UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendants,

ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Intervenor Defendant.

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

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INTRODUCTION

In 2014, the State Department secretly approved two Keystone XL-like pipeline projects. First, the State Department short-circuited its ongoing review of a project that utilizes extremely high operating pressures to force an additional 350,000 barrels per day ("bpd") of tar sands oil through an existing pipeline. Second, the State Department authorized construction and operation of an entirely new, high-capacity crude oil pipeline to import tar sands oil from Alberta, Canada to Superior, Wisconsin. Together, these projects will import significantly more tar sands oil into the U.S. than the Keystone XL pipeline.

The State Department's actions violate the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Congress enacted these statutes to ensure federal agencies carefully consider projects with significant impacts on environmental and cultural resources. To this end, federal agencies like the State Department must strictly follow procedures that require public participation and comprehensive review of impacts before acting on projects such as crude oil pipelines, which can wreak havoc on the environment. Here, the State Department violated NEPA and NHPA by (1) authorizing the new, high-capacity pipeline without any NEPA or NHPA compliance; and (2) short-circuiting an ongoing NEPA and NHPA review of the pipeline expansion project. These violations have silenced public participation and placed resources at risk that are vitally important to Plaintiffs and their members.

STATEMENT OF FACTS

Intervenor Enbridge Energy, Limited Partnership ("Enbridge") owns and operates the pipelines at issue. The pipelines are approximately 1,000 miles long and transport crude oil from Alberta, Canada, to Enbridge's terminal facility in Superior, Wisconsin. AR Doc. 20 at 0056. Because the pipelines cross the U.S.–Canada border, they are subject to the State Department's authority. Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968); Exec. Order No. 13,3369 Fed. Reg. 25,229 (Apr. 30, 2004). Enbridge plans to substantially increase its ability to import crude oil by operating an existing pipeline known as Line 67 at extremely high pressures (the "Line 67 Expansion Project") and by constructing a new high-capacity crude oil pipeline (the "New Pipeline").

Line 67

In May 2007, Enbridge sought authority from the State Department to construct and operate Line 67 to transport crude oil from Hardisty, Alberta, Canada, to Enbridge's terminal facility in Superior, Wisconsin. AR Doc. 20 at 0046, 56–57. Pursuant to NEPA and NHPA, the State Department prepared and finalized an environmental impact statement (FEIS), an in-depth, interdisciplinary review of the proposed pipeline's impacts. AR Doc. 21 at 0072; AR Doc. 22 at 0084–85. The FEIS considered construction impacts along the entire U.S. portion of the proposed project, AR Doc. 37 at 0280–81, as well as impacts from operating Line 67 at an annual average capacity of 450,000 bpd. AR Doc. 38 at 0317.

The State Department assessed, among other things, the potential for oil spills, air pollution, ground disturbances, climate change effects, and impacts on properties eligible for inclusion in the National Register of Historic Places. *See generally* AR Docs. 35–41 at 0222–957; *see, e.g.*, AR Doc. 40 at 0660 (potential pipeline impacts on land use; *id.* at 0791 (operational spills along entire pipeline length); *id.* at 0731–47 (list of eligible historic and cultural resources in Minnesota); AR Doc. 36 at 0265 (agency and tribal participation); AR Doc. 40 at 0716–19 (tribal lands and cultural resources).

After concluding this review, the State Department issued a Record of Decision and granted Enbridge a Presidential Permit for Line 67. AR Doc. 22 at 0077–0104. Among other things, the permit required Enbridge's compliance with mitigation and control plans along the entire length of U.S. portion of the pipeline. AR Doc. 21 at 0073. The State Department further determined that "[i]f Enbridge proposes to increase the capacity of the Project [beyond 450,000 bpd] in the future, the proposed changes to the system would be reviewed by the appropriate federal, state, tribal, and local agencies, including reviews of potential environmental impacts." AR Doc. 38 at 0363. Enbridge placed Line 67 into service in 2010. AR Doc. 23 at 0106.

Line 67 Expansion Project

In November 2012, Enbridge applied to the State Department for authority to expand the capacity of Line 67 by 350,000 bpd to an annual average of 800,000 bpd on

heavy crude oil service. AR Doc. 23 at 0105 n.2.[1] The proposed expansion will not require any physical changes to Line 67's pipe segments; rather, Enbridge will utilize extremely high operating pressures to force the additional 350,000 bpd through the existing pipeline. AR Doc. 23 at 0110; *see also* Kuprewicz Decl. ¶ 41. Enbridge and the State Department acknowledged that this operational change triggered the need to comply with NEPA and NHPA. *See* AR Doc. 23 at 0105 (seeking authorization for an "operational change to the Pipeline"); and Notice of Intent To Prepare a Supplemental Environmental Impact Statement, 78 Fed. Reg. 16,565, 16,566 (Mar. 15, 2013) proposed higher capacity operation of Line 67" requires compliance with NEPA and NHPA).

The State Department indicated that before making any decision on Enbridge's proposal, pursuant to NEPA it would invite public comments and carefully review the project's significant impacts. *Id.* at 16,566. The SEIS would address impacts on a number of resources, including geology and soils; water resources; fish, wildlife, and vegetation; threatened and endangered species; cultural resources; land use, recreation, and special interest areas; visual resources; air quality and noise; socio-economics; environmental justice; and reliability and safety. *Id.* The SEIS would also analyze the construction and operation of the pumping stations needed to increase the pipeline's capacity and two new storage tanks located at Enbridge's terminal facility in Superior, Wisconsin. *Id.* The State Department also noted that the SEIS scoping process would be

[1] Unless otherwise stated, all capacities represent annual average capacities, which Enbridge calculates as 90 percent of the full design capacity. Thus, an annual average of 800,000 bpd is equivalent to a full design capacity of 880,000 bpd. *See* AR Doc. 23 at 0105 n.2.

used to "help identify consulting parties and historic preservation issues for consideration" under Section 106 of NHPA. *Id.* The SEIS process is ongoing.

The New Pipeline Project

On January 30, 2014, Enbridge met privately with the State Department to discuss a plan to construct an entirely new, 36-inch diameter crude oil pipeline from Alberta, Canada, to Superior, Wisconsin (the "New Pipeline"). AR Doc. 7 at 0022. Understanding that the permitting process would subject the project to considerable scrutiny and uncertainty, Enbridge sought to construct the New Pipeline under the authority of an existing permit for another pipeline known as Line 3. *Id.* at 0023. The Line 3 permit, last issued in 1991, authorizes "an existing 34-inch pipeline" and "any land structures, installations or equipment appurtenant thereto" in the United States. AR Doc. 2 at 0006. In order to ostensibly fit within the terms of the existing permit, Enbridge sought to construct the 16-mile border-crossing segment of what is an otherwise 36-inch pipeline from 34-inch diameter pipe (the "New Border Segment"). AR Doc. 7 at 0022–23.

Line 3 was constructed in the 1960s from pipe with a wall thickness of 0.375 inches. AR Doc. 3 at 0011. Throughout its history, Line 3 operated below 760,000 bpd on heavy crude oil service.[2] AR Doc. 12 at 0033; *see also* Kuprewicz Decl. ¶ 32. In contrast, the New Pipeline is a 36-inch diameter pipe that—even with its 34-inch New

[2] The Administrative Record does not reveal how far below 760,000 bpd Line 3 operated. Enbridge indicated this figure represents Line 3's original capacity on a *mixture* of heavy and medium crudes. AR Doc. 12 at 0033. The capacity is lower for heavy crude service.

Border Segment—will transport up to 800,000 bpd on heavy crude oil service.[3] AR Doc. 29 at 0134–36. Moreover, it will follow an entirely different route than the existing Line 3 for 238 miles through Minnesota and Wisconsin. AR Doc. 10 at 0028; AR Doc. 12 at 0033. Enbridge has indicated it will leave the existing 34-inch pipeline in the ground and maintain it in place, making it possible to bring it back into service alongside the New Pipeline. AR Doc. 10 at 0028; *see also* Kuprewicz Decl. ¶ 39. Despite these facts, and without any public participation, the State Department approved the New Border Segment and New Pipeline construction on April 24, 2014. AR Doc. 19 at 0043–44.[4]

Bypass Project

In June 2014, Enbridge again met privately with the State Department to propose a plan to accomplish the Line 67 Expansion before the agency completed its ongoing SEIS for the project. AR Doc. 27 at 0128. Due to "unforeseen Line 67 [Expansion] Project permitting delay," Enbridge proposed bypassing the existing capacity limitation on Line 67 by using the New Border Segment as an alternate border crossing for the Line 67 pipeline (the "Bypass Project"). *See* AR Doc. 29 at 0134–35. Enbridge planned to construct new connections between Line 67 and the New Border Segment just north of the U.S.-Canada border and just south of the Line 67 border segment to circumvent the 450,000 capacity limitation. AR Doc. 29 at 0135. Enbridge explained that "crude oil

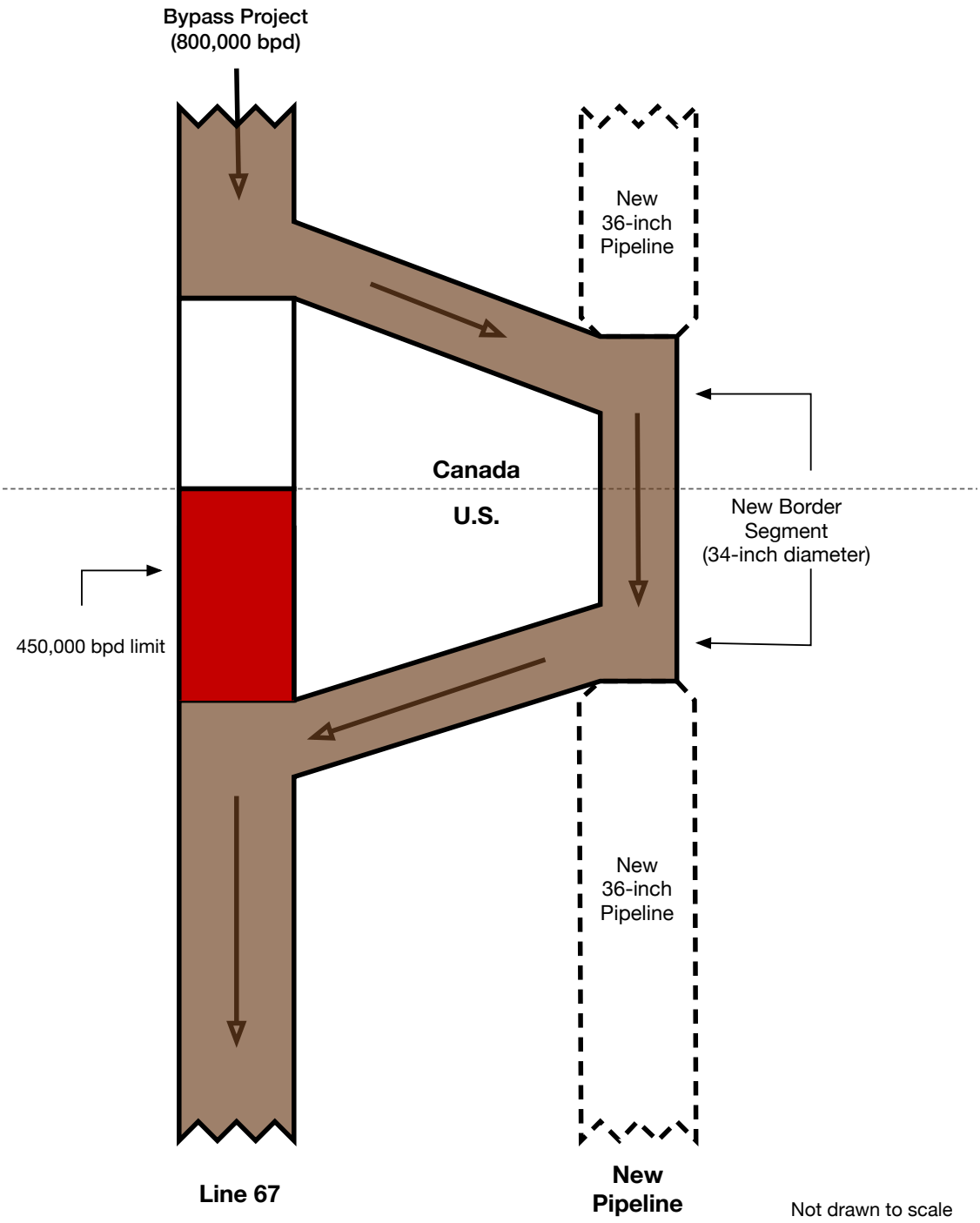
[3] The New Border Segment has a wall thickness of 0.600 or 0.680 inches and, as noted above, will operate well above the capacity of the original Line 3 border segment. *See* AR Doc. 29 at 0134–36 (Enbridge will operate the New Border Segment at an annual average capacity of 800,000 bpd); s*ee also* Kuprewicz Decl. at 8-9.

[4] As discussed below, the State Department later authorized Enbridge to operate the New Border Segment and New Pipeline at 800,000 bpd.

now transported across the border on Line 3 would instead be moved off of Line 3 onto Line 67 at a point in Canada, cross the border on Line 67 and then be transferred back to Line 3 at a point in North Dakota." AR Doc. 27 at 0129. Enbridge further explained the Line 3 border segment would be operated at levels up to 800,000 bpd on heavy crude oil service. *Id.* The State Department later characterized the Bypass Project as a "new approach to the proposed Line 67 capacity expansion project." AR Doc. 33 at 0193.

On July 24, 2014, the State Department authorized Enbridge to proceed with the Bypass Project and operate the New Border Segment (ostensibly Line 3) at 800,000 bpd on heavy crude oil. AR Doc. 33 at 0193. In doing so, the State Department granted Enbridge authority to construct and operate the New Pipeline at capacities beyond those previously authorized. AR Doc. 27 at 0129. From start to finish, the public was completely shut out of the State Department's decision-making process.

Plaintiffs' Conceptual Representation of the Bypass Project



ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS

Plaintiffs claim that the State Department violated NEPA and NHPA, federal statutes that present questions of federal law that this Court has jurisdiction to review under 28 U.S.C. § 1331. The Administrative Procedure Act ("APA") waives the government's sovereign immunity and provides a private cause of action for challenges to final agency actions that violate NEPA and the NHPA. 5 U.S.C. §§ 702, 706; *see Cent. S. Dakota Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 894 (8th Cir. 2001).

The APA defines "agency action" in the broadest terms to include "the whole or a part of an agency . . . license, sanction, relief, or *the equivalent* or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13) (emphasis added). In turn, the definitions expand further to include "other form of permission," "recognition of claim . . . right," and "the whole or part of an agency permit, [] approval, . . . or other form of permission." *Id.* § 551(8), (10), (11). Congress meant to "assure the complete coverage of every form of agency power, proceeding, action, or inaction." *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 (1980) (citing S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946)).

An agency action is "final" when it (1) marks the "consummation of the agency's decisionmaking process" and (2) determines "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted). The agency's decision must be one "from which 'legal consequences will flow.'" *Id.* Whether an agency's action is final depends on "whether the agency has completed its decisionmaking process, and

whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

The "finality" inquiry is "flexible" and "pragmatic." *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149–50 (1967). For example, a letter disclaiming jurisdiction is a final agency action when it "essentially approve[s]" the disputed activity. *See Idaho Rivers United v. U.S. Forest Serv.*, 857 F. Supp. 2d 1020, 1025–26 (D. Idaho 2012) (letter was "final agency action" because it declined jurisdiction in language demonstrating that the agency had completed its decision-making process on the issue); *see also Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1248 (2005) (agency's decision was a final agency action because the agency had no intention of revisiting its decision or consulting NEPA).

The State Department's July 24, 2014 letter informs Enbridge that it may proceed with the Bypass Project without further authorization. AR Doc. 33 at 0193. Consequently, the July 24 letter "essentially approved" new authority to construct and operate the 36-inch, 800,000 bpd New Pipeline and to expand Line 67's capacity by 350,000 bpd. AR Doc. 29 at 0136; *Idaho Rivers*, 857 F. Supp. 2d at 1025–26. It represents the State Department's final word and has "direct consequences" for both Enbridge and Plaintiffs. *Franklin*, 505 U.S. at 798.

II. STANDARD OF REVIEW

Courts review an agency's compliance with NEPA and NHPA under the APA. Courts must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or "without proper observance

of procedure required by law," 5 U.S.C. § 706(2)(A), (D); and may "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). An agency's threshold determination on the applicability of NEPA or NHPA is reviewed *de novo* and is "measured by its reasonableness in the circumstances." *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 22–23 (D.D.C. 2013) (de novo review); *Goos v. I.C.C.*, 911 F.2d 1283, 1291–92 (8th Cir. 1990) (reasonableness standard).

Courts review factual issues under the "arbitrary and capricious" standard when the dispute "implicates substantial agency expertise." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). However, courts owe no deference to an agency's interpretation of NEPA or its implementing regulations "because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to [any one agency] alone." *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (citing *Citizens Against Rails to Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001)).

III. PLAINTIFFS HAVE STANDING

Plaintiffs have standing to bring their claims. To show standing, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. *Iowa League of Cities v. U.S. Envtl. Prot. Agency*, 711 F.3d 844, 869 (8th Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). An organization has standing when (1) individual members would have standing, (2) the interests it seeks to protect are germane to its purpose, and (3) neither

the claims asserted nor relief requested requires participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011). When multiple plaintiffs jointly bring the same claims, only one plaintiff needs standing in order to establish the court's jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Under NEPA, "injury . . . occurs when an agency fails to comply with that statute" and "[t]he injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making." *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006). "Injury in fact necessary for standing 'need not be large; an identifiable trifle will suffice.'" *Sierra Club*, 645 F.3d at 988 (quoting *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008)).

Here, Plaintiffs satisfy the injury-in-fact requirement. The Bypass Project and New Pipeline threaten areas that Plaintiffs' members regularly use and enjoy. Line 67 crosses (and the New Pipeline will cross) forests, wetlands, lakes, and rivers where Plaintiffs' members camp, hike, hunt, fish, ski, explore, observe wildlife, and swim. Decls. of Andrews, Munter, Norrgard, Lesmeister, and Davis.

In addition, Plaintiff White Earth Nation attaches historical, cultural, and spiritual significance to the areas affected by the Bypass Project and New Pipeline. *See, e.g.*, Decl. of White Earth Nation ¶¶ 10–12. An 1855 treaty with the United States grants White Earth Nation's members hunting, fishing, and gathering rights at many locations along the pipeline routes. *Id.* ¶ 4. The people of White Earth Nation continue the traditions of their ancestors by hunting, fishing, and harvesting edible and medicinal

plants in these locations. *Id.* ¶¶ 11–12. Many White Earth Nation members depend on the lakes and rivers along the pipeline routes for their livelihood. *Id.* ¶ 10.

The Bypass Project and New Pipeline threaten Plaintiffs' members' interests by increasing the likelihood of leaks and spills along the pipeline routes. Decls. of Andrews, Munter, Norrgard, Lesmeister, McKenzie and White Earth Nation. In order to increase throughput on Line 67, Enbridge will utilize extremely high operating pressures. Kuprewicz Decl. ¶ 41. The higher pressures and throughput volumes will increase the size of a pipeline spill or leak; and decrease the margin of safety. *Id*. ¶¶ 40,42. Even newer pipelines are not immune to spills and leaks. *Id*. ¶ 43. Moreover, Enbridge's history of spills and leaks in its pipelines system "strongly suggests its integrity management program is inadequate." *Id*. ¶ 44.

Federal regulators acknowledge that higher operating pressures increase the risk of leaks and spills. *See, e.g.*, Pipeline Safety: Lessons Learned from the Release at Marshall, Michigan, 79 Fed. Reg. 25,990, 25,993 (May 6, 2014) (pipeline operators should take "preventative and mitigative measures that protect pipeline integrity, including lower operating pressures"). In addition, the Bypass Project and New Pipeline will harm Plaintiffs' members by increasing harmful air pollution near Enbridge's terminal in Superior, Wisconsin. *See* Decls. of Betty Andersen and Kathryn McKenzie; *see also* Ex. A, Enbridge Energy, Limited Partnership, Superior Terminal Enhancement Project, Prevention of Significant Deterioration, Permit Application 3 (Oct. 2012).

Enbridge's pipelines carry diluted bitumen, or "dilbit." According to the U.S. Environmental Protection Agency ("EPA"), "spills of diluted bitumen can have different

impacts than spills of conventional oil." Ex. B, Letter from Cynthia Giles, U.S. EPA, to Amos Hochstein and Judith G. Garber, U.S. Dep't of State 1 (Feb. 2, 2015) [hereinafter "*EPA Letter I*"]. Dilbit sinks in water, complicating cleanup efforts. Ex. C, Letter from Cynthia Giles, U.S. EPA, to Jose W. Fernandez and Kerri-Ann Jones, U.S. Dep't of State 3 (Apr. 2, 2013) [hereinafter "*EPA Letter II*"]. Dilbit also contains volatile toxic components like benzene. *Id.* EPA therefore insists that the State Department analyze an applicant's "oil spill prevention preparedness, response, and mitigation" before approving a new dilbit pipeline project. Ex. B, *EPA Letter I* at 1. The State Department has yet to complete such an analysis in this case, and Enbridge has refused to commit to basic preparedness, response, and mitigation measures. Ex. D, Letter from Sens. Dribble & Marty, Reps. Hornstein & Wagenius to William Seuffert, Executive Director, Minn. Envtl. Quality Bd. 2–3 (Sept. 23, 2014).

The State Department's hasty and uninformed decision-making increases the risk of harm to Plaintiffs' members' health, as well as to their property, recreational, aesthetic, cultural, spiritual, and economic interests. *See Sierra Club*, 645 F.3d at 986–87 (when an uninformed decision is made, the "harm that NEPA intends to prevent has been suffered"). Because of its failure to conduct any NEPA or NHPA analysis before approving these projects, the State Department lacks the information it needs to effectively mitigate the projects' environmental risks. Accordingly, Plaintiffs' injury in fact is "fairly traceable" to the State Department's NEPA and NHPA violations. *Lujan*, 504 U.S. at 560.

Plaintiffs have also established causation and redressability. In NEPA cases, plaintiffs must establish a "causal connection" between the agency's NEPA violation and "the alleged injury." *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). More specifically, plaintiffs must show that their injury is "fairly traceable to the challenged action of the defendant." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560). Here, the State Department increased the risk of environmental harm by authorizing the Bypass Project and New Pipeline without NEPA and NHPA compliance. *Sierra Club*, 446 F.3d at 816 ("Injury under NEPA occurs when an agency fails to comply with that statute . . . .").

In NEPA and NHPA claims for procedural injuries, the redressability standard is relaxed. *See Lujan*, 504 U.S. at 572 n.7. Plaintiffs must simply demonstrate that the agency might reconsider its decision in light of a full environmental review. *Sierra Club v. Clinton*, 689 F.Supp.2d 1147, 1155 (D. Minn. 2010). Here, the State Department might reconsider its decisions to authorize the projects after complying with NEPA and NHPA. Plaintiffs have therefore established the "irreducible constitutional minimum" of injury, causation, and redressability. *Lujan*, 504 U.S. at 560.

IV. THE STATE DEPARTMENT VIOLATED NEPA

NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. It requires a thorough environmental review of all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "[T]he comprehensive 'hard look' mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an

exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). "[P]roper timing is one of NEPA's central themes. An assessment must be 'prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'" *Metcalf*, 214 F.3d at 1142 (quoting 40 C.F.R. § 1502.5 (1987)). NEPA regulations make clear that timing of the environmental review is critical. *See* 40 C.F.R. §§ 1501.1 (integrate NEPA into early planning to insure appropriate consideration); 1501.2 (integrate NEPA process at earliest possible time to insure decisions reflect environmental values); 1502.2(f) (agency shall not commit resources prejudicing alternatives); 1502.2(g) (purpose of an EIS is to address proposed actions and not justify decisions already made); 1502.5 (timing); 1506.1 (limitations on actions during NEPA process), and 1506.10 (timing of agency action). Thus, an agency may not commit to a decision before completing its review. *See Metcalf*, 214 F.3d at 1145 (federal agency required to redo environmental assessment when agency committed to whaling project before completing its analysis).

A. The State Department Violated NEPA's Limitations on Actions During the NEPA Process by Approving the Bypass Project.

The State Department authorized the Bypass Project before completing its ongoing SEIS for the Line 67 Expansion Project. When Enbridge proposed the Line 67

Expansion Project, the State Department committed itself to a thorough public review of the project's environmental impacts. However, Enbridge grew tired of the process and devised the Bypass Project to circumvent NEPA. AR Doc. 29 at 0134. Inconceivably, the State Department turned what had been a public review of the Line 67 Expansion Project into a "closed door" discussion with Enbridge. On July 24, 2014, the State Department authorized the Bypass Project and substantially prejudiced its ongoing SEIS. AR Doc. 33 at 0193.

1. The State Department acted on the Line 67 Expansion Project before issuing a record of decision.

The Council on Environmental Quality ("CEQ") promulgated NEPA regulations to prevent agencies from prejudicing or foreclosing important choices. Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55,986 (Nov. 29, 1978). Until an agency issues a record of decision on an EIS, NEPA requires that "no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). The choice of reasonable alternatives must include the "no action" alternative. 40 C.F.R. § 1502.14(d). Notably, these regulations are mandatory; NEPA requires agencies to at least *consider* whether an action would prejudice the EIS. There must be some proof in the administrative record showing the agency considered whether a project violates § 1506.1. *Sensible Traffic Alts. & Res., Ltd. v. Fed. Transit Admin. of the U.S. Dep't of Transp.*, 307 F.Supp.2d 1149, 1166 (D. Haw. 2004).

Here, the Bypass Project "concerns" the Line 67 Expansion. 40 C.F.R. § 1506.1(a); AR Doc. 33 at 0193 (the Bypass project is a "new approach to the proposed Line 67 capacity expansion project"); *see also* Amended Notice of Intent To Prepare an SEIS, 79 Fed. Reg. 48,817, 48,817 (Aug. 18, 2014) (the Bypass Project "changes [the Line 67 Expansion] project description"). The projects have the same purpose, execution, and effect. Like the Line 67 Expansion, the Bypass Project involves 800,000 bpd of diluted bitumen entering Line 67 in Hardisty and exiting Line 67 at Enbridge's terminal in Superior, Wisconsin. AR Doc. 23 at 0114; AR Doc. 27 at 0129. Both projects are executed by installing additional pump stations to increase Line 67's internal pressure. AR Doc. 23 at 0110; AR Doc. 27 at 0131. Consequently, the Bypass Project will have the same environmental effects as the Line 67 Expansion. *See* AR Doc. 27 at 0131.

Like the Line 67 Expansion Project, the Bypass Project triggers NEPA even though it involves no physical construction within the so-called "border segment." AR Doc. 23 at 0107 ("[T]he Line 67 [Expansion] Project contemplates neither physical changes or additions to the 3-mile segment of the Pipeline between the U.S.-Canada border and the first mainline shut-off valve, nor the addition of any pipeline-related facilities in that near-border area."). Therefore, approval of the Bypass Project is an "action concerning [the Line 67 Expansion] proposal." *See* 40 C.F.R. § 1506.1(a).

There is nothing in the administrative record to show that the State Department took a "hard look" at whether approving the Bypass Project would have adverse environmental impacts or limit the choice of reasonable alternatives for the Line 67

Expansion. The State Department's approval of the Bypass Project was therefore arbitrary and capricious and not in accordance with NEPA. *Sierra Club v. U.S. Army Corps. of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (an agency's decision is arbitrary and capricious when it fails to take the "hard look" NEPA requires).

Had the State Department taken a hard look at the Bypass Project, it would have found the project adversely affects the environment *and* limits the choice of reasonable alternatives. The State Department already determined that increasing the throughput on Line 67 to 800,000 bpd requires an SEIS because of its potential environmental impacts. Notice of Intent To Prepare a Supplemental Environmental Impact Statement, 78 Fed. Reg. 16,565, 16,566 (Mar. 15, 2013). Enbridge also acknowledged that the environmental impacts of the Bypass Project are the same as those of the Line 67 Expansion. AR Doc. 29 at 0137.

The Bypass Project also limits the State Department's choice of reasonable alternatives. This "new approach to the proposed Line 67 capacity expansion project" allows Enbridge to transport 800,000 bpd from Hardisty to Superior on Line 67. The "no action alternative" is no longer an option. 40 C.F.R. § 1502.14(d). Therefore, the State Department violated NEPA by taking an action "concerning the [Line 67 Expansion] proposal" before issuing a record of decision. 40 C.F.R. § 1506.1(a).

2. The State Department failed to consider whether the Bypass Project would prejudice the Line 67 Expansion SEIS.

Even if the Bypass Project did not "concern" the Line 67 Expansion Project, the State Department must still consider whether the Bypass Project would, as a standalone

project, have an adverse environmental impact or limit the choice of reasonable alternatives for the Line 67 Expansion SEIS. 40 C.F.R. § 1506.1(b). NEPA requires that:

> If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction *that would meet either of the [§ 1506.1(a) criteria]*, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

Id. (emphasis added); *see also* AR Doc. 27 at 0131 (Enbridge acknowledges 1506.1(b) "require[s] an agency to notify an applicant to cease construction of a proposed action under the agency's jurisdiction until the NEPA process has been completed.") (emphasis removed). It is especially important for an agency to consider the prejudicial effect of an action when it is essentially identical in purpose, execution, and effect to the action under the agency's review.

Here, State Department was considering an application from Enbridge for the Line 67 Expansion, and was also aware that Enbridge was "about to take an action within the agency's jurisdiction." 40 C.F.R. § 1506.1(b); *see also* AR Doc. 27 at 0128–31; AR Doc. 29 at 0133–37, 0181–83; AR Doc. 31 at 0185–91 (correspondence between Enbridge and State Department describing the Bypass Project).[5] Thus, NEPA required the State Department to consider whether the Bypass Project would have an adverse environmental impact or limit the choice of reasonable alternatives for the Line 67 Expansion Project

[5] Again, claims that the State Department's authority is limited to construction in the border segment are misplaced. The Line 67 Expansion Project—the project under consideration—triggered NEPA even though no physical changes were made near the U.S.-Canada border.

SEIS. 40 C.F.R. § 1506.1(a), (b). However, there is no evidence of any such effort in the Administrative Record. Consequently, the State Department's failure to consider the effects of the Bypass Project on the Line 67 Expansion SEIS was arbitrary and capricious and not in accordance with NEPA. *Sierra Club*, 295 F.3d at 1216 (an agency's decision is arbitrary and capricious when it fails to take the "hard look" NEPA requires). Moreover, the State Department's failure to notify Enbridge to cease construction and operation of the Bypass Project was an agency action unlawfully withheld. 5 U.S.C. § 706(1).

Although the State Department's failure to consider the Section 1506.1 factors alone violates NEPA, the record demonstrates the Bypass Project in fact harms the environment and limits the choice of reasonable alternatives. As noted above, the environmental impacts from the Bypass Project are the same as the Line 67 Expansion project because they are identical in purpose, execution, and effect.

The Bypass Project also limits the choice of reasonable alternatives for the Line 67 Expansion Project. *See Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042–43 (4th Cir. 1986) ("non-federal actors may not be permitted to evade NEPA by . . . presenting the responsible federal agency with a *fait accompli*"). The State Department will "inevitably be influenced" to approve the Line 67 Expansion if 800,000 bpd are already being transported on Line 67 up and downstream of the New Border Segment. *Id.* at 1042 (agency would be so influenced to approve project if major segments of a highway were built on either side of the portion of the highway under review). Likewise, allowing Line 67 to operate at 800,000 bpd "stand[s] like a gun barrel" aimed at State

Department's ongoing decision-making process. *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 602 (4th Cir. 1992) (internal citations and quotations omitted). "It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent." *Gilchrist*, 808 F.2d at 1042.

Not only does the Bypass Project "stand like a gun barrel" aimed at the State Department; Enbridge has already fired the bullet. Enbridge has finished construction of the Bypass Project interconnections and is authorized to transport 800,000 bpd via the Bypass Project. ECF Doc. 19, Kratsch Decl. ¶ 7 (interconnections are complete); AR Doc. 29 at 0133–37; *see also* Doc. 62, Defs.' Answer to Pls.' Amend. Compl. ¶ 81 (Defendants aver the Bypass Project can accommodate 800,000 bpd).

The record demonstrates that the State Department will face tremendous pressure to approve the Line 67 Expansion Project. *See e.g.*, AR Doc. 29 at 0134 ("[S]hipper needs dictate that the annual average capacity of Line 67 in the United States be increased . . . up to 800,000 bpd by mid-2015"); AR Doc. 27 at 0129 (the Bypass Project is needed to "better meet customer demands"); AR Doc. 31 at 0185 ("increased volumes of crude oil . . . necessary to meet shipper demand"). With heavy tar sands crude oil already flowing through Line 67 at 800,000 bpd, the State Department has prejudiced the ongoing Line 67 Expansion SEIS, effectively silenced Plaintiffs' participation, and allowed Enbridge to utilize "extremely high operating pressures" on Line 67 without considering the impacts.

The State Department cannot allow Enbridge to skirt NEPA simply because Enbridge was frustrated with "unforeseen . . . permitting delay[s]." AR Doc. 29 at 0134.

Nonfederal actors and federal agencies cannot avoid NEPA when it becomes inconvenient. *See, e.g., Ross v. Fed. Highway Admin*., 162 F.3d 1046, 1055 (10th Cir. 1998) (nonfederal actor's attempt to avoid NEPA after project hit an "environmental road block" did not relieve federal agency of its statutory obligation to comply with NEPA). The State Department turned the once meaningful SEIS for the Line 67 Expansion Project into a *fait accompli*. *See Gilchrist*, 808 F.2d at 1042. Thus, the State Department violated NEPA by failing to consider whether the Bypass Project would prejudice the ongoing Line 67 Expansion SEIS.

B. The State Department Approved the New Pipeline Without Complying with NEPA.

The State Department must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). CEQ regulations define "major Federal action" broadly as an action "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18; *Ross v. Federal Highway Admin*., 162 F.3d 1046, 1051 (10th Cir. 1998) (quoting *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990)). The definition of "major Federal action" includes "[a]pproval of specific projects . . . includ[ing] actions approved by permit or *other regulatory decision*." 40 C.F.R. § 1508.18 (emphasis added).

Agency decisions that augment pre-existing legal authority and alter the environmental *status quo* are "major federal actions." *See, e.g.*, *Sierra Club v. Hodel*, 848 F.2d 1068, 1089–92 (10th Cir. 1988) (improvement of pre-existing county right-of-

way through federal land was "major Federal action" that required NEPA review), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (renewal of pre-existing energy development lease without an SEIS violated NEPA because the decision granted developer absolute right to develop and altered "status quo"); *Friends of Columbia Gorge v. U.S. Forest Serv.*, 546 F.Supp.2d 1088, 1102–03 (D. Or. 2007) (agency-issued deed for pre-existing property right triggered NEPA because decision was within the agency's discretion and altered the "environmental *status quo*").

Like the original Line 67 project, the New Pipeline is a "major Federal action significantly affecting the quality of the human environment." See also 40 C.F.R. § 1508.18(b)(4) ("major Federal action" includes "approval of specific projects . . . by permit or other regulatory decision . . . ."). The State Department's July 24, 2014 letter authorizes Enbridge to construct and operate the New Pipeline at 800,000 bpd exclusively on heavy crude. AR Doc. 29 at 0136 (Enbridge will transport 800,000 bpd of heavy crude on New Border Segment). Consequently, the State Department granted Enbridge new authority to import more crude oil than previously authorized. *See supra* note 2 (Line 3 operated below 760,000 bpd on heavy crude oil); *see also Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (federal approval "functionally equivalent to a permit" was a "major Federal action" because it authorized non-federal activity that had significant environmental impacts); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.,* 681 F.3d 1006, 1021–23 (9th Cir.2012) (en banc) (Forest Service letters approving "notices of

intent" for mining were "major federal actions" because the letters authorized, rather than advised, proposed mining activity). Therefore, the July 24 letter triggers NEPA review because it augments Enbridge's legal rights in a way that may significantly affect the environment.

The New Pipeline is not merely a replacement of the 1960s-era Line 3 pipeline: (1) it will operate at a higher capacity (800,000 bpd vs. under 760,000 bpd on heavy crude service), (2) it is larger in diameter for all but 16 miles (36-inch vs. 34-inch), (3) its 34-inch diameter pipe segment (the New Border Segment) has thicker walls and can operate at higher pressures; and (4) it will follow a different route for hundreds of miles.

This "major Federal action" also may significantly affect the environment. This is abundantly clear from the history of similar projects that have triggered NEPA review, including the original Line 67 project and the Line 67 Expansion Project. *See, e.g.,* AR Docs. 35–40 at 0222–0522 (2009 FEIS for Alberta Clipper). Indeed, the Pipeline Hazardous Material and Safety Administration ("PHMSA") Director of Pipeline Safety indicated the New Pipeline project "would likely require an environmental review under NEPA." AR Doc. 10 at 0029. There is simply no doubt that a project of this size and intensity significantly affects the environment. Under the circumstances, the State Department's decision to allow construction and operation of the New Pipeline was not reasonable. *See Goos*, 911 F.2d at 1292 (threshold determination of NEPA applicability is reviewed for "reasonableness in the circumstances.").

V. THE STATE DEPARTMENT VIOLATED NHPA

Although the obligations imposed by NHPA are "separate and independent from those mandated by NEPA," *Nat'l Indian Youth Council v. Andrus*, 501 F.Supp. 649, 674 (D.N.M. 1980), *aff'd,* 664 F.2d 220 (10th Cir. 1981), the two statutory schemes are closely related. Both are "stop, look, and listen" provisions that are "designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs." *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994) (quoting *Morris Cnty. Trust for Historic Pres. v. Pierce,* 714 F.2d 271, 278–79 (3d Cir. 1983)); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). Both statutes require agencies to consider how projects might affect the public interest. *See United States v. 0.95 Acres of Land,* 994 F.2d 696, 698 (9th Cir. 1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

NHPA obligates federal agencies to "assume responsibility for the preservation of historic properties" under their control. Pub. L. No. 113-287 § 306108, 128 Stat. 3227 (2014) (to be codified at 54 U.S.C. § 306108).[6] Section 106 of NHPA requires that federal agencies "having authority to license any undertaking, *prior* to . . . the issuance of any license, shall take into account the effect of the undertaking" on historic properties, including those eligible for inclusion in the National Register of Historic Places. Pub. L. No. 113-287 § 306108, 128 Stat. 3227 (2014) (to be codified at 54 U.S.C. § 306108) (emphasis added); *see also* 36 C.F.R. § 800.1. The advance-timing requirement in the

[6] Formerly 16 U.S.C. § 470f (2012).

plain language of the statute is echoed by the implementing regulations. 36 C.F.R. § 800.1(c); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 555 (8th Cir. 2003) (remanding Surface Transportation Board decision approving new rail line for failure to complete Section 106 process prior to granting railroad construction authority). The timing requirement ensures that the agency considers a broad range of alternatives, including the no-action alternative, to avoid, minimize or mitigate the undertaking's adverse effects to historic properties. *See* 36 C.F.R. § 800.1(c); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859–62 (10th Cir. 1995) (explaining the importance of the consultation process beginning in a timely manner).

An "undertaking" includes "a project . . . under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y). NHPA consultation is necessary "as long as a Federal agency has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals." *Vieux Carre Prop. Owners, Residents & Assoc. v. Brown*. 948 F.2d 1436, 1444–45 (5th Cir. 1991) (*quoting Morris Cnty. Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3rd Cir. 1983)). NHPA is triggered if an agency is able to prevent harm or make alterations to modify a project's impact on historic preservation goals. *Id.*

Section 106 requires federal agencies to consult with various parties to identify historic properties potentially affected by an undertaking and to seek ways to avoid and minimize or mitigate adverse effects. 36 C.F.R. § 800.1(a). The implementing

regulations set forth detailed steps that the agency must take to complete the Section 106 consultation process. *See* 36 C.F.R. §§ 800.3–800.13.

NHPA regulations carve out a detailed consultation process for Native American Tribes. Agencies are required to "consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. § 800.2(c)(2)(ii). This requirement applies "regardless of the location of the historic property," including properties "off tribal lands." *Id.* § 800.2(c)(2)(ii)(D). Agencies "shall ensure" the consultation process provides a tribe with a "reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id.* § 800.2(c)(2)(ii)(A).

As noted above, Plaintiff White Earth Nation attaches historic, cultural, and spiritual significance to the areas affected by Enbridge's projects. *See supra* Section III. Indeed, White Earth Nation was a consulting party during the Section 106 process for the original Line 67 project. *See, e.g.*, AR Doc. 40 at 0751.

A. The State Department Did Not Complete the Section 106 Consultation Process Before Approving the Line 67 Expansion.

The State Department acknowledged that the Line 67 Expansion Project is an "undertaking" and recognized its authority over the project by initiating the Section 106 consultation process. Notice of Intent, 78 Fed. Reg. 16,565, 16,567 (Mar. 15, 2013).

However, it did not complete the consultation process before authorizing Enbridge's "new approach to the proposed Line 67 capacity expansion project." AR Doc. 33 at 0193. This "new approach" is also an "undertaking." At a minimum, the State Department had an *opportunity* to exercise its authority over the Bypass Project to modify its impact on affected historical properties. *See Vieux*, 948 F.2d at 1444–45 (NHPA responsibilities are triggered when agency merely has opportunity to exercise authority). Notably, the Bypass Project has the same effects as the Line 67 Expansion Project on historic properties to which Plaintiff White Earth Nation attaches significance. Both projects transport 800,000 bpd of tar sands crude oil on Line 67 through the 1855 Ceded Territory. AR Doc. 40 at 0720.

Consequently, the State Department violated Plaintiff White Earth Nation's rights afforded under NHPA by allowing Enbridge to proceed with the Line 67 Expansion without consulting White Earth Nation as required by NHPA.

B. The State Department Failed to Undertake, Much Less Complete, the Required Section 106 Consultation Process for the New Pipeline.

The New Pipeline project is an "undertaking" because it is "a project . . . under the direct or indirect jurisdiction of a Federal agency. . . ." 36 C.F.R. § 800.16(y). As noted above, the Section 106 consultation duty is triggered when an agency has an "opportunity to exercise authority . . . to modify its impact on historic preservation goals." *Vieux*, 948 F.2d at 1444–45 (5th Cir. 1991). Here, at a minimum, the State Department had an opportunity to exercise its authority over the New Pipeline. There were numerous communications between Enbridge and the State Department about the

New Pipeline project. *See, e.g.*, AR Doc. 12 at 0031. However, the State Department never completed, let alone initiated, the Section 106 consultation process prior to authorizing the project in violation of NHPA. The State Department found that both the construction and operation of Line 67 and the subsequent Line 67 Expansion Project were "undertakings" under NHPA. Notice of Intent To Prepare an EIS, 73 Fed. Reg. 16,920, 16,920 (Mar. 31, 2008); Notice of Intent To Prepare an SEIS, 78 Fed. Reg. 16,565, 16,566 (Mar. 15, 2013). Similarly, the New Pipeline is an "undertaking" under NHPA because the State Department, at a minimum, had an "opportunity to exercise authority . . . to modify its impact on historic preservation goals." *Vieux*, 948 F.2d at 1444–45 (5th Cir. 1991). The State Department's complete failure to start, let alone complete, the required Section 106 consultation process before determining whether the undertakings could proceed violated NHPA.

CONCLUSION

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

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Respectfully submitted,

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