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INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

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; MARGARET EVERSON, in her	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' REPLY TO TC ENERGY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **Judge: Hon. Brian M. Morris** **Case Filed: April 5, 2019**

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 capacity as 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.

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I. SUMMARY OF ARGUMENT

Plaintiffs' Opening Memorandum shows their entitlement to a preliminary injunction because (1) Plaintiffs are likely to prevail on their claims under the Property and Commerce Clauses of the U.S. Constitution and Executive Order 13,337 ("EO"), (2) Plaintiffs would suffer irreparable harm absent injunctive relief, (3) the balance of equities favors Plaintiffs, and (4) injunctive relief would serve the public interest. TC Energy/TransCanada ("TransCanada") fails to show otherwise.

First, TransCanada claims Plaintiffs lack standing because "[t]he 2019 Permit authorizes . . . *only* 1.2 miles of pipeline facilities *at* the U.S./Canadian border" and "Plaintiffs do not . . . allege that . . . pipeline facilities in that 1.2-mile corridor will harm them." Opp. 2-3 (original emphasis). Not so. Plaintiffs' First Amended Complaint ("FAC") alleges their members "use and enjoy the land and water resources and wildlife . . . that would be directly and irreparably harmed by the Project, *including its first 1.2 miles* . . . ." FAC ¶¶ 28-30 (emphasis added). Plaintiffs explain the border segment "crosses at least one . . . tributary of . . . the Missouri River . . . , a watercourse used by Plaintiffs for drinking and farming among other uses" and which an upstream pipeline leak would harm. FAC ¶ 16.

Second, TransCanada contends "[t]o the extent . . . construction in the 1.2-mile corridor . . . will cause injuries to [Plaintiffs] outside of this area, those injuries are not traceable to the [2019 Permit]" because the National

Environmental Policy Act ("NEPA") "does not apply to the President." Opp. 12-13. Wrong. Plaintiffs have standing whether or not NEPA applies. Defendants admit that *but for* the 2019 Permit, Keystone could not be built. Therefore its impacts anywhere are traceable to the 2019 Permit. *Backcountry Against Dumps v. Chu* ("*Backcountry*"), 215 F.Supp.3d 966, 976 (S.D. Cal. 2015) (that a project "would not have been built absent . . . approval of [a cross-border Presidential] permit . . . . demonstrate[s] that the Defendants' [approval was] causal of [plaintiffs'] injury" although other agency approvals were also required).

Third, TransCanada claims "even if Plaintiffs could tie their alleged out-of-corridor harms to [the] permit . . . those injuries would not be redressable" because a "'grant of injunctive relief against the President himself is extraordinary.'" Opp. 13. Wrong again. Numerous courts have vacated unlawful presidential decisions. *League of Conservation Voters v. Trump,* 363 F.Supp.3d 1013, 1030-1031 (D.Ak. 2019) ("*LCV*") ("vacat[ing] Section 5 of Executive Order 13,795"); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) ("*Hawaii*") (enjoining federal defendants despite presidential involvement), dismissed as moot, 138 S.Ct. 337 (2017); *Clinton v. City of New York*, 524 U.S. 417, 433 n. 22 (1998) ("*Clinton*") (voiding president's line-item veto).

Fourth, TransCanada contends the 2019 Permit did not violate the Property Clause because the Permit's Article 6 states "[t]he permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations

as *may* become necessary or appropriate." Opp. 15-16 (emphasis added). But "may" is permissive, not mandatory. *Haynes v. United States*, 891 F.2d 235, 239-240 (9th Cir. 1989). This passive language does not *require* compliance with anything, and yields to the Permit's express grant of permission "to construct . . . pipeline facilities at the . . . border . . . . *notwithstanding Executive Order 13,337*" – the Executive Order that had *expressly* required State Department review and compliance with NEPA, the Endangered Species Act ("ESA"), the National Historic Preservation Act ("NHPA"), and other environmental laws that Congress adopted pursuant to the Property Clause to govern federal land management. 2017 Permit ¶ 1.[1] TransCanada cannot have it both ways, asserting the 2019 Permit is exempt from environmental laws because Trump issued it "personally," and yet claim his "personal" Permit nonetheless *tacitly* requires agency compliance with the same statutes he plainly sought to evade.

Fifth, TransCanada argues Plaintiffs' Commerce Clause claim likewise fails because of Article 6. Opp. 16-17. But again, Article 6's passive wording fails to *require* compliance with the environmental laws Congress adopted under the Commerce Clause.

Sixth, TransCanada contends Plaintiffs cannot show a violation of EO 13,337 because (1) again, Article 6 requires compliance with "applicable laws"

[1] Administrative Record in *IEN v. State*, CV 17-29-GF-BMM (*see* ECF 111-112, 158, 167) DOSKXLDMT0002485 ("DOS2485").

(TransCanada's words) and (2) Trump had "plenary power" to revoke this Executive Order. Opp. 18-20. Incorrect. The 2019 Permit expressly bypassed State Department review – the cornerstone of EO 13,337 – and did so "notwithstanding Executive Order 13,337." 84 Fed.Reg. 13101. But: Trump did not formally withdraw EO 13,337 before he issued the 2019 Permit. Therefore EO 13,337 remained in effect, and Trump remained bound by it. *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1329-1331 (9th Cir. 1979) ("*Legal Aid*"); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1166 (9th Cir. 1997) ("*Carmel*").

Seventh, TransCanada claims Plaintiffs will not suffer irreparable harm because Trump is obeying all applicable laws. Opp. 20-25. Not so. As summarized above and detailed below, Trump is unconstitutionally evading those laws.

Eighth, TransCanada contends the balance of hardships and the public interest both weigh against an injunction. Opp. 25-27. Wrong again. Environmental harm is irreparable. TransCanada's claimed delay in receiving anticipated profits is not. The public interest favors compliance with environmental laws, not their evasion.

Because TransCanada fails to overcome Plaintiffs' showing that the preliminary injunction criteria are met, Plaintiffs' motion should be granted.

II. BACKGROUND

A. Federal Regulation of Oil Pipeline Construction

TransCanada contends there is no comprehensive federal regulation of oil pipelines, effectively leaving "approval of oil pipelines to the States." Opp. 4. It claims "federal agency approval [is required] only for . . . those discrete segments of an oil pipeline . . . that cross wetlands or navigable waters, affect federal civil works projects, or cross federally-owned land or land held in trust for individual Indians or Tribes." *Id*. 4-5. Incorrect. By ignoring Keystone's environmental impacts elsewhere, TransCanada seeks to sidestep this Court's previous – and correct – rulings that under Congress' comprehensive statutory scheme, the federal government must consider Keystone's environmental impacts along its entire 875-mile length.

Based on presidential actions taken long before Congress adopted a comprehensive scheme for environmental protection between 1968 and 1977, TransCanada claims presidents have "personal" authority to authorize cross-border facilities without regard to Congress' exercise of its Property and Commerce Clause powers to protect the environment. Not so. That Congress did not adopt environmental laws until the 1960's does not mean it lacked authority to do so, nor that presidents could continue to authorize cross-border facilities without regard to Congress' enactments. "Past practice does not, by itself, create power." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

Except Trump, no modern president has ignored Congress' vital role in assuring cross-border permits include comprehensive agency reviews. Thus, in 1968 President Johnson ordered State Department coordination of federal agency reviews to assure that applicable laws were followed. EO 11,423 (33 Fed.Reg 11,741). Likewise in 2004, President Bush issued EO 13,337 (69 Fed.Reg. 25,299) acknowledging the importance of NEPA, ESA and NHPA in those reviews.

Accordingly, this Court properly ruled the State Department had an obligation under these laws to analyze the *whole* of Keystone's impacts, including a determination that Keystone served the national interest based on its impacts throughout its 875-mile length. *IEN v. State*, 347 F.Supp.3d 561, 575-584, 587 (D.Mont. 2018).

The 2019 Permit evades both this Court's rulings and Congress' comprehensive statutory scheme requiring environmental review of the entire Project.

B. State Regulation of Oil Pipeline Construction

Claiming this Court should leave regulation of Keystone to the states, TransCanada stresses that "three states [*i.e.*, Montana, South Dakota and Nebraska] . . . approved construction of Keystone . . . within [their] borders." Opp. 7. It argues this Court lacks jurisdiction over Plaintiffs' challenge to the 2019 Permit because it only authorizes construction within Keystone's first 1.2

miles, leaving the rest of Keystone largely to state regulation. Opp. 6-7. Its position conflicts with Congress' comprehensive statutory scheme.

III. LEGAL STANDARD

TransCanada agrees with Plaintiffs' recitation of the four-part test for a preliminary injunction. Opp. 10.

IV. PLAINTIFFS HAVE ESTABLISHED THEIR LIKELIHOOD OF SUCCESS.

A. Plaintiffs Have Standing

TransCanada contends Plaintiffs cannot show the 2019 Permit causes them an "injury in fact" that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Opp. 10. Wrong. Plaintiffs alleged their members "use and enjoy the land and water resources and wildlife . . . that the Project would harm [and thus] would be directly and irreparably harmed by the construction and operation of the Project, *including its first 1.2 miles* . . . ." FAC ¶¶ 28-30 (emphasis added). TransCanada ignores Plaintiffs' allegations that "within its first 1.2 miles, Keystone crosses at least one unknown tributary of the East Fork of Whitewater Creek, which ultimately "flows into . . . the Missouri River . . . ., a watercourse used by Plaintiffs for drinking and farming among other uses;" and that "[s]hould Keystone leak oil into a tributary of Whitewater Creek, the resulting contamination would flow downstream to the Missouri River," harming Plaintiffs. FAC ¶ 16.

Moreover, it is undisputed that Keystone could not operate without the 2019 Permit. Therefore, even had Plaintiffs only alleged injury from Keystone *outside* its first 1.2 miles, that allegation would suffice. *Backcountry*, 215 F.Supp.3d at 976 (that a project "would not have been built absent approval of [a cross-border Presidential] permit . . . . demonstrate[s] that the Defendants' action [was] causal of the injury" to Plaintiffs despite the need for other agency approvals).

TransCanada also claims Plaintiffs' alleged injuries "are not traceable to the action they challenge" because "NEPA's requirements [are inapplicable to Trump and thus] cannot be used to tie harms outside the border-crossing corridor to a presidential decision that only authorizes activity within that corridor." Opp. 13. Wrong again. TransCanada claims Montana "has approved construction of Keystone XL within its borders." Opp. 17 & n. 15. Trump admits the "Keystone XL Border Segment" between Milepost 0.92 and Milepost 1.2 is located on Montana State Trust Lands. Declaration of Diane M. Friez ¶ 9 & Exh. 2. Montana's easement for Keystone is "contingent upon . . . issuance of the Presidential Permit."[2] Thus, the 2019 Permit allows Keystone's construction on Montana State Trust Lands within the border segment, whether or not the Bureau of Land Management ("BLM") issues any further approvals.[3]

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[2] Volker Reply Dec. ¶ 2, Exh. 1, p. 4.

[3] And, BLM never states it will complete environmental review before approval. Friez Dec. ¶ 10.

Keystone's Final SEIS admits that Keystone crosses an unnamed tributary of the East Fork of Whitewater Creek – which ultimately drains into the Missouri – at Milepost 1.1 – *i.e.*, on Montana State Trust Lands.[4] Keystone crosses a three-acre lake sandwiched between a three-acre Staging Area and an Additional Temporary Workspace ("ATWS"). Friez Dec., Exh. 2 & Legend. Thus, even if direct harm within the 1.2-mile border segment is required, Defendants' own documents confirm that harm.

However, Plaintiffs need only show that (1) Keystone could not operate without the 2019 Permit, and (2) Plaintiffs use and enjoy the lands, waters, and fish and wildlife that Keystone will harm along its 875-mile length. *Backcountry*, 215 F.Supp.3d at 976.

Finally, TransCanada claims "even if Plaintiffs could tie their alleged out-of-corridor harms to [the 2019 Permit] . . . those injuries would not be redressable because "[a] 'grant of injunctive relief against the President himself . . . should . . . raise[] judicial eyebrows.'" Opp. 13, quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Wrong. Numerous courts have vacated unlawful presidential actions. *LCV*, 363 F.Supp.3d at 1030-1031 ("vacat[ing] Section 5 of Executive Order 13,795"); *Hawaii*, 859 F.3d at 788 (enjoining federal defendants despite presidential involvement); *Clinton*, 524 U.S. at 433 n. 22 (voiding president's line-

[4] DOS9652 (FSEIS Appendix D, Table 1 – "Waterbodies Crossed by the Project in Montana" at Milepost 1.11).

item veto).

Accordingly, Plaintiffs have properly alleged their standing.

B. The 2019 Permit Violated the Property Clause

"'The power over the public land thus entrusted [by the Property Clause] to Congress is without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citation omitted). "[T]he Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and *to prescribe the conditions upon which others may obtain rights in them* . . . .'" *Id.* at 540 (emphasis added). Under the Property Clause, Congress has "the power to regulate and protect the wildlife living" on federal lands and waters. *Id*. at 541. The 2019 Permit violates the Property Clause because it allows Keystone's construction without compliance with Congress' comprehensive statutory scheme for protecting federal lands, waters, fish and wildlife.[5]

TransCanada argues "[e]ven if the Court were to reach the merits, Plaintiffs cannot show that they are likely" to prove "the 2019 Permit violated the Property Clause" because "the 2019 Permit does not allow [TransCanada] to use or occupy any federal land without obtaining required rights-of-way from BLM . . . ." Opp. 15. TransCanada cites the Permit's Article 6(1), which, it incorrectly claims, "states that TC Energy *must* obtain 'any right-of-way grants or easements, permits,

[5] Keystone will not just occupy federal lands. It will also divert waters of the United States, such as the Yellowstone River. Volker Reply Dec. ¶ 4, Exh. 3.

and other authorizations as may become necessary or appropriate.'" Opp. 16 (emphasis added).

But the 2019 Permit nowhere states that TransCanada "must obtain" those authorizations. Instead, Article 6(1) merely states that "[t]he permittee is responsible for acquiring" any such authorizations "as *may* become necessary or appropriate." 84 Fed.Reg. 13,102. It fails to identify BLM, let alone state that a "right-of-way grant" or other authorization is *required* before Keystone may be built. As noted, the 2019 Permit evades the comprehensive environmental review required under EO 13,337, which included interagency consultations and specifically required compliance with NEPA, ESA and NHPA, culminating in a required determination by the State Department that Keystone would serve the national interest.

Article 6 does not "require" TransCanada to obtain any specific approvals, let alone comply with Congress' laws protecting federal lands and waters. By eliminating EO 13,337's explicit approval process for federal agencies and their environmental reviews while simultaneously approving Keystone's construction, the 2019 Permit violates the Property Clause.

C. The 2019 Permit Violated the Commerce Clause

Congress' power to regulate commerce is exclusive and far-reaching. The importation of foreign oil via pipeline is "foreign commerce." *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914); *Alaska v. Brown*, 850 F.Supp. 821, 827

(D.Ak. 1994). The Constitution grants Congress the "exclusive and plenary" power "[t]o regulate commerce with foreign Nations." *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009); U.S. Const. art. I, § 8, cl. 3. Congress' Commerce Clause power includes, for example, regulation of Keystone's water crossings under Section 404 of the Clean Water Act, including those within the border segment. *Buttrey v. United States*, 690 F.2d 1186, 1189 (5th Cir. 1982), cert. den. 461 U.S. 927. Trump, by contrast, has no inherent constitutional power to regulate foreign commerce. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994).

The 2019 Permit violates the Commerce Clause because it authorizes Keystone without regard for – and thus in derogation of – Congress' comprehensive statutory scheme to regulate its environmental impacts. TransCanada argues that "Plaintiffs' Commerce Clause claim is based on the same patently erroneous theory" that "the 2019 Permit constitutes an 'approval[] for [Keystone's river] crossings.'" Opp. 16. Again, TransCanada relies on Article 6(1) to claim that it "*must* obtain . . . 'authorizations as may become necessary or appropriate.'" Opp. at 17 (emphasis added). Wrong. The 2019 Permit does not state TransCanada "must obtain" federal permits. Instead, it *removes* that requirement by sidestepping EO 13,337 – which required agencies to comply with Congress' statutory scheme – while simultaneously "grant[ing] permission . . . to TransCanada . . . to construct" the Project. 84 Fed.Reg. 13,101.

D. The 2019 Permit Violated EO 13,337

The 2019 Permit violated EO 13,337 at least seven ways. FAC ¶¶ 81-87. TransCanada addresses none. Instead it argues (1) "the 2019 Permit does not purport to excuse [TransCanada] from complying with other applicable laws," (2) "[a]n Executive Order does not bind the President because it can be 'withdrawn at any time for any or no reason,'" and (3) EO 13,337 states that it "does not . . . create any right . . . enforceable . . . by any party against the United States, its departments, . . . , its officers, . . . or any other person.'" Opp. 18-20. Each argument fails.

TransCanada's first claim fails because the 2019 Permit violates EO 13,337 in the seven respects alleged. FAC ¶¶ 81-87.

TransCanada's second argument, that executive orders can be "withdrawn at any time for any or no reason," fails because Trump did not purport to withdraw EO 13,337 before approving the 2019 Permit. Thus EO 13,337 remained in effect. Where, as here, an executive order implements a statutory mandate, it is enforceable. *Legal Aid*, 608 F.2d at 1329-1331; *Carmel*, 123 F.3d at 1166; *Wyoming Wildlife Federation v. United States*, 792 F.2d 981, 985 (10th Cir. 1986) (upholding fee award for lawsuit enforcing EO 11,990 (protecting wetlands)); *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 591 (D.C. Cir. 2010) (reaching merits of claims that FAA violated EO 11,990); *Citizens for Smart Growth v. Secretary of Dept. of Transp.*, 669 F.3d 1203, 1214 (11th Cir. 2012) (reaching merits of

agency's compliance with EO 11,988 and 11,990).

TransCanada's claim that EO 13,337 "does not . . . create any right . . . against the United States" because Section 6 bars judicial enforcement is meritless. Section 6 never mentions judicial review, and omits the sentence commonly used in executive orders to preclude such review. *E.g.*, EO 12,898 (59 Fed.Reg. 7,629 (2/11/1994)) § 6-609; *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F.Supp.3d 101, 136 (D.D.C. 2017) (noting this preclusive language). Presidents know how to draft executive orders to preclude judicial review. Here, Trump chose not to do so. *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling"); *Ex parte Mitsuye Endo*, 323 U.S. 283, 298 (1944) (executive orders are construed like legislation).

V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

TransCanada argues Plaintiffs will suffer no irreparable harm because (1) Plaintiffs rely on harms "outside the 1.2-mile corridor," (2) Plaintiffs do not allege unlawful conduct, (3) all applicable environmental laws will be followed, and (4) Plaintiffs' reliance upon "bureaucratic momentum" fails because courts must "presume that agencies will follow the law." Opp. 20-25.

TransCanada is wrong on all counts. As discussed, (1) Plaintiffs allege harm within the 1.2-mile corridor that is (2) tied to Trump's unlawful conduct; (3) Plaintiffs demonstrate Trump's evasion of environmental laws protecting federal

lands, waters, fish and wildlife from these harms; and (4) irreparable harm is threatened by TransCanada's declared intent to build Keystone and its ongoing pre-construction activities. Reply Volker Dec. Exhs. 1-5. "The significant impacts from the construction camps" – for example – "risk[] the potential for a 'bureaucratic steamroller' that [this] Court [previously] determined." *IEN v. State*, 2019 WL 652416 *10 (2/15/19).

VI. THE BALANCE OF HARM AND THE PUBLIC INTEREST FAVOR PLAINTIFFS

TransCanada argues a preliminary injunction would delay its anticipated profits from Keystone's operation, and delivering oil provides public benefits. Opp. 26-27. It misses the point. The environmental harm from Keystone's construction is irreparable; TransCanada's delayed profit is not. Unlawful delivery of oil does not benefit the public. The public interest favors enforcement of environmental laws, not their evasion.

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VII. CONCLUSION

For these reasons, Plaintiffs' motion should be granted.

Dated: August 7, 2019 Respectfully submitted,

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

s/ *James A. Patten*
JAMES A. PATTEN

Dated: August 7, 2019 Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** contains 3,250 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

s/ *Stephan C. Volker*

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On August 7, 2019 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

PLAINTIFFS' REPLY TO TC ENERGY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I declare under penalty of perjury that the foregoing is true and correct.

s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)