IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GOVERNMENT OF THE PROVINCE OF MANITOBA, *Plaintiff*, v. KEN SALAZAR, *et al.*, *Defendants*, STATE OF NORTH DAKOTA, *Defendant-Intervenor.*	Case No. 1:02-CV-02057 (RMC) (consolidated with No. 1:09-CV-373)

ERRATA

The Government of Canada ("Canada") hereby submits this Errata with respect to its Motion for Leave to File Brief Amicus Curiae [Doc. No. 133], which was filed today, September 28, 2009. Undersigned counsel inadvertently failed to attach to that Motion the correct version of Canada's Proposed Amicus Brief [Doc. No. 133-3]. Attached as Exhibit 1 to this Errata is a corrected version of Canada's Proposed Amicus Brief. Canada respectfully requests that the Court substitute this corrected version of Canada's Proposed Amicus Brief for the version previously filed as Doc. No. 133-3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, the foregoing Errata and corrected version of the Government of Canada's Proposed Amicus Brief were served by CM/ECF on the following attorneys of record:

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PRELIMINARY STATEMENT

The Government of Canada respectfully submits this brief *amicus curiae* in opposition to the Defendants' motions for summary judgment and to lift the injunction.

A. Interest of Amicus. Canada has been actively engaged in the administrative proceedings surrounding the Northwest Area Water Supply (NAWS) project and predecessor proposals contemplating transfers of significant quantities of water from the Missouri River across the Continental Divide into the Hudson Bay basin. Canada's central concern has been the danger that such a transfer could introduce foreign biota and have damaging and irreversible consequences for the Hudson Bay basin, which is the largest drainage system in Canada. Because the vast majority of the Hudson Bay basin lies in Canada,[1] and because the basin includes many of Canada's most vital resources, the potential harms to Canada from the NAWS project are considerable.

As a sovereign, Canada has a responsibility to safeguard the natural resources on which its population's welfare depends. Canada has particular interests in cases involving transboundary pollution, in the implementation of principles of international law aimed at protecting the environment, and in preserving the vitality of the Boundary Waters Treaty's century-old bilateral regime for preventing transboundary water pollution along the 5500-mile border between the United States and Canada.

Since projects that would transfer Missouri River water to the Hudson Bay drainage were first proposed more that 40 years ago, Canada has sought to protect its interests through diplomatic consultations and administrative proceedings. As set forth in

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[1] See Commission for Environmental Cooperation, *North America Watersheds* (2006) (color map available at http://atlas.nrcan.gc.ca/site/english/maps/archives/various/north_america_cec_watersheds).

the Court's February 3, 2005, opinion, 398 F. Supp. 2d 41, Canada participated actively in the administrative process leading to the approval of the NAWS project, including those under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*

B. Background. This and other proceedings concerning NAWS and its predecessor proposals have taken place against the backdrop of the Boundary Waters Treaty, 36 Stat. 2448 (Jan. 11, 1909) (T.S. No. 548), which provides that "waters flowing across the [United States–Canada] boundary shall not be polluted on either side to the injury of health and property on the other," Art. IV, Sec. 3, and establishes an International Joint Commission (IJC) to which the two Nations may submit disputed matters for advisory recommendation or binding arbitration.

In 1975, Canada and the United States jointly referred to the IJC questions regarding a predecessor proposal. After extensive study, the IJC issued a report, *Transboundary Implications of the Garrison Diversion Unit* (1977) ("*Garrison Report*"),[2] which recommended that, because the safeguards then contemplated "cannot with any certainty prevent biota and disease transfers which would cause severe and irreversible damage to the ecosystem and, in particular, to the commercial and sport fisheries in Canada, those portions of the Garrison Diversion Unit which could affect waters flowing into Canada not be built at this time." *Id.* at 121. The IJC unanimously recommended that such a project proceed only "if and when the Governments of Canada and the United States agree that methods have been proven that will eliminate the risk of biota transfer, or if the question of biota transfer is agreed to be no longer a matter of concern." *Ibid*.

[2] The Report is available at http://bwt.ijc.org (under "For Researchers," Docket 101R).

In light of longstanding concerns about potential harms to Canada, Congress in 1986 enacted the Garrison Diversion Reformulation Act, Pub. L. No. 99-294, which authorized the NAWS, a more circumscribed project than the one previously considered, and provided that this project could go forward only if the Secretary of the Interior, in consultation with other high-level officials, found that it would be consistent with the United States's responsibilities under the Boundary Waters Treaty. As amended by the Dakota Water Resources Act of 2000 ("DWRA"), the law directs, that, prior to construction on NAWS,

> the Secretary [of the Interior], in consultation with the Secretary of State and the Administrator of the Environmental Protection Agency, must determine that adequate treatment can be provided to meet the requirements of the [Boundary Waters Treaty].

Pub. L. No. 106-554, Title VI, § 602(4), 114 Stat. 2763A-282.

Even as reformulated, the NAWS project would work a transfer of some 3.6 billion gallons of water annually across the Continental Divide, "establish[ing] the first artificial link in 10,000 years between the Missouri River Basin and the Hudson Bay Basin," raising the risk that foreign biota would be transferred with "catastrophic consequences" for the Hudson Bay basin. 398 F. Supp. 2d at 47.

In its 2005 Decision, the Court granted Manitoba's request for injunctive relief, holding that the Bureau's decision to construct the NAWS project had been reached without undertaking the examination of impacts required under NEPA. In adjudging the Agency's 2001 Environmental Assessment (EA) deficient, the Decision highlighted, *inter alia*, the magnitude, character, and geologic context of the proposed undertaking; the dangers of interbasin biota transfers; and the potentially "irreversible," and "catastrophic" consequences. *See* 398 F. Supp. 2d at 47. The Court then explained that the EA had not

adequately examined these important environmental considerations. *E.g.*, *id*. at 59 ("no study of the consequences of leakage from the pipeline"). *See also id.* at 65, 68.

On April 15, 2005, the Court entered an injunction that allowed certain construction activities to proceed while the agency conducted its analyses, but prohibits defendants from transferring water across the Continental Divide until they have examined these aspects of the proposed project and provided the relevant decision makers with information necessary to make a proper decision.

C. Administrative Decision on Remand Following this Court's decision, the Bureau announced that it would undertake an environmental impact statement for the project. The Final Environmental Impact Statement (FEIS) (2009 AR 2008_172) designated the NAWS project the Bureau had previously adopted as the "No Action" alternative, and adopted this version, with one significant modification (Missouri River water would be subject to ultraviolet treatment before crossing the Divide). The FEIS declined to endorse an alternative that would avoid transferring unfiltered water, on the ground that it was not cost justified, stating that while such a measure would concededly provide greater protection against invasive biota, the risk of a system failure (and attendant interbasin biota transfer) was "low to very low," FEIS 4-18, under each of the alternatives considered.

While presenting a calculation of comparative *risks*, the Bureau did not claim to have based its decision on a careful review of the *consequences* of an interbasin biota transfer. On the contrary, at least with respect to the great majority of the affected area, the FEIS expressly *disclaimed* having done so and offered a straightforward explanation

for its way of proceeding: the agency understood NEPA to require examination of environmental effects only on the United States side of the border. As stated in the EIS:

> Comments suggested Reclamation should take a hard look at consequences (environmental, social, and economic) in Canada in the event of a transfer of invasive species as a result of this project. The statutory provisions of NEPA (and the Council on Environmental Quality's regulations implementing NEPA) ***do not require assessment of environmental impacts within the territory of a foreign country; therefore this type of evaluation is considered outside the scope of the EIS***. A recent ruling of the United States District Court, District of Nevada upholds this NEPA provision (*Consejo de Desarrollo Economico de Mexicali, AC [v. U.S. Dept. Of Interior*, 438 F. Supp. 2d 1207, 1241 (D. Nev. 2006)]).

FEIS at 1-9 to 1-10 (emphasis added). In the Record of Decision (ROD) (2009 AR 2009_26), the Bureau reaffirmed that "analyzing the potential consequences to the environment of the Hudson Bay basin within Canada is outside the scope of the EIS. The statutory provisions of NEPA (and the Council of Environmental Quality's regulations implementing NEPA) do not require assessment of environmental impacts within the territory of a foreign country." ROD at 8. *See also* 71 Fed. Reg. 11226, 11227 (March 6, 2006) (scoping notice).

In addition to its decision to narrow the scope of the EIS in the manner described, the agency concluded that it was not necessary for the Secretary of the Interior, or the Environmental Protection Agency and the State Department, to reach a new judgment as to the project's consistency with the United States' obligations under the Boundary Waters Treaty. The Bureau determined that it would rely upon the 2001 secretarial determination. Although a section of the Agency's FEIS entitled "What is Next?" had stated that the NEPA process would not be "complete" until after the Bureau's Regional Director had engaged in "consultation with the [EPA Administrator] and the Secretary of State," in order to "comply with the provisions of the Dakota Water Resources Act

relative to the Boundary Waters Treaty of 1909," FEIS 1-12, the ROD announced that no further consultation would occur, explaining that the "treatment processes included in the selected alternative are capable of reducing the Project-related risks of a biological invasion to a level beyond that which could be achieved in the" version of the project on which the other Departments had been signed off in 2001. ROD at 13. *See id.* at 19 ("Therefore, in consideration of the aforementioned findings, the Secretary's determination of January 2001, reached in consultation with the Department of State and EPA, is affirmed."); *cf.* 398 F. Supp. 2d at 60-61 (describing consultation).

SUMMARY OF ARGUMENT

Canada continues to have serious concerns concerning the risks that NAWS poses for Canada's natural resources, and continues to believe that, notwithstanding the actions the Bureau has taken in response to the Court's 2005 decision, the environmental implications of the project for Canada have not been adequately scrutinized or addressed. While the Bureau's proceedings following this Court's remand did include more expansive scientific analysis and did result in a notable change to the project – addition of pre-transfer UV treatment – the project retains the earlier decision to transfer unfiltered Missouri River water across the divide and without a full or careful examination of the consequences of an interbasin biota transfer.

That consideration of these consequences would ordinarily be part of – indeed central to – a proper environmental impact assessment cannot seriously be disputed: as this Court's opinion recognized, any proper calculation of costs and benefits requires considering not only the risk of a system failure, but also of the "quantum and intensity of any ecological effect" that such a failure would produce. 398 F. Supp. 2d at 65. Yet the

Bureau itself announced in so many words that it had not taken and would not take a "hard look at consequences (environmental, social, and economic) in Canada in the event of a transfer of invasive species as a result of this project" and that "this type of evaluation [was] . . .outside the scope of the EIS."

Because the supervening agency action repeats, rather than redresses, the deficiencies that prompted the Court's 2005 decision, we respectfully submit that Defendants are not entitled to relief from the injunction. The reason the Bureau gave for its decision to refrain from considering effects on Canada – that a "NEPA provision" limits agencies to considering effects on the United States side of the boundary – does not support a contrary result. The Bureau's conclusion finds no support in NEPA's text and is contrary to the authoritative construction given that statute by the Council on Environmental Quality (CEQ) and in judicial decisions.

There are especially compelling reasons to reject Defendants' categorical position here. It is settled law that the scope of analysis to be performed under NEPA depends upon the purpose of the proposed action and the particulars of the statutory regime that governs it. In statutes specifically addressing the NAWS project, Congress required that before any such project could be approved, the Secretary of the Interior had to determine, in consultation with Executive Departments principally charged with foreign relations and with environmental protection, that United States treaty obligations respecting pollution of Canadian waters would not be breached. This legislative prescription reflects Congress's judgment that the environmental impacts of NAWS in Canada were not only relevant, but central to, the agency's decision. The Bureau's refusal to address concerns designated by Congress as important – even dispositive – prerequisites to

approval of the NAWS project falls afoul of the general "rule of reason" that guides decisions about what factors must be addressed in an NEPA document.

And if the Bureau's obligation under NEPA were less clear, the principle that United States statutes (like Canadian ones) should be construed in a way that coheres, rather than conflicts, with the obligations imposed under international law would further support Manitoba's position; it is settled, both as a matter of customary international law and in treaties and agreements to which the United States is a party, that States have an affirmative responsibility to prevent transboundary pollution of the kind at issue here. Moreover, for many of the same reasons that motivated Congress to enact NEPA decades ago, international law has increasingly been held to impose a specific obligation, related to but distinct from the general pollution prevention duty, to undertake transboundary environmental analysis. Moreover, this is not a case where equitable or practical or foreign policy considerations support disregarding the cross-boundary effects. The project's most serious impacts are ones to Canada; the Government of Canada has affirmatively requested in-depth review and undertaken to supply the United States with necessary information; and as explained in our earlier amicus brief, Canada has enacted and interpreted domestic laws that impose obligations in parallel circumstances that would be congruent with what NEPA would require here.

Rather than defend the merits of the Agency's operative premise, the agency's attorneys ask the Court to treat the unduly restrictive construction of NEPA as a species of harmless error, suggesting that the Bureau, unintentionally, performed the examination that the law requires. But that submission should not be accepted here: whether it is even logically possible to accomplish a "hard look" unwittingly, the consequences the

EIS disregarded were the most serious ones – and the information that would have provided was precisely what would be most important to the proper discharge of relevant officials' statutory responsibilities.

ARGUMENT

I. THE BUREAU'S AVOWED REFUSAL TO TAKE A HARD LOOK AT THE ENVIRONMENTAL CONSEQUENCES OF THE NAWS PROJECT IN CANADA IS SUFFICIENT REASON TO DENY RELIEF FROM THE INJUNCTION AND DENY SUMMARY JUDGMENT

A. The Bureau's Refusal to Consider the Consequences of NAWS for Canada Is Inconsistent with this Court's February 2005 Decision and NEPA Law

The Bureau's conclusion that impacts upon Canadian resources of an interbasin transfer of biota caused by the project were "outside the scope of the EIS" appears inconsistent with this Court's 2005 Decision. This Court found that the Bureau had not adequately examined the consequences of system failures that could result in Missouri River water's being transferred in the Hudson Bay basin. *See, e.g.*, 398 F. Supp. 2d at 59 (finding that there had been "no study of the consequences of leakage from the pipeline"); *id*. at 65 (stating that, "[w]ithout some reasonable attempt to measure these consequences instead of bypassing the issue out of indifference, fatigue or through administrative legerdemain, the Court cannot conclude that BOR took a hard look at the problem"). The Court explained that it was not sufficient to consider the probability of a failure, because "even a low risk of leakage may be offset by the possibility of catastrophic consequences should any leakage occur." *Ibid.*

The Court's insistence on the Bureau's need to take a hard look at environmental consequences of a release of foreign biota nowhere suggested that the analysis could or should be limited to consequences in the United States. To the contrary, this Court said:

> The determination regarding whether BOR has "identified the relevant areas of environmental concern" and took a "hard look" at the problem is informed by a discussion of the Boundary Waters Treaty and the extensive international negotiation, cooperation and study that has permeated the development of NAWS as a result of the United States' treaty obligations.

398 F. Supp. 2d at 56. *See id*. at 66 (concluding that "Manitoba has raised the specter of significant environmental consequences that deserve serious consideration").[3]

The Bureau declared impacts of NAWS in Canada to be "outside the scope the EIS" based upon its conclusion that, as a matter of law, NEPA does not require analysis of impacts occurring outside the United States. The agency did not cite any specific characteristics of this project that warranted that conclusion, but appeared to rely on the broad proposition that NEPA categorically does not require such an analysis. *See, e.g*., ROD at 8 (stating that "[t]he statutory provisions of NEPA (and the Council of [sic] Environmental Quality regulations implementing NEPA) do not require assessment of environmental impacts within the territory of a foreign country.").

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[3] The analysis in the FEIS focuses on the risk of interbasin transfer under various treatment alternatives, but gives very limited attention to a discussion of the consequences of such a transfer. But as the Court had noted, assessing environmental impacts is a function not only of the probability that harm will occur. See 398 F. Supp. 2d at 65 & n.25 (noting repeatedly that evaluation of environmental harm is a function of the magnitude of the harm, as well as its probability). We do not understand Bureau to have taken the position that the risk of an interbasin transfer of biota has been found to be so remote as to obviate the need for inquiry into the consequences. Cf. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir 1980) (noting that "an impact statement need not discuss remote and highly speculative consequences" and holding that the agency was not required to analyze consequences of nuclear war). Nor could such a position be maintained, given that spills from even well constructed and well maintained pipelines are known to occur regularly. See 398 F. Supp. 2d at 65 n.24 (noting that leaks occur "in even the most sophisticated pipeline systems").

But even if the Court's Decision did not foreclose the Bureau's approach, NEPA's text does not support any such categorical rule. To the contrary, as the D.C. Circuit has recognized, the statutory language points strongly against that restrictive construction: "Section 102(2)(C), on its face, is clearly not limited to actions of federal agencies that have significant environmental effects within U.S. borders." *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 536 (D.C. 1993). The Court noted that it has "repeatedly taken note of the sweeping scope of NEPA and the EIS requirement." *Id.* (citing *Calvert Cliffs' Coord. Comm. v. United States A.E. Com'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971), and 42 U.S.C. § 4321). NEPA instructs agencies to achieve the broad objectives of the analysis requirements "to the fullest extent possible." 42 U.S.C. § 4332.

> The court in *Environmental Defense Fund* further reasoned that that
>
> > [T]he presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States. By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.

Id. at 531. The administrative and design decisions, construction, and operation of NAWS all occur within the United States, and the project is designed solely to benefit communities within the United States.[4]

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[4] That all of the relevant agency action occurs in the United States is one of numerous factors that distinguishes this case from *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 57, 71-72 & n.9 (D.D.C. 2005) (finding that NEPA did not require review of agency's transport of decommissioned military vessels on the high seas or at demolition facilities in United Kingdom; noting that "express terms" of two comprehensive environmental statutes governed such transport, and that British environmental statutes governed ship-breaking activity there).

To be sure, as the D.C. Circuit noted in *Environmental Defense Fund*, courts have held that, in certain circumstances, NEPA does not require analysis of impacts that occur outside the United States. Thus, in *Natural Resources Defense Council v. NRC*, 647 F.2d 1345 (D.C. Cir. 1981), the Court upheld the Nuclear Regulatory Commission's decision, in granting a license allowing a United States firm to export nuclear reactor components to the Philippines, not to analyze under NEPA the Philippine impacts of the reactor. Judge Wilkey's lead opinion offered a number of factors supporting that conclusion, including the risk that environmental analysis of plant operations at the overseas site would "unnecessarily displace domestic regulation by the government of the Philippines," and would interfere with the detailed regulatory scheme under the Nuclear Nonproliferation Act. *See id*. at 1356. *See also id.* at 1348 n.9 (noting that Philippine government supported project and opposed NEPA review of site-specific impacts, citing its own ability to "assess and protect the Philippine environment").[5] Judge Wilkey took pains to emphasize the narrowness of his rationale: "only that NEPA does not apply to NRC nuclear export licensing decisions and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad," *id.* at 1366, but even a broader rationale would not speak to a case like this one, where the actions at issue are taken exclusively within United States borders.

Other cases have also excused NEPA analysis of impacts in foreign countries where such review would interfere with significant diplomatic or national security interests.

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[5] Concurring in the judgment, Judge Robinson concluded that detailed statutory provisions regulating the export of nuclear materials, which imposed tight time-tables on licensing, created a conflict that rendered NEPA inapplicable. 647 F.2d at 1386-87 (citing *Flint Ridge Devel. Co. v. Scenic Rivers Ass'n.*, 426 U.S. 776 (1976)).

E.g., *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993) (holding NEPA inapplicable to Department of Defense operations in Japan because injunction requiring EIS would "risk intruding upon a long standing treaty relationship" governing status of United States forces in Japan, and because "U.S. foreign policy interests outweigh the benefits from preparing an EIS"); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 760-61 (D. Haw. 1990) (NEPA inapplicable to Department of Defense's movement of nerve gas agents in West Germany pursuant to executive agreement, because it "would encroach on the jurisdiction of the FRG" and "substantively interfere with a decision of the President and a foreign sovereign").

In contrast to these cases, no "overriding foreign policy concerns" or threats to "international cooperation" are in play here that might disfavor NEPA review. *Environmental Defense Fund*, 986 F. 2d at 535, 536. Canada affirmatively seeks environmental review of the NAWS project, and stands ready to assist that process. NAWS is not a joint project of the United States and Canada, and no part of it is governed by Canadian law or designed to benefit Canada. Considerations of international comity militate for, not against, environmental review.

Nor is there any conflict with any federal statutory scheme: in the DWRA, Congress has not only encouraged, but required, the agency to consider the impacts of the project on Canada. While that statute refers to a preexisting treaty obligation – the Boundary Waters Treaty – it instructs the Secretary to determine the conformity of NAWS with the Boundary Waters Treaty, in consultation with other United States officials. The DWRA does not consign the decision whether to approve NAWS to an

international mechanism that might be thought to obviate NEPA review. It provides for the very sort of decisional process NEPA was intended to inform.

Furthermore, the agency created by Congress to oversee the implementation of NEPA has determined "that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States." *Guidance on NEPA Analysis for Transboundary Impacts* (July 1, 1997).[6] Citing NEPA's broad language, the Guidance explains:

> Neither NEPA nor the (CEQ) regulations implementing the procedural provisions of NEPA define agencies' obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur.

Id. The CEQ also noted that "[c]ase law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries within the United States, [citing, *inter alia*, *Sierra Club v. U. S. Forest Service*, 46 F.3d 835 (8th Cir 1995): *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988)], and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States but could have environmental effects within the United States. [citing, *inter alia*, *Sierra Club v. Andrus*, 578 F.2d 389 (D.C. Cir. 1978)]." *Id.* (footnotes omitted). CEQ emphasized that "agencies should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the nature ecosystem that cross borders, as well as interrelated social and economic effects." *Id.*

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[6] The guidance is available at http://www.nepa.gov/nepa/regs/transguide.html. CEQ's interpretation of NEPA is granted considerable weight. *See, e.g., Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979); *Davis v. Mineta*, 302 F.3d 1104, 1125 n.17 (10th Cir. 2002).

The Bureau did not provide an analysis of NEPA's text, or that of the CEQ regulations, and did not discuss the CEQ's guidance. The only authority it advanced was the district court decision in *Consejo de Desarrollo Economico de Mexicali, AC v. U.S.*, 438 F. Supp. 2d 1207 (D. Nev. 2006), in which the court held that the Bureau was not obligated to prepare a Supplemental EIS concerning the impacts of a canal-lining project in the Southwest upon wetlands and other resources in Mexico. However, well before the FEIS cited it, that decision was vacated, 482 F.3d 1157 (9th Cir. 2007), in light of a federal statute enacted during the litigation that expressly exempted the project from further NEPA review and provided that a water resources treaty between the United States and Mexico would be the "'exclusive authority for identifying, considering, analyzing, or addressing impacts occurring outside the boundary of the United States of works constructed, acquired, or used within the territorial limits of the United States.'" 482 F.3d at 1168 (quoting statute). Here, far from a statutory override of NEPA obligations, there is a statutory requirement that agency officials make their own informed determination whether the project as planned would violate a treaty restriction on transboundary pollution – a determination that calls for the kind of careful analysis of environmental consequences that NEPA prescribes.[7]

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[7] Nor does the vacated *Consejo* decision even provide persuasive authority for BOR's action. The court in that case did not hold that NEPA never requires analysis of transboundary impacts; it acknowledged the 1997 CEQ guidance and cases requiring NEPA analysis of impacts occurring outside the United States. See 438 F. Supp. 2d at 1235. Applying a particularized "rule of reason" analysis to facts that included uncertainty concerning the intervening influence of water management by Mexican authorities, the court held "based on the facts here and absent a clear statutory intent to the contrary," that no analysis of impacts in Mexico was required. *Id*. at 1238.

B. The Bureau Could Not Properly Exclude Environmental Impacts in Canada from its Analysis Because the Statute that Authorizes and Funds NAWS Mandates Scrutiny of the Potential Environmental Harms in Canada

"[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989)). While the decided cases suggest that determining whether (and to what extent) NEPA requires analysis of environmental impacts outside the United States may sometimes present challenging questions, no such difficulties were presented here. Because the statutes authorizing NAWS call for judgments about environmental consequences in Canada, the Bureau's view that it need not consider them was manifestly unreasonable. As the Ninth Circuit has recently explained:

> In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Proc. (S.C.R.A.P.)*, 422 U.S. 289, 322, (1975). Thus, just as "[w]here an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS," *Westlands Water* [*Dist. v. Dept. of Interior*], 376 F.3d [853, 866 (9th Cir. 2004), so too do the statutory objectives underlying the agency's action work significantly to define its analytic obligations. Put differently, because "NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978), the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis.

Oregon Natural Desert Ass'n v. Bureau of Land Management, 531 F.3d 1114, 1130 (9th Cir. 2008). *See also Marsh*, 490 U.S. at 374 (application of rule of reason turns on the "value of the * * * information to the * * * decisionmaking process"); *Oceana, Inc. v.*

Evans, 384 F. Supp. 2d 203, 240 (D.D.C. 2005) ("the adequacy of an EIS is evaluated according to a 'rule of reason,' *given the scope and purpose of the proposed action*") (emphasis added).[8]

The DWRA's express, specific legislative command – requiring a prior Secretary-level determination that the project would not violate the Boundary Waters Treaty prohibition on injurious trans-boundary pollution, coupled with the further procedural safeguard of a mandatory consultation with the federal agencies charged with environmental protection and international diplomacy – unambiguously made the potential adverse environmental impacts of the NAWS project in Canada a central issue of administrative concern. The implications of the project for Canada's natural resources and economy are a "significant aspect of the environmental impact of the problem," *Vermont Yankee*, 435 U.S. at 553, and squarely within the proper scope of an EIS.[9]

The Bureau's own characterization of the purpose of its action highlights the central relevance of transboundary environmental impacts. The FEIS describes the proposed action as a "proposal to construct a biota water treatment plant (WTP) for the

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[8] Correspondingly, when "any agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," *Public Citizen*, 541 U.S. at 770, it need not analyze the effect in an EIS.

[9] Indeed, in its comments on the preliminary draft EIS, EPA noted the importance of a review of impacts in Canada to a determination of conformity with the Treaty. EPA observed that the Bureau had assessed impacts on Canada in the Red River Water Supply Project and stated: "In light of the value of this assessment in disclosing impacts in Canada's Hudson Bay basin, and in the interest in providing a determination of adequate treatment to meet the requirement of the Boundary Waters Treaty, EPA recommends that a similar assessment of the potential impacts of successful invasion of the Hudson Bay basin be provided in the NAWS DEIS." EPA Region 8, NAWS Preliminary Draft EIS Review (Aug. 16, 2007), 2009 AR 2007_144 at 5.

Project to treat the source water from Lake Sakakawea before it is delivered in to the Hudson Bay drainage," in order to "reduce the risk of a Project-related biological invasion from the Missouri River basin to the Hudson Bay basin." FEIS 1-5. The Bureau explained that the "purpose" of the action is "to adequately treat Project water from the Missouri River basin (Lake Sakakawea) to further reduce the risk of a Project-related biological invasion into the Hudson Bay basin"; that each authorizing statute "includes language on compliance with the Boundary Waters Treaty," and that, by statute, "all costs (construction, operation, maintenance and replacement) of water treatment and related facilities attributable to meeting the requirements of the treaty" would be "funded by the federal government." FEIS 1-6.

As the agency thus acknowledged, this project is inextricably linked to the congressional goal of ensuring compliance with the Boundary Waters Treaty's prohibition on pollution that harms Canada. In light of the "scope and purpose of the proposed action," *Oceana*, 384 F. Supp. 2d at 240, it was unreasonable for the Bureau to exclude from the EIS a careful analysis of the environmental consequences of the various alternatives on the Canadian portion of the Hudson Bay basin.

C. Principles of International Law Support the Conclusion that the Bureau was Required to Examine the Environmental Consequences of NAWS in Canada

"International law and international agreements of the United States are law of the United States, * * * [to which] courts in the United States are bound to give effect," and "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations Law of the United States §§ 111, 114

(American Law Inst. 1987) ("*Restatement*").[10] *See also, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *George E. Warren Corp. v. E.P.A.*, 159 F.3d 616, 624 (D.C. Cir. 1998) (Clean Air Air).

It is a fundamental principle of international law that States are required to take appropriate measures to ensure that activities within their territory does not cause "significant injury * * * to the environment of areas beyond the limits of [their] national jurisdiction." *Restatement*, § 601. Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, and Principle 2 of the 1992 Rio Declaration on Environment and Development (*Rio Declaration*), both affirm that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[11]

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[10] "[C]ourts often rely upon" the *Third Restatement* "as an authoritative exposition of the foreign relations law of the United States." *United States v. Pasquantino*, 336 F.3d 321, 327 (4th Cir. 2003) (citing cases); *see also McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 487 n.1, 488-489 (D.C. Cir. 2008).

[11] *See also* International Law Commission, *Prevention of Transboundary Harm from Hazardous Activities*, [Draft] Article 3 ("The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.") (2001); Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Rep. 226, ¶ (1996) (stating that "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States" is "now part of the corpus of international law relating to the environment).

The prevention duty stems from the broader "*sic utere*" principle, which affirms "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Corfu Channel (United Kingdom v. Albania)*, 1949 I.J.C. 4, 22. *See also* Canada Amicus Brief at 9-10 (June 9, 2003) (Doc. 29). The *sic utere* principle, as applied to environmental matters, is part of law of the United States, *see* Restatement, § 601, both as customary international law and by operation of international agreements to which the United States is a party, including the Boundary Waters Treaty, which, as noted, specifies that "waters flowing across the [U.S./Canada] boundary shall not be polluted on either side to the injury of health or property on the other," Article IV. Indeed, its recognition as a principle of customary international law is often traced to the 1941 *Trail Smelter Arbitration (U.S. v. Canada)*, 3 U.N.R.I.A.A. 1938 (1949), concluded pursuant to that Treaty. *See* Canada 6/9/03 Amicus Brief at 11-13.

International law has recognized the introduction of invasive species and foreign biota from one water basin to another can constitute injury for purposes of the *sic utere* and related principles – as evidenced, for example, by the *Garrison Report*, *supra*, p. 2, and by Congress's prescription in the DWRA that the NAWS project be subject to water treatment adequate to prevent a violation of the Boundary Waters Treaty.

The international law obligation to prevent transboundary environmental harm is an obligation of due diligence that necessarily begins with an enquiry whether a particular activity has the potential to cause significant transboundary harm. Numerous authorities have described a State of origin's obligation to assess transboundary impacts as following directly from the *sic utere* principle. In concluding that federal agencies should consider transboundary impacts in performing impact assessments under NEPA,

for example, the CEQ's 1997 Guidance described this "long-established rule of customary international law," and concluded that "[a]nalysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles." Likewise, scholarly commentaries are of the view that transboundary environmental impact assessment has reached the status of customary international law on this basis. *See, e.g.*, Angela Cassar and Carl Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. Envtl. L.J.169, 189 (2003) (describing the "imperative to determine potential transboundary impacts of a proposed action and identify potential mitigation measures" as "[n]aturally flowing" from the *sic utere* obligation); John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment* 96 Am. J. Int'l L. 291, 295 (2002) ("Principle 21 does seem logically to require assessment of the potential transboundary effects of activities that might cause transboundary harm"). Were it otherwise,

> the substantive prohibition on transboundary harm would be largely meaningless, except perhaps as a basis for post hoc determination of compensation owed to the affected sates. If a state does not know whether an activity might cause transboundary harm, it cannot take steps to avoid the harm.

Ibid. [12]

The increasing importance internationally of the assessment of transboundary environmental impacts is evident in the adoption of the Convention on Environmental

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[12] *See id.* at 296 n.32 (quoting Phoebe Okowa, Procedural Obligations in International Environmental Agreements, Brit. Y.B. Int'l L. 275, 279 (1996) ("A State that fails to assess the impact of proposed activities on the territories of other States can hardly claim that it has taken all practicable measures with a view to preventing environmental damage.")).

Impact Assessment in a Trans-boundary Context, 30 I.L.M. 800 (adopted on February 25, 1991 at Espoo, Finland and entered into force on September 10, 1997), requires States to ensure that an impact assessment including a "description of the potential environmental impact of the proposed activity" is undertaken prior to a decision to authorize or undertake an activity likely to cause a significant transboundary environmental impact – a duty that can be discharged through the domestic legal procedures of the State of origin. *See* Appendix II(d). Under Article 10 of the Espoo Convention, the Appendices form an "integral part" of the Convention.[13]

The Espoo Convention both identifies categories of projects whose trans-boundary aspects should be part of an environmental assessment and also sets out criteria for other projects that can be used by the Parties to categorize the importance of project. *See* Appendices I, III. In judging whether a "significant environmental impact" warranting an assessment is present, the Convention directs consideration to whether an activity will involve "particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing

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[13] The Convention is in force for 43 States, including Canada, and has been signed by an additional 30 states, including the United States. Although the unratified convention is not binding on the United States as an international agreement *per se*, Article 18 of the Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331 (1969), provides that signatory States are "obliged to refrain from acts which would defeat the object and purpose of a treaty" unless they have made their "intention clear not to become a party." The Vienna Convention in turn, is generally accepted as an authoritative guide to current treaty law and practice. S. Exec. Doc. L, 92d Cong. 1st. Sess. (1971); *Restatement,* Pt. III, intro note, pp. 144-145; *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied,* 534 U.S. 891 (2001). Article 18 in particular is generally considered to be declaratory of customary international law. *See Restatement* § 312.

additional loading which cannot be sustained by the carrying capacity of the environment." Appendix III, Para. 1(c).[14]

The United Nations International Law Commission reviewed emerging principles of customary international law on States' obligations respecting transboundary pollution and, in 2001, adopted and presented to the General Assembly its Draft Articles on *Prevention of Transboundary Harm from Hazardous Activities* (adopted 2001). *See* REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION 146-170 (2001) (U.N. Doc. A/56/10 (2001)). Draft Article 7 states that: "Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment." *Id.* at 157. Draft Article 8 recognizes the duty of the State of origin to inform the affected State, prior to authorizing the potentially harmful activity, of "the risk and the assessment," *id.* at 159, and, Draft Article 9 recognizes the State of origin's duty to consult with the affected State on measures to "prevent significant transboundary harm or at any event to minimizing the risk thereof," *id.* at 160.

Other authorities have explained that the requirement to perform transboundary environmental impacts is best understood as grounded in the international law norm of

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[14] The Draft North American Agreement on Transboundary Environmental Impact Assessment (Oct. 21, 1997) (available at http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm), contains provisions similar to those reflected in the Espoo Convention. The negotiations became stalled, not because of disagreement of States' obligation to address transboundary harm, but because of the United States' and Canada's insistence that the obligation should be restricted to national governments. See Charles M. Kersten, Rethinking Transboundary Environmental Impact Assessment, 34 Yale J. Int'l L. 173, 178 & nn. 35, 36 (2009).

reciprocity, which requires "each Country [to] ensure that its regime of environmental protection does not discriminate between pollution originating from it which affects or is likely to affect the area under its national jurisdiction and pollution originating from it which affects or is likely to affect an exposed Country." OECD Council, Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, Recommendation C(77)28(Final), Annex, Princip. 3(a) (May 17, 1977). The principle calls for States to assess the extraterritorial effects of actions within their jurisdiction just as they would domestic effects. *See generally* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 937 (1997).

The non-discrimination principle has special resonance here. As Canada previously explained, if Canada were contemplating a federally funded project within Canada that could cause significant adverse environmental effects within the United States – Canada would be obligated to address any potential impact in the United States. *See* Br. at 21-22 (citing and discussing, *inter alia*, Canadian Environmental Assessment Act, Sec. 2(b), R.S. 1992, c. 37).[15]

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[15] The FEIS asserts that "[i]n Canada, more streamflows are diverted out of their basin of origin than any other country in the world." FEIS 3-13. See also Fed. Deft. Br. 35. The statement, however, is misleading. The vast majority of the diversions in Canada are within the major river basins. Only four diversions, Megiscane, Ogoki, Long Lac, and St. Mary-Milk, carrying a relatively small amount of water (approximately 4% of the 152,232 cfs figure cited in the FEIS), are transfers between Canada's five major ocean drainages. Each of those four projects were constructed more than 50 years ago: Megiscane for hydropower in 1953, Ogoki and Longlac in 1943 and 1939 (to augment flows in the Niagara for hydropower to support WWII industry and with the formal consent of the United States), and St. Mary-Milk (regulated by the Boundary Waters Treaty) in 1917 for irrigation. *See generally* Frank Quinn, Interbasin Water Diversions in Canada (2004). Furthermore, as explained in its 2003 amicus brief, Canadian law today strictly regulates bulk removals from river basins. See p. 23 (citing Boundary Waters

As noted above, the considerations of international comity that are sometimes understood to support a narrow interpretation of United States statutory law point strongly in the opposite direction here. There is no even theoretical danger here, as there can be in cases where actions of United States agencies support potentially destructive activities undertaken by or favored by foreign governments, that applying NEPA might *create* friction in foreign relations, or denigrate, conflict with, or duplicate the environmental laws of another country. On the contrary, Canada and Manitoba have consistently sought such consideration, and three overlapping sets of binding law – customary international law, the Boundary Waters Treaty, and acts of Congress directing specific determinations of compliance with the Treaty for this particular project, all oblige the United States to refrain from activities that cause cross-border effects in Canadian waters. Finally, consideration of trans-boundary impacts in Canada is both practicable and consistent with Canadian domestic practice.

II. THE BUREAU'S CONCLUSION THAT IMPACTS IN CANADA WERE BEYOND THE SCOPE OF ITS EIS WAS NOT HARMLESS

In this Court, the Federal Defendants make no attempt to defend the Bureau's emphatic assertion in both the ROD and the FEIS that the agency had no obligation to address transboundary impacts, arguing that the question of NEPA's reach in these circumstances is only of academic significance. After pointing to various places in the EIS in which "the potential impacts of biological invasions, including in Canada," are addressed, and collecting others in which Canada or its natural resources are mentioned, the brief posits that it does not matter for present purposes "whether or not [consideration

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Treaty Act amendments prohibiting bulk water transfers out of Boundary Waters, R.S. 1985, c.I-17, s. 13, and Manitoba's prohibition on bulk water removals).

of Canadian impacts] is required under NEPA," because the FEIS in fact "addresses the relevant impacts within Canada." Br. 34-35 & n.9.

We respectfully disagree. First, the issue of NEPA's scope is not one that was addressed only in passing by the agency. The position was articulated at the scoping, DEIS, FEIS and ROD stages, and reaffirmed despite specific criticisms in comments. Nor is this a case where an agency stated for the record its narrow view of a governing legal mandate, before then produce a more comprehensive analysis that an alternative interpretation would require. *E.g.*, *Village of Bensenville v. FAA*, 457 F.3d 52, 59 (D.C. Cir. 2006) (agency expressed "uncertainty" over whether Religious Freedom Restoration Act applied in circumstances, but "proceeded as if [it] did apply in order to avoid litigation over the project").

Indeed, the statutory requirement at issue here is precisely the sort that is not amenable to rationalization through post-hoc legal argument. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Whether or not an agency gathered data, the concept of a "hard look" require a conscious process, and is incompatible with or incidental inadvertent consideration. *E.g.*, *Illinois Commerce Com'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988) (decisionmaker must have "fully adverted to the environmental consequences" of the proposed action); *Calvert Cliffs*, 449 F.2d at 1123 (describing NEPA review as an "individualized balancing analysis" in which "much will depend on the particularly magnitudes involved in particular cases").

In fact, the scattered references to Canada in the FEIS do not amount to a hard look, but instead confirm that what the Bureau did in practice was consistent with its stated view of what it was (and was not) legally required to do. While it is true that the

FEIS makes some references to Canada, there is no systematic effort to examine the effect that the project, and a release of biota, could have on particular Canadian resources, territory, populations, or industries.[16]

The effects of an exotic biota in Canada cannot be assumed (cf. Fed. Deft. Br. at 36) to be uniform, generic, or the same as the small portions of the United States within the basin; the Hudson Bay basin covers much of central Canada, and includes unique resources such as Lake Winnepeg, which are vital for reasons of ecology and economics.

Finally, the procedure the Bureau followed after completing its FEIS served to render the document's failure to consider impacts in Canada more important, and to foreclose consultations that might have at least partially addressed the defects. Despite having stated that a final decision would await "consultation with the [EPA Administrator] and the Secretary of State," "relative to the Boundary Waters Treaty of 1909." FEIS 1-12, the Bureau instead ultimately announced that it would "affirm" the 2001 secretarial determination under the DWRA, relying on a "consultation" with EPA and the State Department that had occurred eight years earlier, ROD at 19.

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[16] In this respect, it is noteworthy to compare these references to the discussion of impacts to Canada in the IJC's *Garrison Report*. The *Report* noted that the Board's study of transboundary impacts had included "not just the Souris, Assiniboine and Red River Basin and Lakes Manitoba and Winnipeg, but also the streams entering or leaving the latter Lakes, explaining that it was "quite proper[] to analyze impacts "on the biological resources of Manitoba." *Garrison Report* at 97. The *Report* included an extensive discussion of the "Impact in Canada of the [Garrison Diversion Unit] as Envisioned," including effects on of the project on water quality and effects of the potential spread of new fish diseases on Manitoba's fishing industry. See *id.* at 99-106.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that Defendants have not demonstrated cause to lift the injunction entered by this Court, and that their motion for summary judgment should be denied.

Respectfully submitted,

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