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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

18 _____)
SIERRA CLUB, MINNESOTA)
19 CENTER FOR ENVIRONMENTAL)
ADVOCACY, INDIGENOUS)
20 ENVIRONMENTAL NETWORK, and) Civ. No. _____
NATIONAL WILDLIFE)
21 FEDERATION,)
)
22 Plaintiffs,) COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
)
23 v.) (National Environmental Policy Act, 42
U.S.C. §§ 4321 et seq.)
24 HILLARY CLINTON, in her official capacity)

25
26 COMPLAINT

1 as Secretary of State, JAMES STEINBERG, in)
his official capacity as Deputy Secretary of)
2 State, UNITED STATES DEPARTMENT OF)
STATE, and the UNITED STATES ARMY)
3 CORPS OF ENGINEERS,)
4 Defendants.)

5
6 **INTRODUCTION**

7 1. Plaintiffs bring this action to challenge the United States Department of State’s
8 (“State Department”) issuance of a Presidential permit to Enbridge Energy LP and its affiliates
9 (collectively, “Enbridge”), to construct and operate a pipeline known as the Alberta Clipper, the
10 purpose of which is to import tar sands crude oil into the United States from Canada. The U.S.
11 portion of the Alberta Clipper project involves the building of 384 miles of pipeline, from the
12 Canadian border at Neche, North Dakota, across Minnesota, to a terminal in Superior Wisconsin.

13 2. The Alberta Clipper project is part of Enbridge’s larger pipeline expansion
14 project, which includes the Southern Lights project. The Southern Lights project is designed to
15 transport diluent (a blending agent necessary for transporting tar sands crude oil via the Alberta
16 Clipper pipeline) from U.S. refineries to tar sands production sites in Canada. It is integral to
17 and connected with the Alberta Clipper project. There are two components to the Southern
18 Lights project: a) the Line 13 Reversal/New Diluent Pipeline project (“diluent pipeline”), which
19 requires construction of 678 miles of new pipeline from Manhattan Illinois to Clearbrook,
20 Minnesota, as well as the reversal of flow in Enbridge’s existing Line 13 pipeline (currently a
21 light sour crude pipeline between Edmonton, Alberta and Clearbrook, Minnesota), to create a
22 dedicated diluent delivery system to tar sands production centers in Alberta, Canada; and b) the
23 LSr Capacity Replacement pipeline (“LSr pipeline”), which would provide 313 miles of new
24 pipeline to replace the capacity to import light sour crude oil from Canada into the United States

1 that would be lost due to diversion of Line 13 for the diluent pipeline. *See* Alberta Clipper and
2 Southern Lights Map, attached hereto as Appendix A.

3 3. The Alberta Clipper project and Southern Lights diluent project would greatly
4 increase the availability of heavy tar sands crude in the United States and, possibly, worldwide.
5 The projects would spur refinery expansions and modifications in the United States, leading to
6 increased air and water pollution for residents of the Midwest and other states. Additionally,
7 because extraction of tar sands crude is energy intensive, life-cycle greenhouse gas emissions
8 from burning tar sands-derived fuels are significantly higher than from fuels derived from
9 conventional crude. As a result, the production and refining of more tar sands crude will cause
10 increased emissions of greenhouse gases that contribute to global warming and related harmful
11 effects on the environment.

12 4. In granting the Presidential permit for the Alberta Clipper, the State Department
13 violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and NEPA's
14 implementing regulations, 40 C.F.R. §§ 1500-1508, by: i) failing to analyze the impacts of
15 connected, cumulative, and/or similar actions, including the Southern Lights project; ii) failing to
16 assess all reasonably foreseeable environmental impacts of the project, including indirect, and
17 cumulative effects; and iii) failing to take a hard look at the Alberta Clipper project's stated
18 purpose and need or to adequately consider a reasonable range of alternatives before granting the
19 Presidential permit.

20 5. Plaintiffs allege that because they are connected, cumulative and/or similar
21 actions, a single Environmental Impact Statement (EIS) should be prepared for the Alberta
22 Clipper and Southern Lights projects. If, however, this Court determines that the State
23 Department did not err in separating the environmental review of the Alberta Clipper project
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1 from the Southern Lights project, then Plaintiffs challenge the adequacy of the NEPA review for
2 the Southern Lights project, which only assessed the effects of the LSr capacity replacement
3 pipeline and failed to evaluate any impacts from the diluent pipeline.

4 6. Plaintiffs also challenge the authority of the State Department to issue the
5 Presidential permit for the Alberta Clipper project. The regulation of international tar sands
6 crude oil pipelines falls within Congress's exclusive and plenary authority over matters of
7 foreign commerce pursuant to Article I, Section 8, clause 3 of the United States Constitution.
8 Congress has not delegated that authority to the Executive Branch. Because the President has no
9 constitutional or statutory authority to permit the construction of new pipelines to import tar
10 sands crude oil from Canada, the State Department's issuance of the Presidential permit to
11 Enbridge was unconstitutional or contrary to constitutional right, power, privilege or immunity.

12 7. Plaintiffs request that this Court: a) enter a declaratory judgment that the Alberta
13 Clipper permit was issued in violation of NEPA and the APA; b) issue an order vacating the
14 Alberta Clipper permit; and c) issue preliminary and permanent injunctions enjoining the
15 construction of the Alberta Clipper and Southern Lights diluent pipelines unless and until the
16 State Department complies fully with NEPA.

17 8. In the event that the Court determines that the State Department did not err in
18 separating the environmental review of the Alberta Clipper project from the Southern Lights
19 project, Plaintiffs request that this Court a) enter a declaratory judgment that the LSr permit was
20 issued in violation of NEPA; b) issue an order vacating the LSr permit; and c) issue preliminary
21 and permanent injunctions enjoining the construction of the Southern Lights diluent pipeline
22 unless and until the State Department complies fully with NEPA.

23 9. In addition, Plaintiffs request that this Court enter a declaratory judgment that the
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1 State Department's issuance of the Presidential permit for the Alberta Clipper Project was
2 unconstitutional, and vacate the Alberta Clipper permit.

3 **JURISDICTION**

4 10. This Court has jurisdiction over this action by virtue of the Administrative
5 Procedure Act, 5 U.S.C. § 551 *et seq.*, and 28 U.S.C. § 1331 (federal question jurisdiction).

6 11. An actual controversy exists between the parties within the meaning of 28 U.S.C.
7 § 2201(a). This Court may grant declaratory relief and additional relief, including an injunction,
8 pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 701-706.

9 **VENUE AND INTRADISTRICT ASSIGNMENT**

10 12. Venue lies in this judicial district under 28 U.S.C. § 1391(e) because Plaintiff
11 Sierra Club resides in this district.

12 13. Assignment to the San Francisco Division of this judicial district is proper under
13 Civil Local Rule 3-2 (c)-(d) because Plaintiff Sierra Club is incorporated and headquartered in
14 San Francisco County.

15 **PARTIES**

16 14. Plaintiff SIERRA CLUB:

17 a. Plaintiff Sierra Club is a national nonprofit organization of over one
18 million members and supporters dedicated to exploring, enjoying, and protecting the wild places
19 of the earth; practicing and promoting the responsible use of the earth's ecosystems and
20 resources; educating and enlisting humanity to protect and restore the quality of the natural and
21 human environment; and using all lawful means to carry out these objectives. The Sierra Club
22 has chapters and members in each of the states through which the Alberta Clipper pipeline would
23 pass, and in the state(s) where the refining of the tar sands crude would take place. The Sierra
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1 Club's concerns encompass the protection of wildlands, wildlife habitat, water resources, air,
2 climate change, public health and the health of its members, all of which stand to be affected by
3 these pipelines. The Sierra Club's headquarters are located at 85 2nd Street, 4th Floor, San
4 Francisco, CA 94109-3441.

5 b. Sierra Club brings this action on behalf of its members who live, work,
6 and recreate in areas that will be affected by air and/or water pollution from the pipeline, pipeline
7 facilities, and refineries processing oil from the pipeline, and by the deleterious impacts of
8 increased emissions of greenhouse gases resulting from the refining and end-use of tar sands
9 crude oil. These members face increased risk of harm to their health, recreational, economic,
10 and aesthetic interests as a result of the Department's permitting of the pipeline. The State
11 Department's failure to provide required information and analyze and/or mitigate reasonably
12 foreseeable direct, indirect, and cumulative impacts of the proposed pipeline expansion project
13 has also deprived Sierra Club's members of their right to participate fully in the process leading
14 to the issuance of the Presidential permit.

15 c. The declaratory and injunctive relief Sierra Club seeks will redress the
16 injuries to its members by vacating the Alberta Clipper permit and preventing construction of the
17 diluent pipeline. Sierra Club's injuries will also be redressed by requiring Defendant to remedy
18 the procedural and informational defects in the State Department's NEPA review.

19 15. Plaintiff MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY:

20 a. Plaintiff Minnesota Center for Environmental Advocacy ("MCEA") is a
21 Minnesota-based non-profit environmental organization whose mission is to use law, science,
22 and research to preserve and protect Minnesota's wildlife, natural resources, and the health of its
23 people. MCEA works on a wide range of environmental policy issues, including the
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1 environmental impacts from large construction projects, energy consumption, and climate
2 change. MCEA is located at 26 E. Exchange Street, Suite 206, St. Paul, Minnesota 55101.

3 b. MCEA brings this action on behalf of itself and its members. MCEA
4 members live and recreate in the areas affected by the proposed pipelines and will be affected by
5 the construction and operation of these pipelines. The recreational, aesthetic, economic and/or
6 environmental interests of MCEA and its members are threatened by air and/or water pollution
7 from the pipeline, pipeline facilities, and refineries processing oil from the pipeline, and by the
8 deleterious impacts of increased emissions of greenhouse gases resulting from the refining and
9 end-use of tar sands crude oil. These members face increased risk of harm to their health,
10 recreational, economic, and aesthetic interests as a result of the Department’s permitting of the
11 pipeline. The State Department’s failure to provide required information and analyze and/or
12 mitigate reasonably foreseeable direct, indirect, and cumulative impacts of the proposed pipeline
13 expansion project has also deprived MCEA's members of their right to participate fully in the
14 process leading to the issuance of the Presidential permit.

15 c. The declaratory and injunctive relief MCEA seeks will redress the
16 injuries to its members by vacating the Alberta Clipper permit and preventing construction of the
17 Southern Lights diluent pipeline. MCEA’s injuries will also be redressed by requiring
18 Defendants to remedy the procedural and informational defects in the State Department’s NEPA
19 review.

20 16. Plaintiff INDIGENOUS ENVIRONMENTAL NETWORK:

21 a. Plaintiff Indigenous Environmental Network (“IEN”) is a non-profit
22 organization that works with indigenous individuals and grassroots community groups to protect
23 their sacred sites, land, water, air, natural resources, and the health of their people and all living
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1 things, and to building economically sustainable communities. IEN's work encompasses a range
2 of environmental and economic justice issues that impact the lands and cultures of indigenous
3 peoples and individuals, including mining and oil development on and near indigenous lands;
4 soil and water contamination from energy exploration and development; climate change; water
5 conservation; and the transboundary movement of hazardous materials along the U.S. borders
6 with Canada and Mexico. IEN's headquarters is located at 219 Bemidji Avenue, Bemidji, MN
7 56601.

8 b. IEN brings this action on its own behalf. The environmental impacts of
9 the pipelines, associated facilities, and refineries processing crude oil from the pipeline,
10 including increased air and water pollution and the deleterious impacts of increased emissions of
11 greenhouse gases resulting from the refining and end-use of tar sands crude oil, frustrate IEN's
12 mission of reducing the harmful and disproportionate impacts of tar sands extraction, refining
13 and end-use on indigenous lands and on the health of indigenous communities. Redoubled
14 efforts to educate communities in the vicinity of tar sands development and refineries of the
15 health impacts of increased air and water pollution and new programs to compel Enbridge and
16 the Pipeline and Hazardous Materials Safety Administration within the Department of
17 Transportation to implement adequate safety measures to minimize the risk of leaks and spills,
18 will divert resources from IEN's other program areas.

19 c. IEN advocates for environmental protection to benefit members of Native
20 American Indian tribes and native lands. The interests of the communities and lands that IEN
21 was founded to protect are directly impacted by the Department of State's permitting of the
22 Alberta Clipper pipeline. These communities face increased risk of harm to their health,
23 recreational, economic, aesthetic and cultural interests as a result of the Department's permitting
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1 of the pipeline. Community members' lives, work, and spiritual and cultural practices will be
2 affected by the construction and operation of the pipelines, pipeline facilities, and refineries that
3 process oil from the pipeline, and by the deleterious impacts of increased emissions of
4 greenhouse gases resulting from the refining and end-use of tar sands crude oil. The State
5 Department's failure to provide required information and analyze and/or mitigate reasonably
6 foreseeable direct, indirect, and cumulative impacts of the proposed pipeline expansion project
7 has also deprived IEN of its right to participate fully in the process leading to the issuance of the
8 Presidential permit.

9 d. The declaratory and injunctive relief IEN seeks will redress the injuries to
10 IEN and the communities and resources it seeks to protect by vacating the Alberta Clipper permit
11 and preventing construction of the Southern Lights diluent pipeline. IEN's injuries will also be
12 redressed by requiring Defendants to remedy the procedural and informational defects of the
13 State Department's NEPA review.

14 17. Plaintiff NATIONAL WILDLIFE FEDERATION:

15 a. Plaintiff National Wildlife Federation ("NWF") is the nation's largest non-
16 profit conservation advocacy and education organization. NWF has over one million individual
17 members, including 26,310 and 33,736 members in Minnesota and Wisconsin respectively, and
18 affiliate organizations in 47 states and territories, including North Dakota, Minnesota and
19 Wisconsin. NWF's mission is to educate, mobilize, and advocate to preserve and strengthen
20 protection for wildlife and wild places. NWF also works to protect of wildlife, wild places, and
21 natural resources from the impacts of climate change and the health of its members, which will
22 be affected by the actions described herein. NWF's headquarters is located at 11100 Wildlife
23 Center Drive, Reston, VA 20190.

1 b. NWF brings this action on behalf of its members who live, work, and
2 recreate in areas that will be affected by air and/or water pollution from the pipeline, pipeline
3 facilities, and refineries processing oil from the pipeline, and by the deleterious impacts of
4 increased emissions of greenhouse gases resulting from the refining and end-use of tar sands
5 crude oil. These members face increased risk of harm to their health, recreational, economic,
6 and aesthetic interests as a result of the Department's permitting of the pipeline. The State
7 Department's failure to provide required information and analyze and/or mitigate reasonably
8 foreseeable direct, indirect, and cumulative impacts of the proposed pipeline expansion project
9 has also deprived NWF's members of their right to participate fully in the process leading to the
10 issuance of the Presidential permit.

11 c. The declaratory and injunctive relief NWF seeks will redress the injuries
12 to its members by vacating the Alberta Clipper permit and preventing construction of the diluent
13 pipeline. NWF's injuries will also be redressed by requiring Defendants to remedy the
14 procedural and informational defects in the State Department's NEPA review.

15 18. Defendant UNITED STATES DEPARTMENT OF STATE is a federal agency
16 whose chief administrator is the Secretary of State. The State Department processes applications
17 for Presidential permits for the construction, operation and maintenance of facilities on the U.S.-
18 Canada border. In carrying out its responsibilities, the State Department must comply with
19 applicable requirements of NEPA and the APA.

20 19. Defendant HILLARY CLINTON is the Secretary of State and is sued in her
21 official capacity. Pursuant to Executive Order 13337, 69 Fed. Reg. 25299 (April 30, 2004),
22 Secretary Clinton is responsible for determining whether to issue permits for the construction,
23 operation or maintenance at the borders of the United States of facilities for the exportation or
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1 importation of petroleum products or other fuels to or from a foreign country. In carrying out
2 these duties, Secretary Clinton must ensure compliance with the requirements of NEPA.

3 20. Defendant JAMES STEINBERG is the Deputy Secretary of State and is sued in
4 his official capacity. On February 13, 2009, Secretary Clinton delegated to the Deputy Secretary
5 of State, to the extent authorized by law, all authorities and functions vested in the Secretary of
6 State or the head of agency by any act, order, determination, delegation of authority, regulation,
7 or executive order, now or hereafter issued. Department of State Delegation of Authority No.
8 245-1.

9 21. Defendant UNITED STATES ARMY CORPS OF ENGINEERS. The Army
10 Corps of Engineers (“ACE”) has regulatory authority over the Alberta Clipper and Southern
11 Lights projects pursuant to section 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344, and
12 section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401. ACE is a cooperating
13 agency in the preparation of the State Department’s EA for the LSr pipeline and EIS for the
14 Alberta Clipper pipeline.

15 **FACTS**

16 **Enbridge’s Pipeline Expansion Proposal**

17 22. Enbridge proposes to expand significantly the existing pipeline system it owns
18 and operates between Alberta, Canada and United States. The expansion includes the Alberta
19 Clipper project and the Southern Lights project.

20 23. The Alberta Clipper pipeline is a 992-mile long, 36-inch diameter pipeline
21 running from Hardisty, Alberta, Canada, crossing the border near Neche, North Dakota, and
22 continuing through northern Minnesota to a terminal in Superior, Wisconsin. The Alberta
23 Clipper pipeline will carry approximately 450,000 barrels per day (bpd), with an ultimate
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1 capacity of 800,000 bpd, of heavy crude oil, also referred to as “bitumen,” from the Canadian tar
2 sands to refineries throughout the Midwest. The pipeline will be integrated with and form part of
3 the Enbridge’s mainline oil pipeline system. At Superior, the Alberta Clipper pipeline will
4 connect to a mainline to Chicago, Illinois.

5 24. The Southern Lights project is comprised of two components: the Line 13
6 Reversal/New Diluent pipeline and the LSr Capacity Replacement pipeline.

7 25. The diluent pipeline would transport light hydrocarbons known as “diluent” from
8 Midwest refineries to the Alberta tar sands. Because bitumen crude from the Canadian tar sands
9 is too viscous to be pumped through a pipeline, it must be diluted with lighter liquid
10 hydrocarbons in order to be transported by pipeline. For the diluent pipeline, Enbridge proposes
11 to construct a new 678-mile, 20-inch pipeline from Manhattan, Illinois, to Clearbrook,
12 Minnesota, where it would connect with Enbridge’s existing Line 13. Enbridge proposes to
13 reverse the flow of Line 13, which currently transports light sour crude from Canada to
14 Clearbrook, to create a dedicated diluent delivery system from refineries in Illinois to the tar
15 sands production centers in Alberta. The diluent pipeline would have an initial capacity of
16 180,000 bpd with expansion capability up to 330,000 bpd. The 188-mile segment of diluent
17 pipeline from Clearbrook, Minnesota to Superior, Wisconsin would be constructed at the same
18 time and in the same right-of-way as the Alberta Clipper pipeline.

19 26. The LSr Capacity Replacement pipeline is a new 313-mile 20-inch pipeline being
20 constructed between Cromer, Manitoba, Canada, and Clearbrook, Minnesota to transport light
21 sour crude. According to Enbridge, diversion of the capacity of Line 13 to the diluent pipeline
22 necessitates the construction of an additional pipeline to replace that capacity. The LSr pipeline
23 was proposed and permitted for that purpose. The LSr pipeline would deliver 186,000 bpd of
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1 crude oil from a supply hub near Cromer, Manitoba to the existing Enbridge terminal in
2 Clearbrook. The “ultimate capacity” of the LSr pipeline is 300,000 bpd.

3 27. The TransCanada Keystone pipeline project through North and South Dakota will
4 also carry tar sands crude. The State Department’s final EIS for TransCanada’s Keystone crude
5 oil pipeline was issued in January 2008, and construction began in May 2008. The Keystone
6 pipeline will have a capacity of 450,000 bpd and will extend approximately 1,384 miles within
7 the United States, from the U.S.-Canadian border in western Pembina County, North Dakota to
8 terminals at Cushing in Oklahoma, Wood River in Illinois, and Patoka in Illinois. The Keystone
9 pipeline intersects the proposed Alberta Clipper Project route in eastern Pembina County, North
10 Dakota.

11 28. TransCanada is also proposing to build the Keystone XL pipeline, which is
12 designed to transport tar sands crude oil from the Western Canadian Sedimentary Basin to the
13 Texas Gulf Coast area. The U.S. portion of the proposed XL pipeline would be 1,375 miles long
14 with a transport capacity of 900,000 bpd and would pass through Montana, South Dakota,
15 Nebraska, Kansas, Oklahoma, and Texas.

16 **Regulatory Background**

17 29. Because Enbridge’s proposed expansion would involve construction on the U.S.-
18 Canada border and the import and export of crude oil and refined petroleum products, Enbridge
19 applied to the State Department for Presidential permits. Enbridge submitted permit applications
20 for the import of heavy crude and construction of the Alberta Clipper pipeline, for the import of
21 light sour crude and construction of the LSr pipeline, and for the export of diluent in Line 13.

22 30. Enbridge also applied for permits for the Alberta Clipper and Southern Lights
23 projects from: i) the U.S. Army Corps of Engineers for permits to dredge and fill wetlands and
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1 place structures in or under water-bodies pursuant to section 404 of the Clean Water Act and
2 section 10 of the Rivers and Harbors Act; ii) the U.S. Forest Service for a special use permit to
3 site and construct the pipelines through the Chippewa National Forest; iii) the U.S.
4 Environmental Protection Agency for wastewater discharge permits pursuant to section 402 of
5 the Clean Water Act; and iv) the Bureau of Indian Affairs for approval to cross certain Indian
6 lands. Each agency decision on these permit requests is major federal action triggering NEPA.

7 31. The State Department claimed to be the lead federal agency on the project for
8 purposes of NEPA and assumed responsibility for conducting the environmental review for the
9 expansion. Instead of preparing one EIS for the entire expansion, as NEPA requires, the State
10 Department segregated the component parts of Enbridge's proposal and conducted its
11 environmental review in separate pieces.

12 32. On July 27, 2007, the State Department issued two separate Notices of Intent to
13 prepare separate Environmental Assessments (EAs) for the LSr pipeline and the Alberta Clipper
14 pipeline. Although Enbridge had applied for a Presidential permit allowing it to reverse the flow
15 in Line 13 and export diluent, the State Department, in a letter dated November 28, 2007, told
16 Enbridge that a new or amended permit was not necessary. The State Department, therefore, did
17 not issue a Notice of Intent to prepare an EA for the diluent pipeline. No other federal agency
18 issued a separate notice or undertook separate or supplemental environmental review for the
19 diluent pipeline

20 33. The State Department then determined it would proceed with an EA for the LSr
21 pipeline, but prepare an EIS for the Alberta Clipper pipeline. Plaintiff MCEA, in comment
22 letters sent to the State Department in December 2007, pointed out that all three pipelines were
23 part of one project and that NEPA required the State Department to evaluate all three in one
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1 environmental impact statement. Over MCEA's objections, the State Department proceeded
2 with separate environmental reviews.

3 34. The State Department's EA for the LSr pipeline did not evaluate environmental
4 impacts from the Alberta Clipper pipeline or the diluent pipeline. In its final EA and Finding of
5 No Significant Impact ("FONSI") for the LSr pipeline, the State Department represented that the
6 diluent pipeline would be evaluated in the NEPA analysis for the Alberta Clipper project.

7 35. The State Department issued its draft EIS for the Alberta Clipper project on
8 December 5, 2008, and its final EIS on June 8, 2009. The Department excluded both the LSr and
9 diluent pipelines from its definition of the project under review and asserted that they were not
10 connected actions for NEPA purposes.

11 36. The draft EIS stated that the purpose and need for the project is to transport
12 additional crude oil into the United States from existing Enbridge facilities in western Canada to
13 meet the growing U.S. demand. The draft did not fully analyze all reasonably foreseeable
14 cumulative impacts of the proposal such as the impacts of refining and burning the additional
15 heavy crude oil, or the impacts of increased greenhouse gas emissions. The draft EIS also did
16 not adequately evaluate the risks, environmental impacts, and available mitigation measures
17 associated with spills and operational leaks from the pipeline.

18 37. Plaintiffs and others submitted comments on the draft EIS noting these failures.
19 In these comments Plaintiffs notified the State Department that NEPA requires evaluation of all
20 the component parts of the Alberta Clipper project, including the connected diluent and LSr
21 pipelines, and assessment (and, as warranted, mitigation) of the reasonably foreseeable
22 environmental impacts of the project, including tar sands extraction, expanded U.S. refining of
23 heavy crude from the Canadian tar sands, and increased greenhouse gas emissions from
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1 extraction, refining, and end-use of tar sands crude oil. In addition, Plaintiffs challenged the
2 accuracy of the crude oil demand forecasts underpinning the project’s stated purpose and need,
3 and commented on the State Department’s failure to adequately consider reasonable alternatives.

4 38. On June 8, 2009, the State Department released a final EIS for the project. The
5 final EIS did not include the diluent or the LSr pipelines as connected actions. The final EIS did
6 not adequately respond to Plaintiffs’ comments that the EIS does not consider the reasonably
7 foreseeable environmental impacts of tar sands extraction, of expanded U.S. refining of heavy
8 crude from the Canadian tar sands, or of increased greenhouse gas emissions from extraction,
9 refining, and end-use of tar sands crude oil. The final EIS also did not adequately address the
10 impacts that spills and operational leaks would have on the environment, especially soil and
11 water resources, or on human health, and does not discuss measures to mitigate these impacts,
12 but instead defers to a future review process by the Department of Transportation.

13 39. The State Department, in its Response to Comments in the final EIS, changed the
14 purpose and need for the project, stating that the purpose of the project is to “increase the import
15 of a safe and reliable supply of Canadian crude oil to replace portions of the imported crude
16 coming from foreign sources that are substantially less reliable and stable.” However, this new
17 statement of purpose and need is not reflected in Enbridge’s Presidential permit application, nor
18 is it supported by laws or facts that indicate reduced importation of crude oil from other countries
19 that may be perceived as suffering from instability.

20 40. Because the State Department failed to consider the diluent pipeline in the Alberta
21 Clipper EIS, and because it failed to consider the diluent pipeline in its NEPA review for the LSr
22 pipeline, no study has been conducted to date evaluating the environmental impacts from the
23 diluent pipeline. Defendant ACE and other federal agencies with regulatory authority over the
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1 diluent pipeline are unable to rely on the State Department's environmental review in their
2 permitting decisions because of this failure.

3 41. On August 20, 2009, the State Department issued a Record of Decision (ROD) to
4 issue a Presidential permit for the Alberta Clipper pipeline, along with a determination that
5 issuance of the permit would serve the national interest. The ROD did not supply any
6 meaningful additional environmental information or analysis, but rather relied on the State
7 Department's deficient final EIS.

8 42. On August 20, 2009, the State Department issued the Alberta Clipper Presidential
9 permit. The permit allows the transport of tar sands crude oil from Canada into the United States
10 across the U.S.-Canada border; authorizes the construction, connection, operation and
11 maintenance of pipeline facilities at the border; and contains other terms and conditions on the
12 pipeline and related facilities as set forth in the permit.

13 43. On August 24, 2009, the Army Corps issued Enbridge permits to dredge and fill
14 wetlands and place structures in or under water-bodies in connection with construction of the
15 Alberta Clipper and diluent pipelines. In a telephone conversation with Ralph Augustin, on
16 August 25, 2009, Plaintiffs confirmed the issuance of the permit, and confirmed that the Army
17 Corps did not conduct independent NEPA review but relied on its participation in the State
18 Department's preparation of the Alberta Clipper EIS. The Army Corps refused to provide
19 Plaintiffs with a copy of the permits or the Corps' ROD.

20 **Environmental Impacts of the Project**

21 **A. Impacts of Pipeline Construction and Operation**

22 44. In the United States, construction of the Alberta Clipper pipeline would require
23 the installation of approximately 326.9 miles of new 36-inch-diameter pipeline starting at the
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1 Canadian border in Neche, North Dakota, crossing Minnesota and bisecting the Chippewa
2 National Forest, and ending in a terminal in Superior, Wisconsin. The pipeline would involve a
3 total of three perennial and 24 intermittent water-body crossings in North Dakota; 76 perennial
4 and 86 intermittent crossings in Minnesota, and one perennial and 13 intermittent water-body
5 crossings in Wisconsin. Construction of the pipeline could result in increased sedimentation,
6 degradation and alteration of aquatic habitat, increased runoff and erosion, changes in channel
7 morphology and stability, temporary reductions in flow, and temporary to short-term surface
8 water degradation during or after construction.

9 45. During construction, this pipeline would impact 1,255 acres of upland forested
10 lands, 655 acres of open lands, and 1,346 acres of wetlands. The primary impacts to vegetation
11 would be cutting, clearing and the potential introduction of noxious weeds. It would result in
12 both short-term disturbance and long-term modification to wildlife habitats, including impacts
13 from habitat fragmentation and widening of existing rights-of-way. It could affect fisheries
14 resources by loss or alteration of habitat, reduced spawning success, direct and indirect mortality,
15 adverse health effects, and loss of individuals and habitats due to hydrostatic testing and
16 exposure to toxic materials.

17 46. In addition, the pipeline would cut through a rare wetland area known as a
18 calcareous fen. This is the rarest wetland plant community in Minnesota and Wisconsin and one
19 of the rarest in North America. Minnesota law protects it from all disturbance. On July 7, 2009,
20 after the State Department issued the final EIS for public comment, the Minnesota Department of
21 Natural Resources (MDNR) discovered on a site visit that the proposed pipeline route would cut
22 through a calcareous fen. On July 22, 2009, Plaintiffs sent a letter to the State Department
23 requesting consideration of an alternate route for the pipeline to avoid this calcareous fen, but
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1 received no response.

2 47. Finally, operation of the pipelines presents significant risks to the environment
3 and human health due to operational leaks and spills. Enbridge reports over 30 incidents of leaks
4 and spills on its existing pipeline running through northern Minnesota over the last decade.
5 Nationwide, during the last 20 years, there have been nearly 3,000 reported “significant
6 incidents,” resulting in 43 fatalities and over \$1 billion in property damage.

7 **B. Impacts of Extracting and Refining Tar Sands Crude Oil**

8 48. Tar sands are composed of clay, sand, water, and bitumen – a heavy black viscous
9 oil that can be mined and processed. Extracted bitumen is then refined into synthetic oil and
10 other petroleum products.

11 49. Unlike conventional oil, bitumen cannot be pumped from the ground in its natural
12 state. Instead, deposits are mined using energy-intensive extraction and separation techniques to
13 separate the bitumen from the sand, clay and water. Surface tar sand deposits can be recovered
14 by open pit mining techniques, using large hydraulic and electrically powered shovels to dig up
15 tar sands and transport them for extraction using a hot water separation process. Compressed air
16 and steam injection methods are used to extract deep tar sand deposits, and those methods
17 require large quantities of water and energy for heating and pumping. About two tons of tar
18 sands are required to produce one barrel of oil.

19 50. Both mining and processing of tar sands cause significant environmental impacts,
20 including emissions of global warming gases, destruction of wildlife habitat, and impacts to air
21 and water quality.

22 51. Tar sands development is significantly more energy intensive than conventional
23 oil and gas development. It takes three to five times the amount of energy to extract and upgrade
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1 a barrel of crude from tar sands compared to conventional sources. The lifecycle emissions of
2 greenhouse gases from tar sands oil production is 25% greater than emissions of low-sulfur, light
3 crude oils.

4 52. In addition, tar sands extraction operations require large quantities of water and
5 would draw down surface water flow, adversely impacting stream habitat for migratory fish and
6 other species dependant on local water resources. Drilling one well consumes 5.5 acre-feet of
7 water each year, and the production of one gallon of oil requires 35 gallons of water. Water used
8 in tar sands processing is discharged into toxic tailings ponds so large that they are visible from
9 space. In May 2008 over 500 migratory birds died in a single incident after landing on a tailings
10 pond.

11 53. The Enbridge expansion project will supply U.S. refineries with heavy tar sands
12 crude. According to a 2007 U.S. Geological Survey report, the type of oil extracted from
13 Canadian tar sands contains eleven times more sulfur, six times more nitrogen, eleven times
14 more nickel, and five times more lead than conventional oil.

15 54. Refining tar sands crude transported through the Alberta Clipper pipeline will
16 likely result in higher air emissions of harmful pollutants such as sulfur dioxide, hydrogen
17 sulfide, sulfuric acid mist, and nitrogen oxides, as well as toxic metals such as lead and nickel
18 compounds.

19 55. According to the U.S. Environmental Protection Agency, the human health effects
20 of these pollutants may include premature death; cancer; permanent lung damage; reproductive,
21 neurological, developmental, respiratory, and immunological problems; cardiovascular and
22 central nervous system disorders; bio-mutations; respiratory illness, including bronchitis and
23 pneumonia; and aggravation of heart conditions and asthma.

1 biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the
2 ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

3 61. To accomplish these purposes, NEPA requires all agencies of the federal
4 government to prepare a “detailed statement” that discusses the environmental impacts of, and
5 reasonable alternatives to, all “major Federal actions significantly affecting the quality of the
6 human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an
7 environmental impact statement. To determine whether a federal action will result in significant
8 environmental impacts and requires an EIS, the federal agency may first conduct an
9 environmental assessment. 40 C.F.R. § 1501.4. If a federal agency makes a finding of no
10 significant impact, it may avoid conducting an EIS. *Id.*

11 62. The Council on Environmental Quality (CEQ), established under NEPA within
12 the Executive Office of the President to be responsible for coordinating federal environmental
13 efforts, has promulgated regulations implementing NEPA. 40 C.F.R. §§ 1500-1508. The State
14 Department’s own NEPA regulations, which incorporate and supplement the CEQ regulations,
15 are set forth at 22 C.F.R. §§ 161.1-161.12.

16 63. The EIS process is intended “to help public officials make decisions that are
17 based on understanding of environmental consequences, and to take actions that protect, restore,
18 and enhance the environment” and to “insure that environmental information is available to
19 public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. §
20 1500.1(b)-(c). Where the government has acted prior to fulfilling its NEPA obligations, projects
21 authorized by government action must be suspended until NEPA’s requirements are met.

22 64. The EIS must “provide full and fair discussion of significant environmental
23 impacts and shall inform decision-makers and the public of the reasonable alternatives which
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1 would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.*
2 at § 1502.1. The alternatives analysis is considered to be the “heart” of an EIS. 40 C.F.R. §
3 1502.14. An EIS “should present the environmental impacts of the proposal and the alternatives
4 in comparative form, thus sharply defining the issues and providing a clear choice among options
5 by the decisionmaker and the public.” *Id.* NEPA requires the State Department to “rigorously
6 explore and objectively evaluate all reasonable alternatives,” including the “alternative of no
7 action,” and to “devote substantial treatment to each alternative ... so that reviewers may evaluate
8 their comparative merits.” *Id.*

9 65. An EIS must “specify the underlying purpose and need to which the agency is
10 responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13.
11 An agency must not define its project purpose and need so narrowly as to preclude consideration
12 of reasonable alternatives.

13 66. Pursuant to the CEQ regulations, decision-makers must address in a single EIS all
14 “connected,” “cumulative,” and “similar” actions. *Id.* § 1508.25(a). Actions are connected if
15 they: “(i) [a]utomatically trigger other actions which may require environmental impact
16 statements; (ii) [c]annot or will not proceed unless other actions are taken previously or
17 simultaneously; [or] (iii) [a]re interdependent parts of a larger action and depend on the larger
18 action for their justification.” *Id.* Cumulative actions are those which have “cumulatively
19 significant impacts and should therefore be discussed in the same impact statement.” *Id.* Similar
20 actions are those which have “similarities ... such as common timing or geography.” *Id.*

21 67. CEQ regulations also require that an EIS include, among other things: (i) a “full
22 and fair discussion” of the significance of all “direct,” “indirect,” and “cumulative” effects of the
23 action, 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c); and (ii) a discussion of “means to
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1 mitigate adverse environmental impact.” *Id.* § 1502.16(h). “Direct effects” are caused by the
2 action and occur at the same time and place. 40 C.F.R. § 1508.8(a). “Indirect effects” are
3 reasonably foreseeable effects caused by the action, but later in time or farther removed in
4 distance. *Id.* § 1508.8(b). These may include “growth inducing effects and other effects related
5 to induced changes in the pattern of land use, population density or growth rate, and related
6 effects on air and water and other natural systems, including ecosystems.” *Id.* A “cumulative
7 impact” is defined as the “impact on the environment which results from the incremental impact
8 of the action when added to other past, present, and reasonably foreseeable future actions,
9 regardless of what agency ... or person undertakes such other actions.” *Id.* § 1508.7. Cumulative
10 impacts “can result from individually minor but collectively significant actions taking place over
11 a period of time.” *Id.*

12 68. NEPA directs federal decision-makers to “recognize the worldwide and long-
13 range character of environmental problems.” 42 U.S.C. § 4332(2)(F).

14 69. An agency must first prepare a draft EIS that satisfies to the fullest extent possible
15 the final EIS requirements of 42 U.S.C. § 4332(2)(C). 40 C.F.R. § 1502.9(a). After preparing
16 the draft EIS and before preparing a final EIS, the agency must solicit comments from the public,
17 “affirmatively soliciting comments from those persons or organizations who may be interested or
18 affected.” *Id.* § 1503.1(a).

19 70. After the public comment period, an agency must prepare a final EIS based on its
20 assessment and consideration of the comments received from the public, as well as other relevant
21 Federal, State and local agencies, on the draft EIS. *Id.* § 1503.4(a). An agency must respond to
22 comments by such means as modifying alternatives; developing and evaluating new alternatives;
23 supplementing, improving, or modifying its analyses; making factual corrections; and/or
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1 explaining in detail why the comments do not require further response. *Id.* §§ 1503.4(a),
2 1502.9(b).

3 71. If there are significant new circumstances or information relevant to
4 environmental concerns and bearing on the proposed action or its impacts, the agency must
5 prepare supplements to the draft or final EIS. *Id.* § 1502.9(c).

6 **Regulation of International Tar Sands Crude Oil Pipelines**

7 72. The “foreign commerce clause” of the United States Constitution endows
8 Congress with exclusive and plenary authority to “regulate commerce with foreign nations.”
9 U.S. Const. art. I, § 8, cl. 3. The importation of tar sands crude oil from Canada falls within
10 Congress’s foreign commerce clause powers. Congress has not delegated its power to regulate
11 the importation of Canadian tar sands crude oil to the President, the Executive Branch, or any
12 agency of the Executive Branch. The President has no independent constitutional authority to
13 regulate the importation of Canadian tar sands crude by pipeline.

14 73. To the extent that Congress has made any delegation of its power to regulate
15 international tar sands crude oil pipelines, it is limited to specific grants of regulatory authority,
16 e.g.: i) delegation of authority to the Federal Energy Regulatory Commission to control the rates
17 and valuation of oil pipelines, *see* 42 U.S.C.A. § 7111 *et seq.*; ii) delegation of authority to the
18 Department of Transportation to establish federal pipeline safety regulations, *see* 49 U.S.C. §
19 60134 *et seq.*; and (iii) delegation of authority to the Pipeline and Hazardous Materials Safety
20 Administration in the Pipeline Inspection, Protection, Enforcement, and Safety Act, 49 U.S.C. §
21 60134 *et seq.* These grants of authority do not extend to the State Department and do not
22 delegate the Congress’s power to permit a pipeline for the importation of tar sands crude oil from
23 Canada.

1 evaluate in a single EIS. The Alberta Clipper and diluent pipelines will be constructed
2 simultaneously and in the same corridor and are thus similar actions pursuant to 40 C.F.R. §
3 1508.25(a)(3). Without an increased supply of diluent to facilitate transportation of viscous tar
4 sands crude, the Alberta Clipper pipeline would not be able to transport the 450,000 bpd of crude
5 for which it is designed. Because the Alberta Clipper and diluent pipelines are interdependent
6 parts of a larger action and when viewed together have cumulatively significant impacts, they
7 meet the definition of connected and cumulated actions set forth in 40 C.F.R. § 1508.25(a)(1)
8 and (2).

9 78. Similarly, Enbridge refers to the LSr pipeline as the “capacity replacement
10 project” because its primary purpose is to replace the transport capacity of Line 13 which will be
11 reversed and diverted to transport diluent as part of the diluent pipeline. Because the new LSr
12 pipeline is an interdependent part of the larger expansion project and depends on the diluent
13 pipeline and the Alberta Clipper Project for its justification it meets the definition of a connected
14 action under 40 C.F.R. § 1508.25(a)(1).

15 79. The State Department’s failure to assess the full range of connected, cumulative
16 and similar actions in the Alberta Clipper EIS violated and continues to violate section 102(2)(C)
17 of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA’s implementing regulations including 40 C.F.R. §
18 1508.25(a).

19 80. Accordingly, i) the State Department’s issuance of a Presidential permit for the
20 Alberta Clipper project; and ii) the Army Corps’ issuance of permits for the Alberta Clipper and
21 Southern Lights projects pursuant to section 404 of the Clean Water Act and section 10 of the
22 Rivers and Harbors Act, were arbitrary, capricious, an abuse of discretion, not in accordance
23 with law, and without observance of procedure required by law within the meaning of the APA,
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1 5 U.S.C. § 706(2).

2 **SECOND CLAIM FOR RELIEF**
3 **Violation of NEPA and the APA:**
4 **Failure to Adequately Analyze Indirect and Cumulative Impacts**

5 81. Plaintiffs incorporate and re-allege, as if fully set forth herein, all allegations
6 contained in the preceding paragraphs.

7 82. Defendants failed to include in the EIS for the Alberta Clipper pipeline, a full and
8 fair discussion of the significant indirect environmental effects of the action it approved, in
9 violation of NEPA.

10 83. The environmental review fails to analyze the reasonably foreseeable impacts in
11 the United States of increased exploitation and development of Canadian tar sands due to the
12 pipeline infrastructure expansion. These impacts include the climate impacts resulting from
13 increased emissions of greenhouse gases during tar sands extraction and upgrading and from vast
14 deforestation in the Canadian boreal forest as well as impacts on migratory species.

15 84. The EIS does not adequately address global warming impacts or the mitigation
16 thereof. The final EIS for the Alberta Clipper pipeline does not account for: a) the upstream
17 emissions generated by the increased tar sands development induced by increased U.S. transport
18 and refining capacity; b) refinery upgrades and expansions necessary to accommodate the
19 increased volumes and weight of crude oil delivered by the pipelines; c) the reasonably
20 foreseeable future expansion of the Alberta Clipper pipeline capacity from 450,000 to 800,000
21 bpd; d) the downstream use of the oil; or e) the global warming impacts resulting from the
22 connected diluent pipeline. Because it omits these significant indirect sources of greenhouse
23 emissions, the State Department's treatment of global warming impacts is inadequate.

24 85. Defendants failed to include in the EIS for the Alberta Clipper pipeline, a full and
25

1 fair discussion of the significant cumulative environmental effects of the action it approved, in
2 violation of NEPA.

3 86. The EIS does not assess the cumulatively significant impacts of a) construction
4 and operation of the 188-mile segment of the Southern Lights diluent pipeline that will be
5 constructed between Clearbrook Minnesota and Superior Wisconsin at the same time and in the
6 same right of way as the Alberta Clipper pipeline; b) construction and operation of the remaining
7 490 miles of the Southern Lights diluent pipeline from Superior to Manhattan, Illinois; c) the
8 impacts, including increased greenhouse gas emissions, of making a large source of diluent
9 available for increased exploitation of the tar sands; or d) construction and operation of the LSr
10 pipeline.

11 87. The EIS also does not consider the cumulatively significant impacts of the Alberta
12 Clipper pipeline when added to the Keystone and Keystone XL pipelines which will together
13 transport approximately two million bpd of tar sands crude oil from Canada for refining in the
14 United States. This large increase in the capacity to import heavy bitumen crude for processing
15 in the United States will boost exploitation and development of Canadian tar sands which have
16 cumulative impacts on the climate and migratory species in the United States. The EIS also did
17 not consider the cumulative impacts on regional air and water quality, and the increase in
18 greenhouse gas emissions resulting from refining and using tar sands crude oil delivered by the
19 Alberta Clipper pipeline in addition to the crude delivered by the Keystone and Keystone XL
20 pipelines.

21 88. The State Department's failure to consider and evaluate the indirect and
22 cumulative impacts of increased exploitation and development of the Canadian tar sands, and
23 failure to evaluate the project's cumulative climate impacts violated and continues to violate
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1 section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA’s implementing regulations,
2 including the requirements that agencies take a “hard look” at the impacts of their actions, and
3 that they consider all direct, indirect and cumulative impacts. 40 C.F.R. § 1508.7.

4 89. Accordingly, i) the State Department’s issuance of a Presidential permit for the
5 Alberta Clipper project; and ii) the Army Corps’ issuance of permits for the Alberta Clipper and
6 Southern Lights projects pursuant to section 404 of the Clean Water Act and section 10 of the
7 Rivers and Harbors Act, prior to fulfilling NEPA’s requirements are arbitrary, capricious, an
8 abuse of discretion, not in accordance with law, and without observance of procedure required by
9 law within the meaning of the APA, 5 U.S.C. § 706(2).

10 **THIRD CLAIM FOR RELIEF**
11 **Violation of NEPA and the APA:**
12 **Failure to Adequately Evaluate Risks, Impacts, and Mitigation Measures**
13 **Associated with Spills and Operational Leaks**

14 90. Plaintiffs incorporate and re-allege, as if fully set forth herein, all allegations
15 contained in the preceding paragraphs.

16 91. The State Department’s environmental review has not adequately addressed the
17 impact that spills and operational leaks would have on the environment, especially soil and water
18 resources or on human health. The State Department states that it relies on a future review
19 process by the Pipeline and Hazardous Materials Safety Administration (PHMSA) within the
20 Department of Transportation. However PHMSA has not and does not intent to conduct any
21 separate environmental review for these pipelines.

22 92. In particular, because the State Department failed to consider the connected
23 Southern Lights diluent pipeline, it has not provided information about or evaluated the risks,
24 impacts, or available measures to mitigate leaks and spills from the diluent pipeline. Diluent has
25 not previously been transported through Minnesota’s water-rich environment. The State

1 Department's environmental review fails to identify the specific refined petroleum product that
2 will be used as diluent and offers the public and public officials no understanding of the
3 environmental consequences from leaks and spills of diluent along the Southern Lights diluent
4 pipeline.

5 93. The State Department's failure to adequately evaluate the risks and impacts of
6 spills and operational pipeline leaks, and failure to consider measures to mitigate such risks and
7 impacts violated and continues to violate section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C),
8 and NEPA's implementing regulations, including the requirements that agencies take a "hard
9 look" at the impacts of their actions, and that they consider the direct, indirect and cumulative
10 impacts of their actions. 40 C.F.R. § 1508.7.

11 94. Accordingly, i) the State Department's issuance of a Presidential permit for the
12 Alberta Clipper pipeline; and ii) the Army Corps' issuance of permits for the Alberta Clipper and
13 Southern Lights projects pursuant to section 404 of the Clean Water Act and section 10 of the
14 Rivers and Harbors Act, prior to fulfilling NEPA's requirements are arbitrary, capricious, an
15 abuse of discretion, not in accordance with law, and without observance of procedure required by
16 law within the meaning of the APA, 5 U.S.C. § 706(2).

17 **FOURTH CLAIM FOR RELIEF**
18 **Violation of NEPA and the APA:**
19 **Failure to Adequately Evaluate the No Action Alternative**

20 95. Plaintiffs incorporate and re-allege, as if fully set forth herein, all allegations
21 contained in the preceding paragraphs.

22 96. The State Department failed to take a hard look at the no action alternative and
23 instead rejected it based on conclusory assertions that that alternative does not satisfy the
24 project's purpose and need.

1 97. The purpose for the proposal as stated by Enbridge – meeting growing demand
2 for petroleum products – is based on inaccurate assumptions about future demand for heavy tar
3 sands crude. Current forecasts from the U.S. Energy Information Administration (EIA) show
4 that the demand for crude oil in the U.S. is flat and that the need for net imports will decline
5 dramatically over the next two decades. Adding to that the likelihood of state and federal laws to
6 confront climate change and reduce U.S. dependence on fossil fuels, it is clear that there is no
7 objective or reliable demand forecast that would support the statement of purpose and need in the
8 EIS.

9 98. Without an adequate assessment of the purpose and need for the project, the entire
10 EIS is deficient – the State Department cannot take a “hard look” at alternatives and balance
11 costs and benefits of the project as it considers the national interest unless it has first established
12 that the need for the project as proposed is accurate. The failure to adequately assess purpose
13 and need has led to the State Department’s erroneous summary dismissal of the “no action”
14 alternative without adequate justification.

15 99. Even if the perceived future energy shortfall in the United States were based on
16 reliable forecasts, the construction of these new pipelines is not the only alternative for filling
17 this perceived need. Other alternatives include energy efficiency, renewable energy, clean
18 technologies, and demand-side management. NEPA regulations specifically require
19 consideration of energy requirements and conservation in environmental review documents. 40
20 C.F.R § 1502.16(e). The EIS does not adequately address alternatives to expanding U.S.
21 capacity to import tar sands oil in considering the no action alternative.

22 100. The State Department’s EIS for the Alberta Clipper also fails to adequately
23 consider the enormous expansion in transport capacity that has already been added to the
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1 pipeline systems that serve U.S. refineries, and fails to address this additional capacity
2 availability in evaluating the no action alternative.

3 101. Defendants’ failure to take a hard look at the stated purpose and need for the
4 proposed expansion and to adequately evaluate all reasonable alternatives including the no action
5 alternative violated and continues to violate section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C),
6 and NEPA’s implementing regulations, including the requirement to “rigorously explore and
7 objectively evaluate all reasonable alternatives,” including the “alternative of no action.” 40
8 C.F.R. § 1502.14.

9 102. Accordingly, i) the State Department’s issuance of a Presidential permit for the
10 Alberta Clipper project; and ii) the Army Corps’ issuance of permits for the Alberta Clipper and
11 Southern Lights projects pursuant to section 404 of the Clean Water Act and section 10 of the
12 Rivers and Harbors Act, prior to fulfilling NEPA’s requirements are arbitrary, capricious, an
13 abuse of discretion, not in accordance with law, and without observance of procedure required by
14 law within the meaning of the APA, 5 U.S.C. § 706(2).

15 **FIFTH CLAIM FOR RELIEF**
16 **Violation of NEPA and the APA:**
17 **Failure to Adequately Evaluate the Diluent**
18 **Project in the LSr Environmental Assessment**

19 103. Plaintiffs incorporate and re-allege, as if fully set forth herein, all allegations
20 contained in the preceding paragraphs.

21 104. The State Department prepared a separate EA for the LSr pipeline. This resulted
22 in the State Department’s Finding of No Significant Impact.

23 105. The State Department’s EA for the LSr pipeline did not analyze the diluent
24 pipeline or the Alberta Clipper pipeline, even though they are connected, cumulative and/or
25 similar actions.

1 706(2)(A)(B)(C);

2 B. Declare that the State Department's approval of the Alberta Clipper pipeline and
3 the associated Record of Decision and final Environmental Impact Statement failed to comply
4 with the National Environmental Policy Act and its implementing regulations. 42 U.S.C. §
5 4332(2)(C); 40 C.F.R. §§ 1500-1508;

6 C. Declare that the Army Corps's issuance of permits for the Alberta Clipper and
7 Southern Lights project pursuant to section 404 of the Clean Water Act and section 10 of the
8 Rivers and Harbors Act, and the associated Record of Decision failed to comply with the
9 National Environmental Policy Act and its implementing regulations. 42 U.S.C. § 4332(2)(C);
10 40 C.F.R. §§ 1500-1508;

11 D. Declare that the State Department's approval of the LSr pipeline and the
12 associated final Environmental Assessment and Finding of No Significant Impact failed to
13 comply with the National Environmental Policy Act and its implementing regulations. 42 U.S.C.
14 § 4332(2)(C); 40 C.F.R. §§ 1500-1508;

15 E. Vacate the Presidential permit for the Alberta Clipper;

16 F. Vacate the Army Corps's permits issued for the Alberta Clipper and Southern
17 Lights projects pursuant to section 404 of the Clean Water Act and section 10 of the Rivers and
18 Harbors Act;

19 G. Enjoin any activity in furtherance of construction or operation of the Alberta
20 Clipper and Southern Lights projects;

21 H. Award Plaintiffs their costs of litigation, including reasonable attorney and expert
22 witness fees;

23 I. Grant Plaintiffs such further and additional relief as the Court may deem just and
24

1 proper.

2 Respectfully submitted,

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4 Dated: September 2, 2009

5

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