace it. AR 22; *see also* AR 9 (1991 Presidential Permit art. 9). In a February 5, 2014 letter to the State Department, Enbridge stated that the replacement pipe in the border segment would be of

the same diameter as the original pipe (the diameter specified in the permit) and be placed within the same right of way. AR 23; *see also* AR 35 (Map of Line 3 Proposed Route).[5] Enbridge did not request that the 1991 Presidential Permit be amended in any way or otherwise seek approval from the State Department.

In a subsequent letter dated March 17, 2014, Enbridge explained that it also planned to replace the remainder of the pipeline outside of the border segment and that the non-border segments would be constructed with 36-inch diameter pipe – a standard pipeline size. AR 31-32. In addition, Enbridge indicated that it was considering a route deviation for the replaced Line 3 beginning 120 miles from the border, which is well outside of the border segment. AR 33. While there is no volume limitation in the Line 3 Presidential Permit, Enbridge provided information regarding the prior use of the pipeline and the volumes of oil that had been transported through the pipeline, which varied from an annual average of 390,000 barrels per day ("bpd") to 760,000 bpd of medium or heavy crude and up to 960,000 bpd of light crude.[6] AR 32-33 & n.2. Enbridge also indicated that it would be seeking permission from other agencies with authority over Line 3 outside of the border segment, including the Minnesota Public Utilities Commission ("MPUC"). AR 34. It also noted that the permitting process for the portion of Line 3 outside of the border segment had not yet begun. *Id.*

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[5] Plaintiffs refer to the replacement of Line 3 as the "New Pipeline" and the replacement of the border segment as the "New Border Segment." Pl. Mem. at 5.

[6] As the Plaintiffs did in their brief, unless otherwise noted, Defendants will refer to oil volumes based on an annual average capacity, as opposed to a design capacity. *See* Pl. Mem. at 4 n.1; *see also* AR 105.

On April 24, 2014, the State Department sent a letter to Enbridge addressing two questions Enbridge had raised. AR 43. First, Enbridge sought confirmation that "the replacement of the segment of the Line 3 pipeline from the border to the mainline valve at approximately mile 16" would be consistent with the terms of the 1991 Presidential Permit. *Id.* Second, Enbridge sought to confirm that "the 34-inch pipe diameter descriptor in the Permit applies only to that same 16-mile segment" of the pipeline. *Id.* After considering Enbridge's request and all of the information Enbridge had provided, the State Department confirmed that Enbridge's interpretation on both counts was correct. AR 43-44. Specifically, the State Department stated that "the replacement of the border segment of Line 3 is authorized by the existing 1991 Presidential Permit" and the description of the covered facilities in the permit applied only to "the segment of the pipe extending from the border to the valve at mile 16." AR 44.[7]

2. The Application to Expand Line 67

The second pipeline at issue, Line 67 (Alberta Clipper), runs parallel to Line 3, and the border segment of Line 67 is subject to a separate Presidential permit issued in 2009. AR 72 (2009 Presidential Permit).[8] The permit authorizes operations as described in Enbridge's original application for the Alberta Clipper Line and analyzed in the final

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[7] Plaintiffs are incorrect that the old Line 3 could simply be placed back into service at a later date. *See* Pl. Mem. at 6. Aside from any authorizations that state agencies would require, if Enbridge wished to operate an additional border crossing, it would need a new Presidential permit.

[8] Environmental groups challenged the State Department's approval of the Presidential Permit but were unsuccessful. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1123 (D. Minn. 2010).

environmental impact statement ("FEIS") for the line. AR 73. The analysis in the FEIS was based on an annual average volume of 450,000 bpd, AR 280, which reflects a design capacity of 500,000 bpd. Therefore, 500,000 bpd is the current limit for the border segment on Line 67. *See* AR 129.[9] In November 2012, Enbridge submitted an application for a new Presidential permit requesting that it be permitted to increase the volume of the oil transported across the border on Line 67 up to an annual average of 800,000 bpd (880,000 bpd design capacity) – known as the "Expansion Project." AR 105 n.2. In March 2013, the State Department initiated a process for preparing a supplemental environmental impact statement ("SEIS") in order to evaluate Enbridge's request. *See* 78 Fed. Reg. 16,565 (Mar. 15, 2013); *see also* 78 Fed. Reg. 26,101 (May 3, 2013) (extending initial scoping period for the environmental review). The State Department has not made a decision regarding the Expansion Project, and the environmental review process for the proposal is ongoing.

3. Enbridge's Construction of Interconnections Between Lines 3 and 67

At a meeting in early June and in a subsequent letter on June 6, 2014, Enbridge informed the State Department that it planned to construct interconnections between Lines 3 and 67. AR 128-29; *see also* AR 126 (diagram of interconnections). One set of interconnections would be placed on the Canadian side of the border and the second set would be placed outside of the pipelines' border segments in the United States. *See id.*

[9] The use of a drag reducing agent allows Enbridge to approach the design capacity on a consistent basis and therefore it refers to the 500,000 bpd limit as an annual average. *See* AR 129.

Enbridge has stated that the interconnections would give it greater flexibility in using its pipelines. AR 129. For example, Enbridge could transfer oil north of the border from Line 67 to Line 3, transport the oil through the border segment on Line 3, and then transfer the oil back to Line 67 at a point in the United States after passing through the border segment. AR 128-29. This would enable Enbridge to increase the volume on Line 67 to 570,000 and later to 800,000 bpd south of the border segment (as permitted by the MPUC and consistent with other applicable regulations) while abiding by the requirement of the Presidential Permit to keep the volume through the border segment on Line 67 below 500,000 bpd. AR 129.

But the interconnections do not allow Enbridge to make an overall increase in the amount of oil flowing from Canada into the United States. Enbridge is still limited by its existing Presidential Permit to 500,000 bpd at the border on Line 67 and, due to existing regulatory constraints imposed by other federal and state agencies, approximately 800,000 bpd on Line 3. *See* AR 129. The overall amount of oil transported across the border on Lines 3 and 67 can only increase if Enbridge's current application to the State Department is granted. *See* AR 131; 78 Fed. Reg. at 16,566. As with the planned maintenance on Line 3, Enbridge did not seek permission from the State Department to construct the interconnections.

Enbridge provided additional information regarding the planned interconnections between the pipelines in a June 16, 2014 letter. AR 133. Enbridge explained that it had obtained all necessary approvals, including authorization from the MPUC, to transport up to 570,000 bpd on Line 67 south of the border segment and that it planned to increase the

flow to up to 800,000 bpd by mid-2015. AR 135-36. On July 24, 2014, the State Department sent a letter to Enbridge stating that "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 193. The State Department indicated, however, that it would take the information submitted regarding the interconnections into account in its environmental analysis of the Expansion Project, which is still pending. AR 193-94; *see also* 79 Fed. Reg. 48,817 (Aug. 18, 2014).[10]

II. STATUTORY BACKGROUND

A. Administrative Procedure Act

Plaintiffs' NEPA and NHPA claims are brought pursuant to the judicial review provisions of the APA, 5 U.S.C. §§ 701-06; *see Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376-77 (1989); *Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir. 1991). The APA provides a private right of action and a waiver of sovereign immunity for claims challenging "agency action." 5 U.S.C. § 702. In order to bring a valid claim under the APA, a plaintiff must challenge a "final agency action" that adversely affected it. 5 U.S.C. § 704; *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006). The APA does not apply to Presidential actions. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

[10] Plaintiffs refer to the interconnections as the "Bypass Project." Pl. Mem. at 6.

B. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision-makers of the potential environmental impacts of proposed major federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires agencies to follow certain procedures, but it does not require substantive results. *Id.* at 350. Under NEPA, an agency must prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 837 (8th Cir. 1995) (quoting 42 U.S.C. § 4332(2)(C)). Whether an action of the federal government constitutes a "major federal action" depends upon the degree of legal and factual control exercised by the federal government over the entire project. *See Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1294 (8th Cir. 1990). NEPA does not apply to Presidential action. 40 C.F.R. § 1508.12.

C. National Historic Preservation Act

Section 106 of the NHPA requires federal agencies to consider the potential impacts on historic properties prior to the "approval of any Federal undertaking." 54 U.S.C. § 306108.[11] Like NEPA, the NHPA creates obligations that are procedural in nature; it does not prohibit harm to historic properties. *See City of Oxford, Ga. v. FAA*, 428 F.3d 1346, 1359 (11th Cir. 2005); *see also Mid-States Coal. for Progress v. Surface*

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[11] The NHPA has recently been re-codified; the prior citation for Section 106 was 16 U.S.C. § 470f. The substance has not changed.

Transp. Bd., 345 F.3d 520, 552-53 (8th Cir. 2003). The requirement to comply with the Section 106 process is only triggered if an agency approves a "federal undertaking," and the analysis for determining whether an agency has done so is essentially the same as the analysis for determining whether there has been a major federal action under NEPA. *Ringsred v. City of Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987). Presidential action is not a federal undertaking for purposes of the NHPA. 36 C.F.R. § 800.16(y).

STANDARD OF REVIEW

Summary judgment is appropriate where the evidence presented by the moving party indicates that there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c); *Luigino's Inc. v. Peterson*, 317 F.3d 909, 911 (8th Cir. 2003); *Duffy v. McPhillips*, 276 F.3d 988, 991 (8th Cir. 2002). In cases brought pursuant to the APA, the court is not called upon to make factual findings. Rather, the court should determine, based upon the agency's administrative record, whether the action was arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law. *See United States v. Massey*, 380 F.3d 437, 440 (8th Cir. 2004); *see also* 5 U.S.C. § 706(2)(A). "This standard of review is a narrow one and the court is not permitted to substitute its judgment for that of the agency." *Massey*, 380 F.3d at 440 (citing *Sierra Club v. Davies*, 955 F.2d 1188, 1192-93 (8th Cir. 1992)). The party challenging the agency's decision bears the burden of proving that the agency's action was arbitrary or capricious. *Id.*; *Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 794 F.2d 1339, 1342-43 (8th Cir. 1986). The court's review is limited to the administrative record before the agency decision-maker. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Massey*, 380 F.3d at 440.

ARGUMENT

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

This case focuses entirely on the State Department's interpretation of existing Presidential permits and the scope of the authority delegated to it by the President in Executive Order 13337, as reflected in two letters written to Enbridge. The letters did not "authorize" anything and therefore are not agency actions or final agency actions that can be reviewed under the APA. This reason alone is enough to grant summary judgment to the Defendants based on the particular circumstances of this case. But Plaintiffs' claims also suffer from fundamental legal shortcomings because they challenge the exercise of the President's constitutional authority, which is not reviewable under the APA. Similarly, Plaintiffs' alleged injuries are not redressable because any relief awarded by this Court would impermissibly infringe on the constitutional authority of the President. Accordingly, the Court lacks jurisdiction, and summary judgment should be granted to Defendants.

A. Plaintiffs' Claims Fail for Lack of an Agency Action or a Final Agency Action

NEPA and the NHPA do not supply a private right of action or waiver of sovereign immunity. *See*, *e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *Cent. S. Dakota Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 894 (8th Cir. 2001). Rather, Plaintiffs must rely on the APA to supply these necessary prerequisites to suit. *See Sierra Club*, 446 F.3d at 813 ("[J]urisdiction is limited to judicial review under the APA."); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999); *see also* Am. Compl. ¶¶ 10,

53-55, 117-18, 121, 129-30, 132. In order to bring a valid claim under the APA, a plaintiff must challenge a "final agency action" which adversely affected it. 5 U.S.C. § 704; *Sierra Club*, 446 F.3d at 813. Plaintiffs' NEPA and NHPA claims fail because they do not challenge an agency action or a final agency action, as required by the APA.[12] The State Department did not issue any permit or approval constituting agency action, let alone final agency action. Accordingly, the Court lacks jurisdiction over these claims.

The APA includes a waiver of sovereign immunity and authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702.[13] "Agency action" is defined in the APA to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Further, the agency action complained of must be a "final agency action." 5 U.S.C. § 704; *Sierra Club*, 446 F.3d at 813. Final agency actions are those that "mark the

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[12] In addition to their arguments that the State Department's letters were final agency action reviewable under 5 U.S.C. § 706(2), *see* Pl. Mem. at 9-10, Plaintiffs also argue that the State Department violated NEPA by failing to take appropriate action under 40 C.F.R. § 1506.1, thus violating 5 U.S.C. § 706(1). *See* Pl. Mem. at 21. That argument fails because the State Department had no duty under NEPA to prevent Enbridge from taking actions that are outside of the agency's jurisdiction, as discussed in Section II, *infra*.

[13] Based in part on the fact that section 702 of the APA provides a waiver of sovereign immunity, the requirements of the APA have historically been viewed has jurisdictional. *See*, *e.g.*, *Sabhari*, 197 F.3d at 943. The Eighth Circuit has recently held, however, that certain APA requirements are not jurisdictional and are instead aspects of a party's claim. *See Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010); *see also Iowa League of Cities v. U.S. Envtl. Prot. Agency*, 711 F.3d 844, 862-63 n.12 (8th Cir. 2013). Regardless of the Court's view of this issue, as explained below, Plaintiffs' claims fail as a matter of law – either for lack of jurisdiction or on the merits of the claims.

consummation of the agency's decisionmaking process" and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations and citations omitted); *see also Sierra Club*, 446 F.3d at 813. Here, the State Department did not issue any permit or otherwise approve the actions Enbridge planned to take with respect to Line 3 or Line 67 and thus there is no action, final or otherwise, for the Court to review.

1. The State Department Took No Agency Action or Final Agency Action Regarding Enbridge's Line 3

The State Department did not make any decision to approve the construction of a replacement pipe on Line 3. Rather, in the April 24, 2014 letter, the State Department responded to Enbridge's inquiry regarding the applicability of the 1991 Presidential Permit to its planned maintenance of Line 3. AR 43-44. After considering the inquiry, the State Department found "the replacement of the border segment of Line 3 to be consistent with the authorization in the existing Presidential Permit . . . ." AR 43. The State Department also explained that because the permit authorized facilities at the border, it focused "only on the pipe used from the Canadian border to the first mainline valve in the United States." *Id.* The State Department's interpretation of the requirements of an existing permit does not constitute "agency action" under the APA. 5 U.S.C. § 551(13). The State Department did not issue any "order, license, sanction," or approval of the construction. *Id.* Indeed, the only action that the State Department took regarding Line 3 was taken 24 years ago when the 1991 permit was issued.

Merely confirming the legal parameters of an existing permit in response to an inquiry from a company does not constitute reviewable agency action under the APA. *Cf. Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (finding that a letter from EPA to a company disagreeing with the company's interpretation of an emissions regulation was not a reviewable agency action)[14]; *Indus. Safety Equip. Ass'n., Inc. v. EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988) (finding that a guidance document providing safety information did not constitute a reviewable agency action under the APA). Because the State Department's letter "tread no new ground" and "left the world as it found it," it was not an "agency action" within the meaning of the APA. *Indep. Equip. Dealers*, 372 F.3d at 428. As then Judge John Roberts reasoned, a finding that letters re-stating existing legal requirements were reviewable agency action "would quickly muzzle any informal communications between agencies and their regulated communities – communications that are vital to the smooth operation of both government and business." *Id.*

Moreover, the State Department's letter was not a final agency action because it made no determination "from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The letter had no legal effect. It did not prohibit or require any action of Enbridge and therefore it was not a final agency action. *See Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940, 944-46 (D.C. Cir. 2012) (FDA warning letters to industry

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[14] In *Indep. Equip. Dealers*, plaintiffs brought a petition under the Clean Air Act, not the APA, but the court found that the requirements of the APA were similar and bolstered the conclusion that the letters were not reviewable agency action. 372 F.3d at 61.

indicating that their products were mislabeled were not final agency actions); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010) (a reference guide providing answers to frequently asked questions was not a final agency action); *Ariz. Mining Ass'n v. Jackson*, 708 F. Supp. 2d 33, 41-42 (D.D.C. 2010) (letters to companies clarifying the scope of EPA rules were not final agency actions); *Cheyenne-Arapahoe Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1169 (N.D. Okl. Jul 11, 2002) (a letter advising a tribe of the appropriate classification of an electronic game was not a final agency action).[15]

2. The State Department Took No Agency Action or Final Agency Action Regarding the Interconnections Between Lines 3 and 67

The State Department also did not approve the construction of the interconnections between Enbridge's Lines 3 and 67. As with the maintenance-driven replacement of Line 3, the State Department simply responded to an inquiry from Enbridge, this time regarding its plans to construct interconnections between its pipelines to allow it greater flexibility to transport oil within the United States. *See* AR 128-29; AR 134-36; *see also* AR 185-91. Based on the information provided by Enbridge, the State Department responded in its July 24, 2014 letter that "Enbridge's intended changes to the operation of the pipeline outside of the border segment do not require authorization

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[15] In *Iowa League of Cities*, the Eighth Circuit found that the two letters sent by the EPA to a U.S. Senator were "promulgations" under the Clean Water Act ("CWA"). *See* 711 F.3d at 865. The case does not apply here because the court distinguished the requirements for review under the CWA from the review requirements of the APA. 711 F.3d at 863 n.12. Further, unlike the letters in this case, the EPA letters in *Iowa League of Cities* represented new binding policy applicable to regulated entities. *See id.* at 863-65.

from the U.S. Department of State." AR 193. Thus, the State Department expressly did not authorize Enbridge's actions and therefore took no action that could be construed as an agency action or final agency action subject to APA review. *See*, *e.g.*, *Indep. Equip. Dealers*, 372 F.3d at 428; *Holistic Candlers*, 664 F.3d at 944-46.

Neither of the cases relied upon by Plaintiffs, *see* Pl. Mem. at 10, support their argument that the July 24, 2014 letter should be considered a final agency action. In *Idaho Rivers United v. U.S. Forest Service*, 857 F. Supp. 2d 1020 (D. Idaho 2012), the court found that letters denying petitions to issue regulations constituted final agency action. *See id.* at 1025-26. In contrast, Enbridge did not seek any State Department action, and the State Department did not grant or deny any request from Enbridge. The decision in *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 397 F. Supp. 2d 1241 (D. Mont. 2005), also does not support Plaintiffs' argument because the Forest Service in that case made a decision to use fire retardant – an action within its jurisdiction. *See id.* at 1252. In short, these cases cannot overcome the weight of authority demonstrating that an agency's explication of existing legal requirements in a letter is not a final agency action under the APA.

B. The State Department's Implementation of Executive Order 13337 Is Presidential Action Conducted Solely Pursuant to the President's Inherent Constitutional Authority and Therefore Is Not Reviewable Under the APA

Implementation of the President's directives in Executive Order 13337 is not reviewable because Presidential actions are not reviewable under the APA. The State Department accepts applications for cross-border pipeline facilities pursuant to the

President's inherent constitutional authority. *See* Exec. Order 13337 § 1(a). The President delegated the authority to issue permits for such facilities based on his authority under "the Constitution and the laws of the United States of America." Exec. Order 13337 at 1[16]; *see also Greene County Planning Bd. v. Fed. Power Comm'n*, 528 F.2d 38, 46 (2d Cir. 1975) ("Executive Order 10485 . . . delegates an executive function to the [Federal Power Commission], a function rooted in the President's power with respect to foreign relations if not as Commander in Chief of the Armed Forces."). When the State Department takes an action relating to an application for a Presidential permit or an existing permit, it acts solely pursuant to the authority delegated to it by the President in the executive order. *See id.*; *see also Natural Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) ("The State Department acts solely at the behest of the President and in accordance with the President's guidance as set forth in Executive Order 13,337.").

It is well-established that an action by a President is not an agency action that can be challenged under the APA. *Franklin*, 505 U.S. at 800-01; *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (the Secretary of Defense's recommendations to the President regarding base closures were not reviewable under the APA because the decision was within the President's discretion). As explained by the Supreme Court, "Out of respect for the separation of powers and the unique constitutional position of the President, we find that

[16] Executive Order 13337 also references 3 U.S.C. § 301, but that section merely provides the President the general authority to delegate to agencies or executive branch officials the performance of "any function which is vested in the President by law."

textual silence is not enough to subject the President to the provisions of the APA." *Franklin*, 505 U.S. at 800-01.

The President has substantial inherent constitutional authority in the area of foreign affairs. *Am Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936). In carrying out this constitutional authority, the President often acts through subordinates. *See Curtiss-Wright*, 299 U.S. at 320 (A President must rely on "agents in the form of diplomatic, consular and other officials."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("[The President] is authorized to appoint certain officers, who act by his authority and in conformity with his order.").

When the President delegates his inherent constitutional authority to an agency head, the action remains the action of the President and is not reviewable under the APA. *See Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975) ("For the purposes of this appeal the Secretary's actions are those of the President, and therefore by the terms of the APA the approval of the regulation at issue here is not reviewable."); *cf. Tulare Cnty. v. Bush*, 185 F. Supp.2d 18, 29 (D.D.C. 2001) ("These counts fail to allege jurisdiction, however, because the Forest Service is merely carrying out the directives of the President, and the APA does not apply to presidential action."), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002); *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978) ("The argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are

necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd.").

In prior litigation regarding a different pipeline, two separate courts held that the State Department's issuance of a Presidential permit was a Presidential action and therefore not subject to review under the APA. *See Sisseton Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D. S.D. 2009); *Natural Res. Def. Council*, 658 F. Supp. 2d at 113. In doing so, both courts found that the delegation of the President's constitutional authority to the Secretary of State did not change the fundamentally Presidential nature of the action. *See Sisseton Wahpeton*, 659 F. Supp. 2d at 1082 ("The President is free to delegate some of his powers to the heads of executive departments, as he has done here, and those delegation actions that are carried out create a presumption of being as those of the President."); *Natural Res. Def. Council*, 658 F. Supp. 2d at 111 ("[T]o challenge the issuance of a presidential permit, whether by the President himself or by the State Department as the President's delegee, is to challenge a presidential act, which is not reviewable under the APA."). Further, as the D.C. court recognized, "Judicial review of permitting decisions that the President has delegated to the State Department would impose an unconstitutional burden on his power to delegate that the APA does not require, let alone contemplate." *Id.* at 112. Accordingly, the President's delegation of his authority to issue Presidential permits for cross-border pipelines does not subject those decisions to APA review.[17]

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[17] In prior litigation involving the Alberta Clipper Pipeline, the court found that the preparation of an EIS was, by itself, a final agency action that could be reviewed under

For the same reason, Plaintiffs' claims fail on the merits because NEPA and the NHPA are inapplicable to Presidential actions. *See* 40 C.F.R. §1508.12; 36 CFR 800.16(y). Simply put, no NEPA or NHPA analysis is required to decide how or when to exercise the President's constitutional powers and require a Presidential permit. *See Natural Res. Def. Council*, 658 F. Supp. 2d at 112-13 ("The President's authority to issue permits for cross-border pipelines is completely discretionary and is not subject to any statutory limitation, including NEPA's impact statement requirement."); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1088 (9th Cir. 2004).

C. Executive Order 13337 Is Not Judicially Enforceable

The APA also cannot provide a basis for challenging the State Department's exercise of functions delegated in Executive Order 13337 because the executive order does not create judicially enforceable obligations. *See*, *e.g.*, *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) (recognizing that executive orders such as the one at issue in this case are viewed "as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action."). Actions taken pursuant to executive orders may be judicially reviewable if: (1) the executive order is based upon statutory authority, (2) there is a

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the APA. *See Sierra Club. v. Clinton*, 689 F. Supp. 2d 1147, 1156 (D. Minn. 2010). Defendants disagree that an EIS, as opposed to an agency's final decision document, is a reviewable agency action under the APA. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006) (finding that an agency's finding of no significant impact was a final agency action). But the reviewability of an EIS is irrelevant in this case because the agency has not issued an EIS or any other NEPA document.

legal standard or "law to apply" by which the agency's action may be judged, and (3) the executive order does not expressly disclaim the creation of a private right of action. *See City of Albuquerque v. U.S. Dep't of the Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997).

None of these criteria is met here. First, as discussed above, Executive Order 13337 delegates the President's constitutional authority, not statutory authority. Second, Executive Order 13337 does not impose a standard by which the Court could conduct meaningful judicial review. The Secretary of State is instructed to issue a permit for border facilities if doing so would "serve the national interest" and provides no guidance on how such permits are to be administered. Exec. Order 13337 § 1(g)-(h). The executive order thus provides no objective standards for the Court to apply. Third, Executive Order 13337 expressly states that it creates no privately enforceable rights:

> This order is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

Exec. Order 13337 § 6. Accordingly, Executive Order 13337 creates no obligations that may be enforced in a private lawsuit. Thus, the Department's implementation of the Order provides no basis for a claim under the APA. *See Natural Res. Def. Council*, 658 F. Supp. 2d at 112 ("Nor is this case like those in which courts have allowed APA review of actions pursuant to an executive order that was itself governed by statute and did not preclude judicial review.").

D. Plaintiffs' Alleged Injuries Are Not Redressable

Plaintiffs lack standing because their alleged injuries are not redressable by an order of this Court. In order to establish standing, Plaintiffs must demonstrate that their alleged injuries "will likely be redressed by a favorable decision." *Pucket v. Hot Springs School Dist. No. 23-2*, 526 F.3d 1151, 1157 (8th Cir. 2008) (quotation omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To that end, Plaintiffs seek an order vacating the purported State Department approvals and an injunction prohibiting Enbridge from transporting more than 450,000 bpd across the border on Line 3 or doing any construction on Line 3. *See* Am. Compl. at 37.

But an order vacating the State Department's April 24 and July 24, 2014 letters would have no effect on Enbridge's operations because the State Department did not issue any new approvals in those letters, and Enbridge did not need approval to proceed with its plans. The letter relating to Line 3 merely confirmed that Enbridge's proposal to replace the border segment with new pipe was within the scope of its pre-existing permit. And the letter relating to the interconnections between Lines 3 and 67 merely confirmed that the project is outside the scope of the State Department's authority under Executive Order 13337. Thus, a vacatur of those letters would not prevent Enbridge from moving forward, and would not provide any effective relief to the Plaintiffs.

Plaintiffs' requested injunction also provides no basis for effective relief because it would impermissibly interfere with the inherent constitutional authority of the President. President Johnson first granted the authorization to construct, operate, and maintain Line 3's border facilities in 1968, and he did not impose any limitation on volume as part of

that authorization. In an exercise of delegated authority, the State Department later renewed that authorization in 1991, again, without any limitation on volume. AR 1, 5, 6-10. The injunction Plaintiffs seek would impose a limitation on volume for the first time, and thus would directly countermand the authorization originally granted by President Johnson. *Cf. Bancoult v. McNamara,* 445 F.3d 427, 437 (D.C. Cir. 2006) (in cases involving executive branch decisions relating to foreign policy and national security, "[t]he courts may not bind the executive's hands . . . whether directly – by restricting what may be done – or indirectly – by restricting how the executive may do it").

Further, enjoining Enbridge's construction of the pipeline outside of the border segment on the basis that the State Department was required to authorize such activity would require the State Department to regulate activities outside of the authority delegated to it in Executive Order 13337. It is not for the courts to instruct the President that he must exercise his inherent constitutional authority over foreign affairs and national security in a particular manner (or that he must delegate such authority to an agency) to regulate the construction and operation of pipelines that are not at the borders of the United States. Such an order would impermissibly violate the separation of powers doctrine and, therefore, there is no relief that the Court could order that would redress Plaintiffs' alleged injuries. *See Center for Biological Diversity v. Hagel*, No. C-03-4350 EMC, 2015 WL 1568838, at *18-*21 (N.D. Cal. 2015) (plaintiffs' NHPA claim challenging the approval of a military base in Okinawa, Japan was not redressable because the court could not enjoin the construction of the base without impermissibly infringing on executive branch authority); *Salmon Spawning & Recovery Alliance v.*

Gutierrez, 545 F.3d 1220, 1227-29 (9th Cir. 2008) (environmental groups lacked standing to challenge the State Department and other agencies based on alleged violations of the Endangered Species Act because the court could not set aside a treaty entered into by the United States).

II. Plaintiffs' NEPA and NHPA Claims Fail on the Merits Because the State Department Took No Action Triggering the Requirements of These Statutes

Plaintiffs' NEPA and NHPA claims fail on the merits because, even assuming the Court has jurisdiction, the State Department has taken no action triggering the requirements of NEPA or the NHPA. For fundamentally the same reasons that the State Department's letters to Enbridge do not constitute final agency action under the APA, the letters also are not "major federal actions" under NEPA or a "federal undertakings" under Section 106 of the NHPA. Therefore, the requirements of those statutes are inapplicable.

A. The State Department Took No Major Federal Action Triggering the Requirements of NEPA

No requirement to prepare a NEPA analysis was triggered in this case because the State Department took no major federal action with respect to either Line 3 or Line 67. *See* 42 U.S.C. § 4332(2)(c) (requiring an analysis of environmental impacts for "major Federal actions significantly affecting the environment"); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004). In determining whether a project is a major federal action requiring a NEPA analysis, the Eighth Circuit has considered three factors:

> (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether the overall federal involvement with the project is sufficient to turn essentially private action into major federal action.

Ringsred, 828 F.2d at 1308 (quoting *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980)) (internal brackets and quotation marks omitted). The analysis depends largely on the degree of legal and factual control exercised by the federal government over the non-federal aspects of the project. *See Goos*, 911 F.2d at 1294.

The April 24, 2014 letter informing Enbridge that its planned maintenance of Line 3 was authorized by the existing permit for the line was not a major federal action. *See* AR 43. As discussed in Section I.A., *supra*, the State Department did not issue a new permit for Line 3; rather, the applicable Presidential Permit, which authorized the permittee "to operate and *maintain*" a pipeline at the border, was issued in 1991. AR 6 (emphasis added). The State Department simply confirmed that Enbridge's planned maintenance-driven replacement of the border segment of Line 3 was authorized by its existing permit. AR 43-45.

Such a ministerial action, in which the agency does not exercise its discretion but merely confirms the existence of a prior approval, is not a major federal action. *See Goos*, 911 F.2d at 1295 (the ICC's role in permitting the conversion of a rail line to a trail was ministerial and therefore was not a major federal action); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-13 (9th Cir. 1995) (the U.S. Bureau of Land Management's determination that the construction of a road was in conformance with an existing right of way was not a major federal action); *Sharps v. U.S. Forest Serv.*, 823 F. Supp. 668, 676-77 (D. S.D. 1993) (a Forest Service decision memorandum establishing prairie dog

colonies in a manner that conformed to a prior agency decision notice was a ministerial act, not a major federal action).[18]

Further, the fact that Enbridge informed the State Department of its plans does not thereby render any of its actions a major federal action. *See N.J. Dep't of Envtl. Prot. & Energy*, 30 F.3d 403, 416 (3d Cir. 1994) ("Where a non-federal party voluntarily informs a federal agency of its intended activities to ensure that they will comply with law and regulation . . . , the agency's review of the plan does not constitute a major federal action."). Likewise here, Enbridge informed the State Department of its intended actions to assure the agency that its actions complied with appropriate legal requirements. The State Department confirmed that Enbridge's plans were already authorized under its existing permit, and therefore there was no action for the agency to take.

Likewise, the State Department's July 24, 2014 letter informing Enbridge that its planned interconnections did not require State Department authorization was not a major federal action. *See* AR 193. The interconnections are outside of the State Department's jurisdiction, which extends only to the border segment of the pipeline. Informing Enbridge of this limitation did not amount to an action, let alone a major federal action, by the State Department. *See Ringsred*, 828 F.2d at 1308 (the construction of a parking

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[18] The State Department's interpretation of the 1991 permit as authorizing the replacement of the Line 3 border segment is entitled to deference. *See Employers Ins. Of Wausau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995) (the court's review of an agency's interpretation of its own order is deferential).

ramp adjacent to an Indian gaming facility was not a major federal action because the agency had "no role in or control over the construction of the parking ramp").[19]

Plaintiffs argue that the July 24, 2104 letter permitted Enbridge to increase the flow of oil across the border on Line 3 from 760,000 bpd to 800,000 bpd and therefore was a major federal action. Pl. Mem. at 24. Contrary to Plaintiffs' assertion, however, the Presidential Permit for Line 3 does not include a limit on the amount of oil that can be imported on the line. *See* AR 6-10. Nor would transporting 800,000 bpd across the border be an increase above historical levels. Enbridge indicated that in recent years, the throughput had been roughly 760,000 bpd, but was sometimes more or less, and that it had in the past been as high as 960,000 bpd when transporting light crude. AR 33 & n.2.

Plaintiffs also argue that the replacement of Line 3 is a major federal action because the pipe's wall thickness will be greater than before, it will have a larger diameter in areas outside of the border segment, and it will follow a different route for part of its length. Pl. Mem. at 25. But none of these factors indicate that any major federal action was taken by (or was required of) the State Department. As Plaintiffs tacitly admit, the border segment was constructed of 34-inch diameter pipe – the same diameter expressly authorized in the permit. *See* AR 6. The permit makes no mention of

[19] The cases relied upon by Plaintiffs are inapposite because they do not pose circumstances where an agency is merely stating whether it has jurisdiction over a non-federal action. *See Ramsey v. Kantor*, 96 F.3d 434, 444-45 (9th Cir. 1996) (finding that an incidental take statement issued pursuant to the Endangered Species Act ("ESA") was a major federal action under NEPA); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1023-24 (9th Cir. 2012) (finding that an agency's approval of notices of intent ("NOI") constituted "agency action" under the ESA, but also explaining that the Ninth Circuit had previously held that such NOIs were not major federal actions under NEPA).

pipe thickness or pressure, *see id.* at 6-10, and such matters are regulated by other federal and state agencies, such as the Petroleum and Hazardous Materials Pipeline Administration ("PHMSA")[20] and the MPUC. *See* AR 135-36.

Finally, the route of the pipeline over its entire length is irrelevant because the State Department only has permitting authority over the border segment, not the entire length of the pipeline. *See* Exec. Order 13337 § 1(a). The current permit for Line 3 states that it authorizes the permittee "to operate and maintain a pipeline on the borders of the United States in Pembina County, North Dakota for the transport of liquid hydrocarbons between the United States and Canada." AR 6. Consequently, the State Department has no authority to regulate the route of Line 3 outside of the border segment and has not done so.

B. The State Department Did Not Violate 40 C.F.R. § 1506.1

Plaintiffs next argue that the State Department failed to take appropriate action under 40 C.F.R. § 1506.1 to ensure that the purposes of NEPA are met with respect to the ongoing review of the proposed Expansion Project, but that argument also fails. The actions Plaintiffs complain of – the construction of interconnections between Lines 3 and 67 – are outside of the State Department's jurisdiction. The regulation provides that an agency should take no "action" regarding a pending proposal that would "[h]ave an adverse environmental impact" or "[l]imit the choice of alternatives." 40 C.F.R. §

[20] Plaintiffs cite an internal State Department memorandum documenting a conversation with the PHMSA Director of Pipeline Safety, who indicated that an environmental analysis under NEPA likely would be conducted. AR 29. However, the Director was not referring to a State Department NEPA process. *See id.*

1506.1(a). Where "an 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 [those] criteria," then the agency should "notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved." *Id.* § 1506.1(b) (emphasis added). Thus, an agency is only required to take action (and only could take action as to a non-federal entity) if it has jurisdiction over the applicant's activities and the authority to stop the applicant from pursuing those activities.

Enbridge informed the State Department that it planned to construct the interconnections in Canada and south of the border segment within the United States. AR 134-36. Based on that information, the State Department properly determined that the interconnections were outside of its permitting jurisdiction. AR 193. As a result, the State Department had no duty or authority under 40 C.F.R. § 1506.1 to prevent Enbridge from constructing the interconnections. *See Sw. Williamson Cnty. Comty. Ass'n v. Slater*, 243 F.3d 270, 285-86 (6th Cir. 2001) (rejecting an injunction against the construction of a state highway because it was outside the jurisdiction of the Federal Highway Administration ("FHWA")); *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 605 (4th Cir. 1992) (reversing an injunction against the construction of portions of a pipeline outside of the jurisdiction of the Federal Energy Regulatory Commission ("FERC")).

For the same reason, Plaintiffs are incorrect that the State Department violated NEPA by failing to notify Enbridge that it should cease construction and operation of the interconnections. *See* Pl. Mem. at 21 (citing 5 U.S.C. § 706(1)). In order to bring a

successful claim under section 706(1), Plaintiffs must show that the State Department "failed to take a *discrete* agency action that it is *required to take*." *S. Utah Wilderness Alliance*, 542 U.S. at 64. Plaintiffs have not identified any action that the State Department should have (or could have) legally taken within the scope of the authority delegated in Executive Order 13337, let alone a discrete action that it was required by law to take. Unless Enbridge were planning to take an action that would alter the border facilities or operation of those facilities in a manner not allowed under current permits, the State Department lacks jurisdiction to act.[21]

Moreover, contrary to Plaintiffs' assertions, the existence of the interconnections will not limit the range of alternatives considered by the State Department when deciding whether to approve Enbridge's proposed Expansion Project. *See* Pl. Mem. at 19, 21-22. Plaintiffs claim that the State Department will be pressured to approve the Expansion Project because Enbridge will already be transporting an additional 800,000 bpd across the border. *See id.* But that is simply not the case. Enbridge already is authorized by its existing Presidential Permits to transport at least 800,000 bpd (and potentially more assuming consistency with PHMSA regulations and state requirements) over the border

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[21] Plaintiffs argue that the State Department's authority is not limited to the border segment because the State Department is conducting a NEPA analysis for the proposed Expansion Project on Line 67, which, like the interconnections, involves no physical changes to the pipe at the border. *See* Pl. Mem. at 20 n.5. But they miss the point. The State Department required a new permit and decided, as a policy matter, to prepare an analysis consistent with NEPA for the Expansion Project because it would increase the volume of oil imported through the Line 67 border facilities above the amount authorized by the current Presidential Permit. *See* 78 Fed. Reg. at 16,566. In contrast, Enbridge's construction of the interconnections does not allow it to import any more oil on Line 3 than previously allowed. *See* AR 33 & n.2; AR 135-36.

on Line 3 and up to 500,000 bpd on Line 67. AR 32-33 & n.2; AR 78. The construction of the interconnections does not change the amount of oil that Enbridge may legally transport across the border. Accordingly, Plaintiffs are incorrect that the construction of the interconnections will limit the State Department's consideration of alternatives in the SEIS for the proposed Expansion Project. *See Slater*, 243 F.3d at 282-83 (finding that the construction of interchanges outside of the FHWA's jurisdiction would not limit its consideration of alternatives).

Plaintiffs' reliance on *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986) is unavailing. As an initial matter, the holding in *Gilchrist* has been undermined by subsequent case law holding that a plaintiff must challenge final agency action under the APA in order to bring a valid NEPA claim. *See Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007). Without a final agency action, as is the case here, there is no valid claim under the APA. *See id.* at 1297-98. Further, the circumstances of this case are unlike *Gilchrist*. In that case, a county planned to construct highway segments up to a park border before the Secretary of the Interior decided whether to allow the highway to cross the park or selected a potential route. *See id.* at 1041-42. Thus, the court's concern was that the Secretary would be influenced to approve the crossing at a particular location. *See id.* Here, the construction of the interconnections will not influence the State Department's decision regarding the Expansion Project because Enbridge's existing permits already allow it to import oil across the border and the amounts allowed under the permits have not increased as a result of the interconnections. Thus, the State Department is free to decide at a later date

whether the Expansion Project should be approved, thereby allowing an increase in the amount of oil flowing across the border on Line 67.

This case is also unlike *Ross v. FHWA*, 162 F.3d 1046 (10th Cir. 1998). *See* Pl. Mem. at 23. There, the court found that once federal funds had been allocated for a highway project and a significant portion of the highway had already been built, the remaining portion could not be defederalized to avoid the requirements of NEPA. *See* 162 F.3d at 1051-54.[22] The critical distinction is that in the present case, the State Department never had regulatory authority over the entire length of the pipelines at issue – its jurisdiction is limited to the facilities "at the borders of the United States." Exec. Order 13337 § 1(a). Thus, the State Department did not attempt to remove itself from a construction project over which it had authority; rather, it never had that authority to begin with. Further, the State Department will continue its environmental review process for analyzing Enbridge's proposed Expansion Project. *See* 79 Fed. Reg. at 48,817-18.

C. The State Department Did Not Engage in a Federal Undertaking Requiring Compliance with the NHPA

The State Department was not required to complete an NHPA Section 106 process because it did not engage in a federal undertaking. *See* 54 U.S.C. § 306108. Neither the State Department's April 24, 2014 letter regarding the Line 3 replacement nor the July 24, 2014 letter regarding the interconnections constituted a federal undertaking that would trigger Section 106 compliance. The standard for determining whether a federal undertaking under the NHPA has occurred is essentially the same as the one for

[22] The court did not address 40 C.F.R. § 1506.1.

determining whether an agency has engaged in a major federal action under NEPA. *Ringsred*, 828 F.2d at 1309; *see also Karst*, 475 F.3d at 1295-96; *SAC & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001).

As demonstrated above, the State Department did not take a major federal action by informing Enbridge that its planned maintenance was covered by the existing permit and that Enbridge's planned interconnections were outside of its jurisdiction. By the same token, these actions also do not constitute a federal undertaking for purposes of the NHPA. *See Ringsred*, 828 F.3d at 1309 (finding that the construction of a parking ramp adjacent to an Indian gaming facility was not a federal undertaking); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1484 (10th Cir. 1990) (finding that the construction of bridges that would connect to federally funded highways was not a federal undertaking).

Relying on a Fifth Circuit case, Plaintiff argues that the State Department should have conducted a Section 106 process for the replacement of Line 3 because it had "an opportunity to exercise its authority" over the project. Pl. Mem. at 29 (citing *Vieux Carre Property Owners, Residents and Assocs., Inc.*, 948 F.2d 1436, 1445 (5th Cir. 1991). The issue in *Vieux Carre* was not whether the agency was required to conduct a Section 106 process for a non-federal project over which it lacked jurisdiction. Instead, the issue was whether the NHPA applied to "ongoing Federal actions," and the court found that the law did apply as long as the agency "has [an] opportunity to exercise authority at any stage of an undertaking . . . ." *Id.* Thus, even if the Eighth Circuit were to adopt this interpretation of NHPA Section 106, it has no application here because the State

Department has no ongoing authority over Enbridge's pipelines outside of the border segments.

Accordingly, the State Department did not take any action that would trigger the requirements of Section 106 and therefore did not violate the NHPA.

CONCLUSION

For the foregoing reasons, as a matter of law, the Court lacks jurisdiction over Claims One and Two of Plaintiffs' First Amended Complaint and those claims also fail on the merits. Therefore, summary judgment should be granted to Defendants.

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