Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
P.O. Box 2529
Billings, MT 59103-2529
Telephone: 406-252-3441
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

Peter R. Steenland
Peter C. Whitfield
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TC Energy Corporation

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

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE,

Plaintiffs,

vs.

PRESIDENT DONALD J. TRUMP, UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; GREG SHEEHAN, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official

CV 19-28-GF-BMM

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INUNJUNCTION

capacity as Acting U.S. Secretary of the Interior,

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP, a Delaware limited partnership, and TC ENERGY CORPORATION, a Canadian Public company,

Defendant-Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Defendants TransCanada Keystone Pipeline LP and TC Energy Corporation ("TC Energy") oppose Plaintiffs' motion for a preliminary injunction. As Defendants explain in detail below, Plaintiffs cannot satisfy the requirements for such relief because their claims are based on mischaracterizations of both the Presidential Permit and the legal principles they have invoked to challenge it. In light of these fatal flaws, Plaintiffs are not likely to succeed on the merits of their claims nor will they suffer irreparable injury.

Plaintiffs' Property Clause claim assumes that the permit President Trump signed on March 29, 2019 (the "2019 Permit") authorizes the Keystone XL Pipeline ("Keystone XL") to occupy and use federal land at the U.S./Canada border (as well as 45 miles of federal land at various points along the pipeline's 875-mile route) without obtaining the rights-of-way required under the Federal Land Management of Policy Act ("FLPMA"). This is demonstrably untrue. A Presidential Permit is an *additional* legal requirement that an oil pipeline must obtain to transport oil across the U.S./Canada border; it does not excuse compliance with any other requirements imposed by federal law, including the requirement for rights-of-way to cross federal land. The 2019 Permit explicitly says so, and TC Energy has sought all required rights-of-way from the Bureau of

Land Management ("BLM"). Issuance of the 2019 Permit, therefore, cannot violate the Property Clause.

Similarly, Plaintiffs' Commerce Clause claim assumes that the 2019 Permit authorizes construction of all 875-miles of the pipeline, which Plaintiffs contend violates the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the Clean Water Act ("CWA"). This claim, too, is demonstrably wrong. The 2019 Permit authorizes the construction and operation of *only* 1.2 miles of pipeline facilities *at* the U.S./Canadian border. And, because a Presidential Permit is an additional requirement, it does not excuse compliance with applicable environmental laws, which is why TC Energy is awaiting action on its application to the Army Corps of Engineers (the "Corps") to build under the Missouri River and preparing notices for other permits required under the CWA. It is also why the government is continuing to update the NEPA analysis as this Court previously ordered, so that BLM and the Corps can rely on it when they act on TC Energy's requests for rights-of-way and CWA permits.

Nor is there any merit to Plaintiffs' claim, added after the filing of their motion, that issuance of the 2019 Permit violated Executive Order 13337. A President cannot violate an Executive Order. Instead, the President is free at any time, and for any reason, to amend, revoke, or *supersede* an Executive Order.

President Trump clearly superseded Executive Order 13337 when he issued the 2019 Permit "notwithstanding" that Order.

Plaintiffs' mischaracterizations of the 2019 Permit are also fatal to their ability to demonstrate Article III standing. The Permit authorizes only the pipeline's border crossing. Plaintiffs do not, because they cannot, allege that construction of pipeline facilities in that 1.2-mile corridor will harm them in any way. And because they cannot obtain an injunction against the President, any injury from the 2019 Permit cannot be redressed.

Finally, even if Plaintiffs can rely, for purposes of showing irreparable injury, on harms unrelated to the segment of the pipeline that crosses the border, the injuries do not flow from a violation of any duty the President had to protect them against such harms. And, they are not imminent, because TC Energy does not intend to commence construction until it obtains the required permits and rights-of-way from the Corps and BLM. In the end, therefore, Plaintiffs must invoke the "bureaucratic momentum" theory. But that theory—which, Defendants contend, violates the duty of courts to presume that government officials will follow the law—is unavailable here.

Before the Ninth Circuit, IEN's fellow appellees, the Northern Plains Resource Council ("Northern Plains"), argued that, even if the 2019 Permit mooted the appeals pertaining to the validity of the Presidential Permit issued in 2017, this

Court's injunction should not be dissolved because, if it was, TC Energy could proceed with construction and skew the future decision-making of the BLM or Corps. The Ninth Circuit necessarily rejected this claim, and granted Defendants' motion to vacate the judgments and dissolve the injunction. Plaintiffs cannot invoke the "bureaucratic momentum" theory to circumvent that ruling in this case.

II. BACKGROUND

A. Regulatory Background

Plaintiffs' claims proceed from the premise that a Presidential Permit authorizes construction of a cross-border oil pipeline throughout its entire U.S. route. In fact, such a permit authorizes only the border crossing, and does not displace other federal permitting requirements, including those governing use of federal land within the border crossing itself. Beyond these discrete federal permitting requirements, however, Congress has left approval of oil pipelines to the States.

1. Federal Regulation of Oil Pipeline Construction

Natural gas pipelines cannot be built without approval from the Federal Energy Regulatory Commission ("FERC"), but there is no such requirement for oil pipelines.[1] Instead, while federal law establishes oil pipeline design and

[1] *Compare* 15 U.S.C. § 717f(c)(1)(A) (FERC approval needed to construct a natural gas pipeline), *with* 49 U.S.C. § 60502 (no requirement for oil pipeline).

construction standards,[2] and regulates rates and access to pipeline transportation,[3] it requires federal agency approval only for the construction of those discrete segments of an oil pipeline (if any) that cross wetlands or navigable waters, affect federal civil works projects,[4] or cross federally-owned land[5] or land held in trust for individual Indians or tribes.[6]

An oil pipeline that crosses the Nation's border must obtain an *additional* permit—a Presidential Permit. Presidents have imposed this requirement on various types of cross-border facilities for nearly 150 years.[7] Until 1968, Presidents

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[2] 49 U.S.C. § 60102(a); 49 C.F.R. pt. 195.

[3] *See* 49 U.S.C. § 60502; 49 U.S.C. app. § 1 (1988).

[4] *See* 33 U.S.C. §§ 404, 408, 1344. TC Energy is applying for Section 408 permission for construction under the Missouri River. For other water crossings, it will rely on Nationwide Permit 12, which allows construction of utility lines in U.S. waters "provided the activity does not result in the loss of greater and 1/2 acre of [U.S. waters] for each single and complete project." 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017).

[5] *See* 30 U.S.C. § 185; 43 U.S.C. § 1761 (authorizing Interior Department to grant right-of-way). TC Energy is applying for a right-of-way grant to cross federal land in Montana.

[6] *See* 25 U.S.C. §§ 323, 324 (authorizing Interior to grant right-of-way across land held in trust for Indian tribes or individual Indians).

[7] *See* President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, pt. 1 (Dec. 6, 1875).

personally issued permits for certain cross-border facilities.[8] That year, President Johnson delegated his authority to issue such permits to the United States Department of State ("State").[9] In 2004, President George W. Bush refined the process for issuing such permits.[10] On April 10, 2019, President Trump formally revoked that delegation and established a new process in which the President again personally issues or denies permits.[11] Notably, these Presidential actions did not purport to convey the sweeping authorizations Plaintiffs attribute to them. Instead, these Executive Orders made clear that Presidential permits only authorized "the construction, connection, operation, or maintenance" of facilities "*at the borders of the United States.*"[12]

2. State Regulation of Oil Pipeline Construction

Many states separately require permits to construct pipeline segments and facilities within their borders. Montana, South Dakota, and Nebraska—the three

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[8] *See* Whiteman, *Digest of International Law*, Vol. 9 (1968).

[9] *See* Executive Order 11423, § 1(a), 33 Fed. Reg. 11,741 (Aug. 20, 1968).

[10] *See* Executive Order 13337, 69 Fed. Reg. 25,299 (May 5, 2004).

[11] *See* Executive Order 13867, 84 Fed. Reg. 15,491, 15,492 (Apr. 15, 2019).

[12] *See* Executive Order 13337, 69 Fed. Reg. 25,299 (emphasis added); *see also* Executive Order 11423, § 1(a), 33 Fed. Reg. 11,741 (same); Executive Order 13867, 84 Fed. Reg. at 15,492 (same, except referring to "the international boundaries of the United States").

States that Keystone XL will cross—require the approval of a state agency or official before an oil pipeline can be built in the State.[13] In addition, a pipeline carrier must acquire any necessary land or easements by negotiating agreements with landowners or invoking state eminent domain procedures.[14] To date, each of the three states has approved construction of Keystone XL within its borders.[15]

B. Procedural Background

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively "IEN") originally filed suit against State and other federal agencies in March 2017 alleging that the federal agencies violated the Administrative Procedure Act ("APA"), NEPA, and other environmental statutes

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[13] *See* Mont. Code Ann. § 75-20-201; Neb. Rev. Stat. §§ 57-1405(1), 57-1503; S.D. Codified Laws §§ 49-41B-2, 49-41B-2.1, 49-41B-4

[14] Montana, Nebraska and South Dakota authorize pipeline carriers to acquire property by eminent domain. *See* Mont. Code Ann. § 75-20-113; Neb. Rev. Stat. § 57-1101; S.D. Codified Laws §§ 49-2-12; 49-7-11.

[15] Mont. Dept. of Envtl. Quality, *In the Matter of the Application of TransCanada Keystone Pipeline, LP for a Certificate of Compliance under the Major Facility Siting Act*, at 1 (Mar. 30, 2012); Pub. Util. Comm'n of S.D., *In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline*, No. HP14-001, Final Decision and Order Finding Certification Valid And Accepting Certification, at 1-9 (Jan. 21, 2016); Neb. Pub. Serv. Comm'n, *In the Matter of the Application of TransCanada Keystone Pipeline L.P., Calgary, Alberta, seeking approval for Route Approval of the Keystone XL Pipeline Project Pursuant to the Major Oil Pipeline Siting Act*, Application No. OP-0003, Order (Nov. 20, 2017), https://psc.nebraska.gov/sites/psc.nebraska.gov/files/doc/2017.11.20.Final%20Order.pdf, *appeal pending*, No. 17-01331 (Neb.).

as part of the State's issuance of a 2017 Presidential Permit (the "2017 Permit") authorizing the transboundary facilities for Keystone XL. *See Indigenous Envtl. Network v. State*, 4:17-cv-29-BMM ("*IEN I*"), Compl. (Doc. 1) and First Am. Compl. (Doc. 61). The Defendants moved to dismiss the complaint, contending that, in exercising the President's authority to issue a Presidential Permit, State engaged in presidential, not agency, action, and that its decision was therefore not reviewable under the APA. *See, e.g.*, *IEN I*, Mot. Dismiss (Doc. 44); *IEN I*, Mem. In Supp. of Defs.' Mot. for Summ. J. at 6-7 (Doc. 173).

The Court disagreed, and concluded that, in issuing the 2017 Permit, State had failed to comply in certain respects with the APA and NEPA. *See IEN I*, Nov. 22, 2017 Order at 11-15 (Doc. 99); *IEN I*, Aug. 15, 2018 Partial Order on Summ. J. at 9 (Doc. 210). The Court also enjoined pipeline construction and certain pre-construction activities, and denied TC Energy's motion for a stay pending appeal.

On March 29, 2019, while the appeals of the Court's decisions were pending, the President revoked the 2017 Permit and granted the 2019 Permit for Keystone XL under his own signature. 84 Fed. Reg. 13,101 (Apr. 3, 2019). A week later, IEN filed this suit challenging the new 2019 Permit. Shortly thereafter, Defendants asked the Ninth Circuit not only to dismiss the appeals (and cross-appeal) as moot, but to vacate this Court's judgments and dissolve the injunction. IEN and Northern Plains strenuously objected to the latter relief. Both argued (as

IEN does here) that issuance of the 2019 Permit was an improper attempt to evade and circumvent this Court's rulings and injunction. *See* IEN Partial Opp. to Mots. To Dismiss, No. 18-36068, Doc. 47 at 1 (9th Cir. Apr. 17, 2019); Northern Plains Opp. to Mots. To Dismiss, No. 18-36068, Doc. 49-1 at 34, 36 (9th Cir. Apr. 23, 2019). Northern Plains argued that the injunction should remain in place because the federal defendants had not yet completed an adequate environmental review for the pipeline. Reprising its "bureaucratic momentum" theory, Northern Plains argued that, "[s]hould the injunction be dissolved," TC Energy would likely proceed with construction "outside of the BLM and Corps jurisdictional areas, thereby skewing those agencies' decision-making processes." Northern Plains Opp. to Mots. To Dismiss, No. 18-36068, Doc. 49-1 at 36. The Ninth Circuit necessarily disagreed, and granted Defendants' motions in full, entering an order that dismissed the appeals and cross-appeal as moot, vacated this Court's judgment, dissolved the permanent injunction, and remanded with instructions to dismiss the suits as moot. *See* Order, No. 18-36068, Doc. 56 (9th Cir. June 6, 2019). That order became final on July 22, 2019, when no party sought rehearing or rehearing en banc. *See* Fed. R. App. P. 40 (providing 45-day deadline for filing a petition for rehearing).

III. LEGAL STANDARD

A preliminary injunction is an "'extraordinary remedy never awarded as of right.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). To obtain such relief, therefore, a plaintiff "must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest." *Id.* The first factor is the most important; when a plaintiff cannot show likelihood of success on the merits, the Court "need not consider the remaining three [*Winter* elements]." *Id.*

Plaintiffs cannot establish a likelihood of success on the merits, or any of the other factors necessary to obtain the relief they seek.

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS

A. Plaintiffs Lack Standing

Plaintiffs are unlikely to succeed because they lack Article III standing. To demonstrate standing, Plaintiffs must show that issuance of the 2019 Permit causes them to suffer an "injury in fact" that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs cannot make any of these showings.

Plaintiffs have not alleged that they have used or enjoyed the lands or waters in the 1.2-mile corridor where Keystone XL will cross the U.S./Canadian border and that they have concrete plans to do so in the future. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Instead, they allege that they have used and enjoyed "lands and waters within and adjacent to *the proposed route of the Project*" and "within the Project *area*." First Am. Compl. ¶¶ 28-29 (Doc. 37) (emphases added). But, by its express terms, the 2019 Permit only "grant[s] permission … to construct, connect, operate, and maintain pipeline facilities *at the international border* of the United States and Canada *at Phillips County, Montana*." 84 Fed. Reg. at 13,101 (emphases added). Its title reflects this same limitation. *See id.* (authorizing pipeline facilities "*at the International Boundary* Between the United States and Canada") (emphasis added). And it defines "Border facilities" as those "appurtenant" to the pipeline segment "from the international border … to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border." *Id.* Plaintiffs cannot suffer a concrete, cognizable injury from pipeline construction in a 1.2-mile corridor of land that they do not claim to have used or enjoyed in the past and do not claim to have any definitive plans to use or enjoy in the future. *Lujan*, 504 U.S. at 564.

Tacitly acknowledging this fatal problem with their standing, Plaintiffs claim that the President has "attempt[ed] to authorize the balance of Keystone's 875 miles, by referring to its other 'Facilities.'" Mem. In Supp. Mot. at 14 (Doc. 27-2). But this is plainly wrong. The term "Facilities" is used in the "Conditions" section of the 2019 Permit. There, the authorization to construct and operate facilities at the border is conditioned on (1) TC Energy's compliance with all laws that apply to the rest of the pipeline in the United States and (2) TC Energy's indemnification of the United States from any claim of liability arising from the construction or operation of the rest of the route. *See* 2019 Permit, arts. 1(2) & 6(2), 84 Fed. Reg. at 13,101-02. Neither of these conditions on TC Energy's permission to build 1.2 miles of trans-border pipeline facilities authorizes the construction of such facilities elsewhere.

To the extent Plaintiffs allege that construction in the 1.2-mile corridor at the border will cause injuries to them outside of this area, those injuries are not traceable to the action they challenge. To be sure, in their prior litigation, Plaintiffs were able to rely on harms occurring outside the border corridor. But this was because this Court concluded that: (1) State was subject to NEPA when it issued the 2017 Permit, (2) NEPA required State to evaluate environmental impacts from the entire pipeline, and (3) State had failed adequately to do so in certain respects.

This theory for linking harms outside the border-crossing corridor to issuance of a Presidential Permit is unavailable here.

NEPA applies to federal "agencies," 42 U.S.C. §§ 4332, 4333, and NEPA regulations define "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. It is indisputable that the President alone issued the 2019 Permit, which is the alleged source of Plaintiffs' injuries.[16] Because it does not apply to the President, NEPA's requirements cannot be used to tie harms outside the border-crossing corridor to a presidential decision that only authorizes activity within that corridor.

Finally, even if Plaintiffs could tie their alleged out-of-corridor harms to a permit that authorizes Keystone XL to cross the border—and they cannot—those injuries would not be redressable. A "grant of injunctive relief against the President himself is extraordinary, and should ... raise[] judicial eyebrows." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). *Franklin* acknowledged that courts can prevent illegal action by the President if they can enter "injunctive relief against

[16] Plaintiffs name various agencies and agency officials as defendants and vaguely assert that they have violated "the federal environmental laws with which the Project must comply," First Am. Compl. ¶ 21. But these defendants did not issue the 2019 Permit and Plaintiffs do not allege that they have made any permitting decisions with respect to the Project. Insofar as the Complaint can be understood to state any claim against these defendants, those claims must be dismissed for lack of any final agency action subject to judicial review.

executive officials" who will implement a presidential directive, and it left open the possibility that the President could be enjoined to perform "a purely 'ministerial' duty," 505 U.S. at 802. But here, no executive officials need to take action to make the 2019 Permit effective. And Plaintiffs do not and cannot allege that the President had a *mandatory* duty *not* to allow TC Energy to build an oil pipeline across the U.S./Canada border. And while they suggest that this Court's decision precluded the President from granting a new permit (at least in the absence of a reasoned explanation for deviating from Secretary of State John Kerry's earlier decision not to grant a Presidential Permit), First Am. Compl. ¶¶ 76-77; Mem. In Supp. Mot. at 25, the President was not a defendant in the prior litigation, and thus was not bound by its ruling that State had to provide such an explanation for the 2017 Permit. And he certainly cannot be enjoined to comply now with an order that has been vacated and an injunction that has been dissolved.

It is no answer to argue that the Court can enter an injunction against TC Energy. An injunction would have to be based on the theory that TC Energy has received an invalid governmental authorization for its pipeline to cross the border. But, to enjoin TC Energy, the Court would also have to enter injunctive relief against the President *nullifying* that authorization; it cannot leave the authorization in place while enjoining the permittee from relying on it. Indeed, Plaintiffs recognize this, which is why they ask the Court for relief that renders that Permit

of "no legal force and effect." Prayer for Relief ¶¶ 1-3. District Courts, however, lack the authority to render such relief against the President.

B. Plaintiffs Are Unlikely To Succeed On Their Claim For Relief Under The Property Clause

Even if the Court were to reach the merits, Plaintiffs cannot show that they are likely to succeed on any of their claims. Their assertion that issuance of the 2019 Permit violated the Property Clause rests on a demonstrably incorrect characterization of what that Permit does. First Am. Compl. ¶¶ 61-62. Plaintiffs claim that the 2019 Permit authorizes TC Energy to use and occupy federal land within the border-crossing corridor (and 45 miles of federal land elsewhere along its route) without obtaining rights-of-way from the BLM, which is charged with managing federal land under the FLMPA and Mineral Leasing Act ("MLA"). Mot. 13, 20-22. But the 2019 Permit does no such thing.

The Presidentially-imposed permitting requirement for cross-border infrastructure is, and always has been, a requirement *in addition to*, not in derogation of, any and all other applicable federal, state, and local permitting requirements. *See supra* p.6. Thus, in authorizing the construction of the 1.2-mile border-crossing corridor, the 2019 Permit does not allow TC Energy to use or occupy any federal land without obtaining required rights-of-way from BLM for the federal land within that corridor (or anywhere else). The 2019 Permit simply

addresses the additional permitting hurdle that applies to Keystone XL *because* its facilities will cross the border.

The express terms of the 2019 Permit confirm this. It states that TC Energy must obtain "any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate." 2019 Permit, art. 6(1), 84 Fed. Reg. at 13,102. And, as required under the 2019 Permit, TC Energy has applied for such rights-of-way from BLM in order to construct facilities on federal land within the 1.2 miles of the border as well as the additional 45 miles of federal land beyond the border. Decl. Dr. Norrie Ramsay ¶ 6, July 24, 2019, attached. Accordingly, Plaintiffs do not—and cannot—state a claim under the Constitution's Property Clause.

C. Plaintiffs Are Unlikely To Succeed On Their Claim For Relief Under The Commerce Clause

Plaintiffs' Commerce Clause claim is based on the same patently erroneous theory. In their motion, Plaintiffs note that Congress enacted the CWA and required the Corps and the Fish and Wildlife Service ("FWS") to manage "river crossings and their environmental impacts," yet, Plaintiffs claim, the 2019 Permit constitutes an "approval[] for these crossings." Mem. In Supp. Mot. at 23; *see also id.* at 27 (claiming that, because the Permit authorizes construction of the entire pipeline "*without requiring compliance with applicable federal environmental*

laws, it conflicts with … Congress's comprehensive scheme of environmental regulation adopted pursuant to its Commerce Clause powers).

But again, the 2019 Permit does not authorize construction of the entire pipeline. And it states that TC Energy must obtain any "permits, and other authorizations as may become necessary or appropriate." 2019 Permit, art. 6(1), 84 Fed. Reg. at 13,102. This obviously includes CWA permits, which TC Energy will obtain prior to constructing the pipeline. Ramsay Decl. ¶ 9.

Plaintiffs' theory that the 2019 Permit purports to override these requirements is not only legally unfounded, it is inexplicable. After the 2019 Permit issued, Defendants asked the Ninth Circuit to dismiss the appeals as moot and to vacate this Court's judgments and dissolve its injunction. In connection with that request, the Department of Justice explained that the federal government was "working to complete an updated [Supplemental Environmental Impact Statement]" to address "all of the issues [this Court] identified," and would complete this work even if the appeals were dismissed and this Court's judgments were vacated, "so that other federal agencies, including BLM and the Corps, will be able to rely on it in the future if and when they issue their own permits related to the pipeline." United States' Reply in Supp. of Mot. to Dismiss, No. 18-36068, Doc. 53, at 8-9 (9th Cir. May 7, 2019). Plaintiffs thus are fully aware that neither

BLM nor the Corps has treated the 2019 Permit as obviating the need for rights-of-way or CWA permits for the project.

D. Plaintiffs Are Unlikely To Succeed On Their Claim That The 2019 Permit Violates Executive Order 13337

Plaintiffs' claim that the President issued the 2019 Permit in violation of Executive Order 13337 suffers from a series of legally dispositive flaws.

First, the central premise of this claim is that the 2019 Permit excuses TC Energy from complying with all other applicable laws and regulations, in contravention of Executive Order 13337's explicit statement that applicants for such permits must comply with "*any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations*." Executive Order 13337, § 5, 69 Fed. Reg. at 25,301 (emphasis added). For the reasons just discussed, however, the 2019 Permit does not purport to excuse TC Energy from complying with other applicable laws, and TC Energy is already seeking or will seek all additional authorizations required to build Keystone XL on federal lands and across waters subject to the jurisdiction of the Corps.

Plaintiffs also claim that the President violated the Executive Order by failing to make the "national interest" determination that State was required to make, and by failing to provide a "reasoned explanation" for deviating from the determination that Secretary of State Kerry made when he denied TC Energy's

application for a permit in 2015. The latter "requirement," however, arose from the *APA* and applied to State by virtue of this Court's conclusion that State engaged in agency action when it issued the 2017 Permit. The President is not subject to the APA, *Franklin*, 505 U.S. at 801, and this Court never held that he was. Indeed, the President was not even a party in the prior litigation.

More fundamentally, Plaintiffs' claim founders on the legal principle that a President cannot violate an Executive Order. An Executive Order does not bind the President because it can be "withdrawn at any time for any or no reason." *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965); *see also Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 77 (1977) (President "legally could revoke or supersede [an] Executive order at will"). Given the President's plenary power to withdraw, revoke, or *supersede* an Executive Order, it follows that he need not do so in any particular manner. *See Status of Presidential Memorandum Addressing the Use of Polygraphs*, 2009 WL 153263, at *8 (O.L.C. Jan. 14, 2009) ("the President is generally free to amend or revoke instructions to his subordinates in a form and manner of his choosing"). Plaintiffs cite no authority to the contrary. Indeed, they completely fail to address the foregoing authorities, even though TC Energy cited them in the motion to dismiss it filed before Plaintiffs moved for a preliminary injunction.

Here, the President explicitly stated in the 2019 Permit that he was granting it "*notwithstanding Executive Order 13337*." 84 Fed. Reg. at 13,101 (emphasis added). Thus, the President plainly superseded Executive Order 13337 when he issued the 2019 Permit, as he was entitled to do.[17] As a matter of law, therefore, issuance of the 2019 Permit could not violate that Order.

Finally, even if the President could have violated Executive Order 13337—and he could not have—Plaintiffs cannot sue to enforce it. That Order expressly states that it "does not[] create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person." Executive Order 13337, § 6, 69 Fed. Reg. at 25,301. Plaintiffs do not even mention, much less address this language, which categorically bars them from bringing a suit to enforce Executive Order 13337 against the President, or anyone else.

II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM

Because Plaintiffs cannot show any likelihood of success on the merits, the Court "need not consider the remaining three [*Winter* elements]." *Google, Inc.*, 786

[17] As a consequence, the validity of the 2019 Permit does not depend in any way on whether Executive Order 13867 can be given "retroactive effect." Mem. In Supp. Mot. at 26-27.

F.3d at 740. Even if the Court does so, however, Plaintiffs have failed to satisfy the other key prerequisite to the extraordinary relief they seek—*i.e.*, that they are likely to suffer irreparable injury.

In attempting to show otherwise, Plaintiffs rely on a series of alleged environmental harms from construction and operation of the pipeline outside the 1.2-mile corridor at the U.S./Canada border. Mem. In Supp. Mot. at 30-33. Many of these alleged harms (*e.g.*, potential leaks or climate change impacts) will arise, if at all, only from the operation, not the construction, of the pipeline, and thus cannot justify an injunction barring construction and pre-construction activities. Some of the alleged harms from construction (*e.g.* damage to local roads, mowing of rights-of-way) are not irreparable. Still others (*i.e.*, those attributable to construction camps) are too speculative to justify injunctive relief, as they rest on predictions of misbehavior by third-parties (construction workers) and further speculation that local law enforcement efforts will not curb such misconduct. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) ("[P]laintiffs must establish that irreparable harm is *likely*, not just possible.").

Most fundamentally, however, Plaintiffs have failed to tie these alleged harms to violations of any laws designed to protect them from such harms. Simply put, Plaintiffs are not entitled to an injunction that protects them from harms caused by *legal conduct*. *See Califano v. Yamaski*, 442 U.S. 682, 702 (1979) (the

"scope of injunctive relief is dictated by the extent of the *violation* established") (emphasis added). The allegedly illegal action they attack, however, is issuance of the 2019 Permit, which only authorizes the construction and operation of facilities in the 1.2-mile border-crossing corridor. The asserted invalidity of that Permit cannot justify an injunction against otherwise legal construction activities *outside* that corridor, both because the Permit does not authorize any such activities, and because the President was under no obligation to consider any environmental effects attributable to construction or operation of the pipeline outside of the border-crossing area. The duty to consider the environmental effects of interconnected action arises by virtue of NEPA, 40 C.F.R. § 1508.25, but NEPA does not apply to the President. *See supra* at 13. Similarly, the other environmental laws Plaintiffs cite—ESA and the CWA—do not apply to the President, because they do not include the "express statement by Congress" that is required to establish that a federal law applies to the President. *Franklin*, 505 U.S. at 801. In short, none of the alleged environmental harms Plaintiffs cite is attributable to a violation of any legal duty the President has to protect Plaintiffs from the harms they recite. And the only unlawful action they allege is that of the President.

Of course, BLM and the Corps are subject to NEPA and the ESA and must comply with those statutes when granting rights-of-way for federal land and CWA permits. But Plaintiffs do not allege in their complaint or claim in their motion that

these agencies have granted any rights-of-way or CWA permits for Keystone XL, much less done so in violation of NEPA or any other statute. Moreover, TC Energy does not intend to begin construction of the pipeline until it receives these federal permits and rights-of-way grants. Ramsay Decl. ¶ 9. For this reason, Plaintiffs' reliance on alleged harms from construction, Mem. In Supp. Mot. at 15, 29-30, cannot provide a basis for injunctive relief.

The government told the Ninth Circuit that it is "working to complete an updated [Supplemental Environmental Impact Statement]" to address "all of the issues [this Court] identified," so BLM and the Corps can "rely on it in the future if and when they issue their own permits related to the pipeline." United States' Reply in Supp. of Mot. to Dismiss, No. 18-36068, Doc. 53, at 8-9. There is no basis for presuming that a new analysis of these issues will be deficient—such a presumption that would contravene its duty to "presume that agencies will follow the law," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010). And if it turns out that Plaintiffs can identify any injury-causing defects in this supplemental analysis when and if BLM or the Corps rely on that analysis to issue rights-of-way or CWA permits, Plaintiffs can challenge those defects then. There is thus no basis for entering a preliminary injunction now. *See Ctr. for Food Safety*, 636 F.3d at 1173.

In the end, therefore, Plaintiffs' showing of irreparable harm hinges on its bureaucratic momentum claim. Mem. In Supp. Mot. at 31-32, 34. Although this Court concluded otherwise, TC Energy submits that Ninth Circuit precedent precludes reliance on out-of-circuit cases that assume that agencies will skew their environmental analysis once construction of a project is underway. Indeed, the Ninth Circuit has held that courts have a duty to "presume that agencies will follow the law," *Pit River Tribe*, 615 F.3d at 1082, and "cannot assume that government agencies will not comply with their NEPA obligations in later stages of development." *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988).

But even if this Court disagrees, Plaintiffs' bureaucratic momentum claim is still unavailing. First, TC Energy has already invested enormous amounts of time, money, and energy in seeking various federal, state and local permits and approvals, as well as litigating over the validity of State's 2017 Permit and the Nebraska route. There is no basis for claiming that all of this effort creates no bureaucratic momentum, but the moment TC Energy starts to install worker camps, such momentum is "unstoppable." Mem. In Supp. Mot. at 34. In light of the extraordinary relief Plaintiffs seek, they must explain how such an incremental step is key to prejudicing the outcome of the decisions BLM and the Corps still need to make. They have plainly failed to do so.

Second, as detailed above, Northern Plains argued in the Ninth Circuit that this Court's injunction should remain in place because the federal defendants had not yet completed an adequate environmental review for the pipeline and that, "[s]hould the injunction be dissolved," TC Energy would likely proceed with construction "outside of the BLM and Corps jurisdictional areas, thereby skewing those agencies' decision-making processes." Northern Plains. Opp. to Mots. To Dismiss, No. 18-36038, Doc. 49-1 at 36. The Ninth Circuit necessarily disagreed, and granted Defendants' motions in full. *See* Order, No. 18-36068, Doc. 56. TC Energy respectfully submits that it would be an abuse of discretion to effectively re-impose an injunction on construction of Keystone XL based on the very same "bureaucratic momentum" theory that the Ninth Circuit necessarily rejected when it dissolved an earlier, and essentially indistinguishable injunction.

III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION.

The balance of hardships tilts in favor of TC Energy as the company will suffer substantial economic costs if Keystone XL suffers further delay. Harms from the delay of a project are cognizable harms that counsel against an injunction. *See Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012) ("[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs"); *James River Flood*

Control Ass'n v. Watt, 680 F.2d 543, 544 (8th Cir. 1982) (per curiam) (lost "opportunity to begin the project [construction] this season" is irreparable injury).

Plaintiffs' "build later" mantra overlooks significant costs associated with delay and longer period to recoup investment decisions. As set forth in the declaration of Dr. Ramsay, TC Energy faces a significant prospect of delay should the Court enjoin all preconstruction activities. Ramsay Decl. ¶¶ 13-16. TC Energy must complete the worker camps by the end of this year in order to position itself to commence construction of Keystone XL as early in 2020 as possible should it receive the necessary authorizations from the BLM and the Corps. Failure to do so could delay the completion of the Project past its planned in-service date and result in lost earnings of approximately $950 million. Ramsay Decl. ¶ 13. The increased workforce and extended construction season entailed in an effort to maintain that in-service date would cost more than $155 million, with uncertain prospects of success. Ramsay Decl. ¶ 12. A delay also would threaten the hundreds of jobs and significant tax revenue that the Project would provide. Ramsay Decl. ¶¶ 14-15.

Additionally, a delay in the in-service date would preclude TC Energy's customers from using the services they reserved through contracts. Ramsay Decl. ¶ 14. The Project would connect one of the world's largest sources of heavy crude oil production with the world's largest refining complex capable of refining heavy

crude oil. TC Energy has a significant interest in being able to satisfy market demand for transportation service on Keystone XL.

IV. THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION

Finally, the public interest weighs in favor of denying Plaintiffs' motion. Keystone XL, by providing a secure and reliable source of petroleum to United States refineries, will serve the national interest and is important to national energy security. Keystone XL also plays an important role in maintaining strong bilateral relations with Canada. The State Department confirmed Keystone XL will provide these benefits. *See* Record of Decision and National Interest Determination (Mar. 23, 2017) available at https://www.state.gov/wp-content/uploads/2019/02/Record-of-Decision-and-National-Interest-Determination.pdf. Delay of the project would harm these federal interests.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

DATED this 24th day of July 2019,

/s/ Jeffery Oven
Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
P.O. Box 2529
Billings, MT 59103-2529

Telephone: 406-252-3441
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

/s/ Peter R. Steenland, Jr.
Peter R. Steenland, Jr.
Peter C. Whitfield
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000 (telephone)
(202) 736-8711 (fax)
Email: psteenland@sidley.com
pwhitfield@sidley.com

Counsel for TransCanada Keystone Pipeline LP and TC Energy Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed in 14-point font, double spaced, and contains 6,303 words, excluding tables, caption, signatures, and certificates of service and compliance.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

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

/s/ Jeffery J. Oven