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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Federal Defendants, and TRANSCANADA CORPORATION, *et al.*, Defendant-Intervenors.	CV 17-29-GF-BMM **DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF STAY PENDING APPEAL**

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MEMORANDUM IN SUPPORT OF STAY PENDING APPEAL

Defendant-Intervenors TransCanada Corporation and TransCanada Keystone Pipeline LP (Collectively, "TransCanada") respectfully submit this memorandum in support of its motion pursuant to Rule 62(c) to stay the Court's November 8, 2018 Order (ECF 218) and November 15, 2018 Order (ECF 219) granting summary judgment to Plaintiffs and enjoining any activity in furtherance of construction or operation of the Keystone XL Pipeline Project (Keystone XL), as well as the Court's December 7, 2018 Supplemental Order Regarding Permanent Injunction (ECF 232) that prohibited TransCanada from conducting certain preconstruction activities while TransCanada pursues an appeal. Absent a stay of the permanent injunction, TransCanada will continue to suffer irreparable harm. Additionally, the current injunction impedes, among other things, the United States' interest in energy security and a strong bilateral relationship with Canada. A stay is warranted because the Court erred in holding that the issuance of a Presidential Permit is subject to review under the Administrative Procedure Act (APA),[1] finding that the U.S. Department of State (State) failed to comply with the National Environmental Policy Act (NEPA) and the Endangered Species Act

[1] *See* November 22, 2017 Order (ECF 99) denying TransCanada's and Federal Defendants' motion to dismiss.

(ESA),[2] and in denying TransCanada's motion to amend the Court's order enjoining preconstruction activities.[3] A stay of the permanent injunction best serves the public interest and will not substantially injure Plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

Full procedural and factual backgrounds are set forth in the Court's November 22, 2017 Order on Federal Defendants' and TransCanada's Motion to Dismiss for Lack of Jurisdiction (ECF 99), August 15, 2018 Partial Order on Summary Judgment Regarding NEPA Compliance (ECF 210), and November 8, 2018 Order on Summary Judgment (ECF 218). Accordingly, TransCanada provides this condensed synopsis of relevant factual and procedural information.

In March 2017, State issued, on behalf of the President, a Record of Decision/National Interest Determination ("ROD/NID") and a Presidential Permit that authorized TransCanada to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana. (ECF 171 at p. 15). Plaintiffs Northern Plains Resource Council and Indigenous Environmental Network filed suit shortly thereafter.. Federal Defendants and TransCanada moved to dismiss the complaints because they

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[2] *See* November 8, 2018 Order (ECF 218) granting partial summary judgment to Plaintiffs.

[3] *See* December 7, 2018 Order (ECF 232).

challenged Presidential action, which was not subject to NEPA or review under the Administrative Procedure Act (APA). The Court denied the motions to dismiss on November 22, 2017 (ECF 99), and proceeded to resolve the merits of the complaints on cross-motions for summary judgment.

On August 15, 2018 (ECF 210), the Court granted partial summary judgment to Plaintiffs, and ordered State to supplement its NEPA review with an analysis of Keystone XL's alternative route through Nebraska. That review is ongoing. Then, on November 8, 2018, the Court addressed the remaining claims, ruling for Plaintiffs on some of their claims (ECF 218) and ordering State to supplement its NEPA review and ESA analysis with an analysis of additional information that post-dated the 2014 final supplemental environmental impact statement (FSEIS). The Court not only vacated the ROD/NID, but it also permanently enjoined Federal Defendants and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities" until State completes the supplemental review. Nov. 8 Order at 54 (ECF 218).

TransCanada moved the Court to clarify or modify the scope of the injunction to permit TransCanada to continue with a number of preconstruction activities that were outside the scope of the vacated Presidential Permit. *See* Motion (ECF 221). The Court permitted certain activities, but continued to enjoin

preconstruction activities such as the preparation of off-right-of-way storage yards and worker camps, as well as patrolling the right-of-way to discourage migratory bird nesting. *See* Supp. Order Regarding Permanent Injunction (ECF 232). On December 21, 2018, TransCanada filed a notice of appeal. *See* Notice of Appeal (ECF 232).

LEGAL STANDARD

The Supreme Court has laid out a four-factor test for granting a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

ARGUMENT

I. TransCanada Is Likely To Succeed On The Merits Of Its Appeal

A. State's Decision To Issue The Presidential Permit Is Not Subject To Review Under The APA or ESA

TransCanada is likely to succeed in its appeal of this Court's decision that issuance of the Presidential Permit constitutes agency action subject to review

under the APA or ESA. Nov. 22, 2017 Order at 12-14, 27-30 (ECF 99); Nov. 8 Order at 52 (ECF 218).

i. APA

Plaintiffs rely on the APA for their cause of action and the waiver of sovereign immunity necessary to sue the federal government, but the APA does not authorize judicial review of *presidential* action. *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994). And, in deciding to issue the Presidential Permit at issue here, State acted pursuant to an express delegation of the *President's* inherent authority over foreign affairs. Respectfully, this Court's reasons for concluding that issuance of the Presidential Permit was nevertheless an agency, rather than presidential, decision are mistaken.

It is undisputed that State has no independent statutory authority to permit the construction, operation, and maintenance of a cross-border pipeline. Its authority over such activities derives entirely from the President's inherent authority to manage foreign relations, and is conferred—and controlled—by an express delegation from him. Indeed, as indicated in Executive Order 11423 and Executive Order 13337, the authority for issuing Presidential Permits for such facilities exists "by virtue of the authority vested in [the President] as President of the United States and Commander in Chief of the Armed Forces of the United States...." 33 Fed. Reg. 11741 (Aug. 20, 1968); EO13337 (April 30, 2004).

Accordingly, because the authority to issue a Presidential Permit is fundamentally an exercise of presidential power, State's exercise of that authority pursuant to an express delegation from the President is not "agency action" reviewable under the APA, as three courts have squarely held. *See NRDC v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F.Supp.2d 1071 (D.S.D 2009); *White Earth Nation v. Kerry*, No. 14-4726, 2015 WL 8483278 (D. Minn. Dec. 9, 2015). *See also Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 101 (D.D.C. 2016) (issuance of permit for international bridge not reviewable under APA when State acted pursuant to a delegation of the President's statutory authority), *aff'd*, 883 F.3d 895 (D.C. Cir. 2018).

In reaching a contrary conclusion, this Court relied on State's 2008 statements that issuance of the Presidential Permit would constitute a "'major federal action'" and that it had a "duty to prepare an EIS." ECF 99 at 8. "The logical conclusion," this Court stated, "is that the State Department intended for the publication of the ROD/NID and the issuance of the accompanying Presidential Permit to be reviewable as final agency action." *Id.* This conclusion is flawed for several related reasons.

First, State's "intent" is legally irrelevant: it cannot unilaterally alter the nature of a presidential decision it has been tasked with making. Again, because

State has no authority to issue a permit for an international pipeline except by virtue of a delegation from the President, the issuance of such a permit is, by its very nature, an exercise of presidential, not agency, power. An agency subject to the control of the President has no ability to convert a "presidential" act into an "agency" act—either by statements or regulations it publishes in the Federal Register or by any other means.[4]

Second, "Congress alone has power to waive or qualify immunity," *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20 (1926), and "limitations and conditions upon which the Government consents to be sued must be strictly observed." *Soriano v. United States*, 352 U.S. 270, 276 (1957). In the APA, Congress chose not to waive sovereign immunity with respect to presidential decisions. It is thus clear that, if the President himself had issued TransCanada a Presidential Permit without considering *any* environmental impacts, his decision would not have been subject to review under the APA. It is equally clear that the President can delegate that decision to State. In exercising this delegated presidential power, State cannot expand the scope of the APA's waiver of sovereign immunity through any actions it takes or statements it makes. The scope of the waiver is for Congress, not State, to determine and control.

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[4] Similarly, the fact that the decision is "final" and that "legal consequences will flow" from it, ECF 99 at 9, does not alter its *presidential* character.

This Court expressed concern that an agency "could shield itself from judicial review under the APA for any action 'by arguing that it was "Presidential," no matter how far removed from the decision the President actually was.'" ECF 99 at 14 (quoting *Protect Our Cmtys. Found. v. Chu*, No. 12CV3062, 2014 WL 1289444 at *6 (S.D. Cal. Mar. 27, 2014)). But here, State is acting pursuant to a *direct* presidential delegation embodied in two Executive Orders and a Presidential Memorandum. Recognizing the presidential nature of the decision State has made here creates no risk that the agency will be able to shield from review other decisions it makes when exercising its own statutory authority.

This Court also observed that "[n]o agency possesses discretion whether to comply with procedural requirements such as NEPA." ECF 99 at 14. Here, however, State is exercising a presidential power and making a decision on behalf of the President. The authoritative NEPA regulations promulgated by the CEQ expressly provide that the "federal agenc[ies]" that must comply with NEPA do *not* include the President. *See* 40 C.F.R. § 1508.12.

Moreover, even if Congress intended NEPA's procedural requirements to govern agencies even when they exercise delegated presidential authority, it does not follow that the APA's judicial review provisions apply. NEPA itself does not provide for judicial review. And insofar as its design "guarantees that the relevant information will be made available to the larger audience that may also play a role

in the decisionmaking process," *Chu*, 2014 WL WL 1289444 at *5, that larger audience here is the President—it is his decision whether to grant the necessary cross-border permit, and he is ultimately politically accountable for that decision. In these circumstances, therefore, it is up to the President to determine whether the environmental information the agency has developed is an adequate input into the "national interest" determination he has delegated to the agency.

This Court's contrary conclusion implicates the same separation of powers concerns that led the Supreme Court to rule that the APA does not authorize judicial review of presidential decisions. Under this Court's reasoning—and the reasoning in *Chu* and *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010)—when the President makes a decision (a) that he is constitutionally authorized to make and (b) that will significantly affect the environment, he *cannot* delegate that decision to any federal agency *unless* he waives the protections from judicial review that Congress afforded his decisions in the APA and subjects those decisions to injunctive relief. That is an extraordinary burden to place on the President, and there is no "express statement" in the APA or NEPA, *Franklin*, 505 U.S. at 801, demonstrating that Congress chose to impose it. In the absence of such an express statement, courts cannot effectively put the President to such a choice based on their interpretations of how NEPA and the APA interact.

Finally, this Court also erred in ruling that State's decision constituted agency, rather than, presidential action because the President "waived … any authority he retained to make the final decision regarding issuance of the Presidential Permit." ECF 99 at 12. The waiver provision "is merely a device for managing the President's decision-making process." *NRDC*, 658 F. Supp. 2d at 111. Given the extensive prior history surrounding TransCanada's efforts to obtain a Presidential Permit, the President was free to expedite the decision-making process by dispensing with further review. An action does not cease to be presidential because the President himself does not make the final decision. Instead, under *Franklin*, the relevant inquiry "is whether 'the President's authority to direct the [agency] in making policy judgments' is curtailed in any way or whether the President is 'required to adhere to the policy decisions' of the agency." *Id.* (quoting *Franklin*, 505 U.S. at 799). Here, no statute curtails the President's authority. Nor does the "waiver" provision *require* the President to adhere to a Department decision he does not like: he is free to issue a new Presidential Memorandum that eliminates the "waiver" provision and overrides any decision State makes.

ii. ESA

Plaintiffs' claim under the citizen-suit provision of the ESA that State violated the consultation requirement of Section 7 of the ESA fails for the same

reason as their NEPA claim. The ESA citizen-suit provision authorizes a claim against "any person, including the United States and any other governmental instrumentality or agency," 16 U.S.C. § 1540(g)(1)(A), with no mention of the President; and Section 7 of the ESA applies expressly to "Federal agenc[ies]," *id.* § 1536(a). As discussed above, the President is not a federal agency, and the rationale of *Franklin* makes clear that, like an APA claim, a claim against the President under the ESA alleging a violation of Section 7 of the ESA is not subject to judicial review. Since the Presidential Permit issued by State constituted action of the President, it is not subject to judicial review under the ESA.

B. Even If The APA Could Apply To State's Decision To Issue A Presidential Permit, That Decision Was Committed To The Agency's Discretion And Thus Is Not Subject To Judicial Review

The APA also does not apply because a national interest determination is committed to agency discretion and thus exempt from review. *See* 5 U.S.C. § 701(a)(2); *Detroit Int'l Bridge*,189 F. Supp. 2d at 106 ("Given the broad discretion afforded to . . . State in E.O. 11423, this Court cannot review the issuance of the NITC/DRIC Presidential Permit under the APA's arbitrary and capricious standard.").

This Court's conclusion that NEPA provides the relevant standard, ECF 99 at 16, is mistaken. The critical decision State has made in this case is to issue a Presidential Permit; it is that decision "by which rights or obligations have been

determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). And the standard that governs issuance of a Presidential Permit, as set forth in the governing Executive Order, is whether it "would serve *the national interest*." E.O. 11423 (emphasis added).

Because the President "did not define the circumstances in which the construction of an international [pipeline] would be in the 'national interest' . . . [and] chose to rely on the Secretary of State's 'judgment,'" there is "simply no law to apply" on review. *Detroit Int'l Bridge*, 189 F. Supp. 2d at 105-06. *See also Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975) ("[s]ince presidential action in the field of foreign affairs is committed to presidential discretion by law … it follows that the APA does not apply to" agency's approval, pursuant to delegation of presidential authority, of regulations governing international fishing rights); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 903 (D.C. Cir. 2017) ("[i]n the foreign affairs arena, the court lacks a standard to review the agency action"). Indeed, a national interest determination for a transboundary pipeline is a judgment on a question of foreign policy and national interest that is not fit for judicial involvement. *See id.*; *see also Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) (no APA review where court "would necessarily be 'second guessing' not only the Executive's determinations regarding the military value of

the eight vessels but also its judgments on questions of foreign policy and national interest. These are not subjects fit for judicial involvement")

Given the existing precedent where courts found they lacked the ability to review the issuance of a Presidential Permit and other purely discretionary determinations, TransCanada is likely to succeed on appeal on this issue, resulting in the dismissal of Plaintiffs' complaints.

C. NEPA Supplementation Is Not Warranted

The Court erred in holding that "new information" related to Keystone XL requires State to supplement its NEPA analysis. In determining whether an agency must supplement its NEPA analysis, a court must consider three questions: (1) is there remaining federal agency action, (2) is there "new" information, and (3) does the "new information provide[] a *seriously* different picture of the environmental landscape." *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (citation omitted). A court must be satisfied that all three questions are answered in the affirmative. If an agency has completed its action, then there is no basis to require additional analysis. If information is not new and significant, then it is irrelevant because NEPA does not obligate agencies to supplement their environmental reviews "every time new information comes to light after the EIS is finalized." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373-74 (1989); *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d

1147, 1155 (9th Cir. 2008) (a supplemental EIS was not required because there were "no new impacts that were *significantly* different than those already considered" (emphasis added)); 40 C.F.R. § 1502.9(c)(1)(ii). The Court misapplied these standards in requiring supplementation.

i. Mainline Alternative Route

The Court held that State must prepare a "post-decision supplemental EIS [environmental impact statement]" on the Mainline Alternative route in Nebraska. Aug. 15 Order at 9-10 (ECF 210). In so holding, the Court committed legal error because State had completed its decisionmaking process before the State of Nebraska changed Keystone XL's route through the state.

The Court, relying on *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989), determined that NEPA obligates federal agencies to take a hard look at the potential impacts of an action "even after a proposal has received *initial* approval." Order at 9 (emphasis added). From *Marsh*, the Court constructed its own erroneous legal standard, concluding that NEPA's duty to supplement exists "when a project has not been fully constructed or completed." Order at 9. But *Marsh* instructs that the duty to supplement a NEPA analysis exists only where "there remains "major Federal actio[n]" to occur," in other words where there is a "still pending decisionmaking process." 490 U.S. at 374.

The Court improperly analogized *Marsh* to the existing case by suggesting the ongoing federal action there was similar to State's decisionmaking process here. In *Marsh*, however, the federal agency did not dispute that federal action remained because the agency was the entity constructing the project. *Id.* at 373-75. Here, State disputed that it had any remaining federal action. As indicated during summary judgment, State had issued the Presidential Permit before Nebraska altered the pipeline. The completion of the ROD/NID concluded State's action and terminated any obligation by State to supplement the NEPA analysis. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) ([A]gency's duty to supplement its NEPA analysis "is necessary only if there remains major Federal actio[n] to occur." (citation omitted)). The Court glossed over this fact. This was error.

ii. Oil Markets

The Court erred in finding that ongoing changes in oil markets necessitated a revised NEPA analysis. In its decision, the Court concluded that low oil prices – those below the range that the SEIS considered – were material to "the Department's consideration of Keystone's impact on tar sands production." Nov. 8, 2018 Order at 18. The Court failed to identify how low oil prices correlated to significantly different environmental impacts. Instead, the Court noted only that lower oil prices could affect the outlook for oil production. *Id.* But the FSEIS

already indicated that low oil prices could result in less oil production. DOSKXLDMT0005895-96. Because reduced oil production or lower oil prices would not produce significantly different environmental impacts from those already analyzed, these facts do not require State to update its NEPA analysis.

iii. Oil Spill Data

The Court also failed to address how new oil spill data would alter State's analysis of the potential for Keystone XL to experience a release. The Court indicated that the pipeline spills postdating the FSEIS "qualify as significant," and opined that the "Department would have evaluated the spills in the 2014 SEIS had the information been available." Nov. 8 Order at 30 (ECF 218). Whether an agency would have evaluated information had it been available is not the proper legal standard for evaluating new information under NEPA. Instead, the Court had to find that new spill data indicates that Keystone XL would impact the environment in a manner that State did not analyze. No such finding is possible on the record here.

The Court also found that State acted upon incomplete information by failing to consider the National Academy of Sciences (NAS) study on dilbit. Nov. 8 Order at 29-31 (ECF 218). This conclusion is not supported by the record. The FSEIS disclosed the fact that dilbit reacts differently from other crude oils when released into water and the ROD/NID addressed the NAS study. State disclosed

that dilbit is less biodegradable, less buoyant, and can be more difficult to clean up than other crude oils. DOSKXLDMT6613-16. State also addressed recommendations of the NAS study and found TransCanada's mitigation measures sufficient to mitigate the issues identified in the study. DOSKXLDMT02507 ("the measures that Keystone has already committed to-including commitments relating to development of an ERP and other mitigation plans that account for new information adequately address the new challenges, training needs, and communication needs identified in the NAS 2016 study."). The Court failed to identify any specific element of the NAS study that was overlooked; it claimed only that the study itself needed to be addressed. Order at 30. State's hard look, however, included the obligation to update response planning as more information specific to dilbit develops. In the ROD/NID, State explained that various mitigation requirements were sufficient to address "new" knowledge regarding dilbit. Accordingly, the Court's conclusion that the absence of the NAS study in the 2014 FSEIS requires NEPA supplementation is not supported by the facts in the record.

iv. GREET Model

The Court erred in concluding that State must supplement its NEPA analysis with a revised calculation of potential GHG emissions using the GREET model. In its decision, the Court offered no analysis suggesting the potential impacts of

Keystone XL would be significantly different if State used the GREET model; it stated only that State must use it. That is not what the law requires.

The FSEIS conservatively analyzed potential GHG impacts and calculated the total amount of GHG emissions attributable to the project. DOSKXLDMT07199-200, 7231.[5] Even at the high end of the range, the estimated emissions are a miniscule percentage of the overall amount of GHG emissions in the United States – State estimated GHG emissions from pipeline operation to be 1.44 million metric tons per year compared to 6,821.2 million metric tons of annual GHG emissions in the United States (0.021%) or 30,313 million metric tons globally (0.0048%). FSEIS at 4.15-79. A 5 to 20 percent increase in the potential emissions of the project would not significantly change the amount of GHG emissions in either the United States or globally – at the upper end it changes domestic GHG emissions by a few thousandths of a percent. This is consistent with State's conclusion that the "amount to which [climate change] effects are attributable to any single man-made project is very small." FSEIS at 4.14-2. An increase in GHG emissions that small would not alter the analysis of potential

[5] The FSEIS indicates that the GHG emissions attributable to Keystone XL should not include the full lifecycle emissions associated with the crude extraction and combustion because a midstream project on its own is unlikely to increase production or downstream use. DOSKXLDMT02502. The Court did not conclude that the GHG emissions associated with upstream production or downstream combustion should be attributed to Keystone XL. Nov. 8 Order at 19-23.

environmental impacts in a manner significant enough to merit NEPA supplementation.

D. State's Cumulative Impacts Analysis Complied with NEPA

The Court erred in holding that State should have considered the cumulative impacts from the Alberta Clipper pipeline expansion project in the Keystone XL NEPA analysis. The Court reasoned that State was unaware of the cumulative impacts of both projects notwithstanding the fact that it disclosed in the 2017 EIS for the Alberta Clipper the potential cumulative GHG emissions of both pipelines. This is illogical.

An agency can satisfy NEPA by addressing the cumulative impacts of one project in a later project's EIS. *See North Carolina v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992); *Citizens Concerned about Jet Noise, Inc. v. Dalton*, 217 F.3d 838 (4th Cir. 2000); *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010 (9th Cir. 2011). State followed this approach in analyzing the cumulative impacts of Keystone XL and the Alberta Clipper pipeline expansion. In the Alberta Clipper EIS, which was published after the Keystone XL FSEIS, State analyzed the cumulative impacts of both pipelines.

With a full understanding of the potential cumulative impacts, State granted a permit for the Alberta Clipper project. Despite this action and the fact that State determined in the ROD/NID that the potential GHG emissions of Keystone XL

were not a basis to deny a permit, the Court held that State must to supplement the Keystone XL FSEIS to address the cumulative GHG impacts of both projects. Order at 21. State already performed this exact analysis in the Alberta Clipper EIS, however. NEPA does not mandate needless duplication. Moreover, State's performed its GHG impacts analysis based on a cumulative impacts approach because a single project in isolation has little, if any, impact on climate change. *See* FSEIS Sec. 4.14.4. Accordingly, the Court erred in ordering State to consider the cumulative impacts of both projects again.

E. State Properly Analyzed Impacts to Cultural Resources

The Court erroneously held that State's failure to conduct cultural resources surveys on 1,000 acres of land violates NEPA. In reaching this decision, the Court completely overlooked the Programmatic Agreement governing the project and TransCanada's obligation to complete cultural surveys prior to any construction activity. NEPA's "hard look" requirement does not preclude an agency from relying on a Programmatic Agreement as part of its review of an action to assess potential impacts of a project prior to completing cultural resources surveys. *See Colo. River Indian Tribes v. Dep't of Interior*, No. ED CV14-02504 JAK, 2015 WL 12661945, at *19 (C.D. Cal. June 11, 2015); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1234 (9th Cir. 2014); *cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) ("[I]t would be inconsistent

with NEPA[ ] ... to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."). Here, State was able to complete a review of potential impacts to cultural resources because the Programmatic Agreement imposed a variety of mitigation measures that would prevent adverse impacts to cultural resources. Numerous federal agencies follow the same procedure when analyzing the potential impacts of major infrastructure projects. *See HonoluluTraffic.com*, 742 F.3d at 1234; *City of Alexandria v. Slater*, 198 F.3d 862, 873 (D.C. Cir. 1999). The Court's decision that an agency cannot satisfy the hard look requirement until it completes all resource surveys runs contrary to the weight of authority on this issue and is likely to be overturned on appeal.[6]

F. State Adequately Explained Its Policy Change on GHG Impacts

In its analysis regarding the weight State afforded to GHG impacts, the Court erred in two respects. The Court wrongly held that State was required to justify its policy change regarding GHG impacts and wrongly concluded that State disregarded prior factual findings.

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[6] In its Order, the Court relied on an unrelated Ninth Circuit case faulting the Forest Service for using incorrect data in analyzing impacts to elk. Nov. 8 Order at 27 (citing *Native Ecosystems Council v. U.S. Forest Serv., an Agency of U.S. Dept. of Agric.*, 418 F.3d 953, 965 (9th Cir. 2005)). Here, however, there is no question whether State's data on cultural resource impacts is correct.

The APA does not authorize review of a NID because it is a purely discretionary decision. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017). Even assuming that a policy change regarding a NID is reviewable under the APA, State acknowledged that the underlying facts regarding Keystone XL's GHG emissions had not changed. DOSKXLDMT0002499-2502, 2518. Contrary to this Court's ruling, State did not reject these facts. Instead, it accepted these facts and then concluded that US leadership on climate change was no longer needed because other countries had announced intentions to address climate change issues. DOSKXLDMT0002518. Additionally, State prioritized energy security, economic development, and infrastructure policies over climate change concerns. *Id*. This ROD/NID was a policy change, not a refusal to accept facts found by the earlier administration. State's shift in priorities was explained in and fully supported by the ROD/NID. The Court failed to indicate how this explanation fell short of any legal requirement. Accordingly, TransCanada is likely to prevail on appeal of this ruling.

G. The US Fish and Wildlife Service Complied with the ESA

The Court also erred in setting aside State's 2012 Biological Assessment (BA) and the US Fish and Wildlife Service's (FWS) 2013 Biological Opinion

(BiOp) and concurrence.[7] The Court set aside the BA and BiOp solely for the purpose of considering the updated data on oil spills – the same data that the Court ordered as a supplement to the 2014 SEIS – with respect to potential adverse impacts to endangered species. Just as the Court's reasoning in the NEPA context is inconsistent with the proper legal standard and unsupported by the facts in the record, the Court's reasoning in the ESA context is equally faulty. The Court cited no legal basis for this determination other than the principle that the "best scientific and commercial data available" must be used. (Doc. 281, p. 44). Moreover, the Court pointed to no FWS statements identifying oil spills as a potential source of adverse effects to the listed species nor does the order contain any support for such a finding. Accordingly, TransCanada is likely to prevail on appeal of this issue.

II. TransCanada Is Entitled To A Stay

Because the Court had no authority to set aside the Presidential Permit, there is no legal basis for issuance of the permanent injunction, and the injunction should be stayed in its entirety. In all events, the injunction is overbroad and must be

[7] As discussed above, neither the APA nor the ESA provides a right of review for Plaintiffs' claim that State violated Section 7 of the ESA. Thus, the Court has no jurisdiction to review Plaintiffs' ESA claims.

stayed insofar as it bars TransCanada from performing preconstruction work pending the appeal. This is so for two independent reasons.

First, this Court's authority to enjoin actions by TransCanada "extends only so far as the [presidential] permitting authority." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005). Thus, even if "[State's] improperly constrained analysis violated NEPA," this Court "could only enjoin" TransCanada from undertaking "acts that required a [State Department] permit." *Id.* But State only issues "Presidential permits for the construction, connection, operation, or maintenance, at the borders of the United States," of "pipelines," bridges, and similar facilities. Executive Order 1333, Section 2(a). There is no requirement that TransCanada receive a Presidential Permit to transport or refurbish pipe, mow grass, fabricate materials, or construct a labor camp or storage yard on land it owns or leases in the United States. Thus, even assuming that the Court has the authority to enjoin the Presidential Permit, any injunction would have to be limited to construction or operation of the pipeline and cannot extend to activities TransCanada will undertake prior to construction.

Second, there is no equitable basis for enjoining preconstruction activities. This portion of the injunction causes irreparable harm to TransCanada, and a stay would advance the public interest and cause no harm to plaintiffs.

As demonstrated and described in detail in the Ramsay declaration (ECF 222-1), the inability to conduct preconstruction activities is causing significant irreparable injury to TransCanada. Among other harms:

- The injunction threatens TransCanada's substantial investment in a workforce of approximately 700 people needed to perform preconstruction work like pipeline refurbishment, preparation of a work force camp, material fabrication, and civil routing and environmental survey – jobs that will not exist if the preconstruction work cannot continue. Ramsay Decl. ¶¶ 23-24, 28.

- The injunction creates a significant risk that TransCanada will lose its skilled workers. If they cannot perform preconstruction activities for TransCanada, skilled workers are likely to find other employment in the highly competitive market for pipeline construction workers. Ramsey Decl. ¶ 30.

- The loss of workers and inability to perform preconstruction activities will put TransCanada behind schedule and make it impossible for TransCanada to begin construction of the pipeline in 2019 if defendants prevail on their appeal of the injunction. *See* Ramsay Decl. ¶26.

As the Ninth Circuit has recognized, such harms from the delay of a project are all cognizable harms that that counsel against an injunction. *Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012); *see also James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (finding irreparable injury unless the court granted a stay because of lost "opportunity to begin the project [construction] this season"). And that is particularly true in this case, because NEPA and ESA do not authorize an award of monetary damages that could remedy these costs to TransCanada. *Cf. Sampson v. Murray*, 415 U.S. 61, 90 (1974) (financial harm is generally not "irreparable" if "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation").

At the same time, a stay will cause no harm to Plaintiffs. In their submissions, Plaintiffs have alleged potential injuries from the building of the actual pipeline and operation of Keystone XL. *See, e.g.*, Decl. of T. Goldtooth ¶¶ 10-11 (ECF 148); Decl. of K. Mossett ¶¶ 9-10 (ECF 149). These purported injuries are speculative and are primarily centered on potential releases from the pipeline once operational. The merits of TransCanada's appeal will be decided well before the pipeline is operational.

Additionally, Plaintiffs' allegations that they will be injured by a "biased NEPA process" caused by "bureaucratic momentum" is legally erroneous and devoid of factual support. The Court's contrary holding in the December 7th

Order misconstrued the "bureaucratic momentum" cases like *National Audubon Society v. Department of Navy*, which allowed the Navy to purchase property and engage in planning activities to construct a landing field on a controversial site even though the EIS the Navy considered before selecting the site was inadequate. 422 F.3d 174, 181 (4th Cir. 2005). The Fourth Circuit did not reach this result simply because the planning activities did "'not include cutting even a single blade of grass in preparation for construction.'" Dec. 7 Order at 8. Instead, the court carefully considered the nature of the activities and determined that none actually limited the Navy's "'choice of reasonable alternatives.'" 422 F.3d at 206 (quoting 40 C.F.R. 1506.1(a)(2)). The court also assumed that the Navy would act "in good faith" and that "the SEIS will proceed with a hard look and honest assessment of the environmental impacts." 422 F.3d at 206.

If the Navy can acquire land for *its own project* without being deemed to have limited its choice of reasonable alternatives in a supplemental EIS, then TransCanada can engage in preconstruction activities without limiting the *State Department's* choices of reasonable alternatives in any supplemental EIS that may be required by this litigation. In contrast to *Audubon Society*, where the Navy had a financial interest in the site of the landing field analyzed in the EIS, State has no financial interest in the privately-owned and financed Keystone XL project. Nor is there any suggestion that the prior State decisions concerning the Presidential

Permit for the Keystone XL project were influenced by the amount of work TransCanada has completed. *See* 77 Fed. Reg. 5677 (Feb. 3, 2012) (Pres. Obama 2012 denial); DOSKXL1157 (2015 ROD); DOSKXL2490 (2017 ROD). And because a stay allowing TransCanada to engage in preconstruction activities would not result in construction of any portion of the pipeline, it cannot "skew the analysis and decision-making" toward approving a pipeline route that is already partially built. *See, e.g., Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007) (entering preliminary injunction prohibiting construction of one of two roads that would give access to a proposed ski village pending resolution of a NEPA challenge to the Forest Service's decision to allow construction of both roads).

Finally, the injunction will harm the public interest in energy security and impair important foreign relations interests of the United States. As State explained, the Keystone XL "Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security." ROD/NID at 27. The Keystone XL Project also plays an important role in maintaining strong bilateral relations with Canada. ROD/NID at 29. Such judgments are constitutionally entrusted to the President and State and are entitled to deference by

the courts. *See, e.g., Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24-25 (2008). Delay of the project would harm these national interests.

CONCLUSION

For the reasons stated above, TransCanada requests that the Court stay the permanent injunction in its entirety while TransCanada conducts its appeal in the Ninth Circuit or, in the alternative, that the Court stay the permanent injunction insofar as it prohibits preconstruction activities that do not require a Presidential Permit.

Respectfully submitted this 21st day of December, 2018,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this Memorandum contains 6457 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including for footnotes and indented quotations.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, a copy of the foregoing motion was served on all counsel of record via the Court's CM/ECF system.

/s/ Jeffery Oven