

**SIERRA CLUB
NATURAL RESOURCES DEFENSE COUNCIL
PLAINS JUSTICE**

May 28, 2009

Jeff Wiese
Associate Administrator for Pipeline Safety
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
East Building, 2nd Floor
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Docket Number PHMSA-2006-26617 - TransCanada Keystone Pipeline, L.P. (April 30, 2007)

**Applicability of National Environmental Policy Act to TransCanada Keystone Pipeline LP
Special Permit to Design, Construct and Operate at 80% of SMYS**

Dear Mr. Wiese:

We request that the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (“NEPA”) in connection with TransCanada’s petition for a Special Permit and request for review and approval of the Emergency Response Plan and Integrity Management Program for the Keystone Crude Oil Pipeline. The special permit was granted April 30, 2007 and allows Keystone to design, construct and operate two new crude oil pipelines (the Keystone Pipeline and Keystone Cushing Extension) using a design factor and operating stress level of 80 percent of the steel pipe’s specified minimum yield strength (SMYS) in rural areas. The current regulations in 49 CFR 195.106 limit the design factor and operating stress level for hazardous liquids pipelines to 72 percent of SMYS. The decision by PHMSA in this matter was a major federal action significantly affecting the quality of the human environment under 42 U.S.C. § 4332, 40 C.F.R. § 1508, and DOT Order 5610.1c, and as such requires the completion of an environmental impact statement (EIS) by the PHMSA prior to a ruling in this matter. PHMSA must also prepare an EIS before approving both the Emergency Response Plan and the Integrity Management Program for the Keystone Pipeline, required by 49 C.F.R. § 194.119 and 49 C.F.R. § 195.452 respectively, because these approvals are also major federal actions under 42 U.S.C. § 4332, 40 C.F.R. § 1508, and DOT Order 5610.1c. Further, PHMSA should have assumed the role of lead agency or co-lead agency in the preparation of an EIS for the Keystone Crude Oil Pipeline.

NEPA Requires that the PHMSA Prepare an EIS for Issuance of the Special Permit Requested by TransCanada for the Keystone Crude Oil Pipeline and Granted by PHMSA

A decision by PHMSA to grant a special permit that waives long-standing federal pipeline maximum operating pressure regulations for 30 and 36 inch diameter crude oil pipelines extending 1,379 miles is a major federal action significantly affecting the human environment, and is therefore subject to NEPA review. 40 C.F.R. § 1508.18 and DOT Order 5610.1c(4)(a) state that “permits” are subject to NEPA review requirements, as are regulatory “decisions” and “actions,” respectively. Further, 40 C.F.R § 1508.18 states that federal actions include projects that are “entirely or partly . . . regulated or approved by federal agencies” TransCanada sought approval from the PHMSA of its petition for a special permit to waive the maximum operating pressure regulations for a pipeline subject to PHMSA regulation. Thus, the PHMSA decision in this matter was an approval of a regulated matter, and therefore an action subject to NEPA.

Moreover, the PHMSA decision in this matter was a “major federal action significantly affecting the quality of the human environment” as defined by 40 C.F.R § 1508.18 and 27. The factors making this a “major” action include, but are not limited to:

- the sheer size and cost of this project;
- the substantial impacts of construction of this project, which was significantly altered by approval of the Special Permit;
- the potential for catastrophic human and environmental impacts; and
- the potential cost savings (at least hundreds of millions of dollars) that will result from granting a Special Permit to TransCanada.

The requested waiver was not a minor alteration of a peripheral technical standard in a limited geographic area. Rather it was a substantial alteration of a core safety standard for one of the longest and largest crude oil pipelines ever constructed in the United States. The PHMSA decision affected not only maximum operating pressure requirements, but also other standards affecting construction along the entire pipeline, such as the depth of trenching and equipment type and placement. The on-the-ground impacts of a PHMSA waiver are substantial.

The PHMSA decision on the Special Permit will or may significantly affect the human environment because, among other things, it would or might:

- significantly affect public health and safety, particularly if the PHMSA makes an error in judgment that results in substantial spills of crude oil;
- require deeper trenching along thousands of miles of pipeline, thereby having a greater impact on the land;
- result in a highly controversial action that – in a significant departure from prior US pipeline regulatory practice – provides for less protection for rural families, lands, and communities, relative to the protection provided in developed areas;
- establish a precedent for future waivers of the existing maximum operating pressure standards without formal amendment of this standard;

- allow for additional pumping equipment to maintain higher pressures, thereby resulting in greater energy use; and
- result in a greater disturbance of land to ensure an increased depth of cover, thereby putting more historical, cultural, and natural resources at risk.

Even if the PHMSA maintains the same overall level of safety with a waiver of the maximum operating pressure standards, which we do not concede it will, this does not mean that the environmental impacts of construction and operation of the pipeline are the same since the special permit was granted in comparison to if it had been denied. The PHMSA special permit fundamentally changed the physical design and construction of the Keystone Crude Oil Pipeline, and thereby will result in significant impacts to the environment.

A PHMSA decision on a special permit is, in its own right, a major federal action significantly affecting the human environment that requires preparation of an EIS. Therefore, a failure by the PHMSA to prepare an EIS before it took action on the Special Permit violated NEPA.

NEPA Requires that PHMSA Prepare an EIS for Approval of an Emergency Response Plan for the Keystone Crude Oil Pipeline

TransCanada was required to submit, 49 C.F.R. § 194.101, and PHMSA is required to approve, 49 C.F.R. § 194.119, an Emergency Response Plan for the Keystone Crude Oil Pipeline. The purpose of this response plan is to “reduce the environmental impact of oil discharged from onshore oil pipelines.” 49 C.F.R. § 194.1. Among other things, an Emergency Response Plan must, for the entire pipeline and for each response zone:

- assess and address removal of a worst case spill for this particular pipeline;
- identify economically and environmentally sensitive areas;
- describe spill detection and mitigation procedures; and
- identify response activities and response resources.

As such, the Emergency Response Plan will be the primary governmental mechanism to protect public health and safety and the environment in the event of a spill. Defects in the Emergency Response Plan could have catastrophic impacts on the environment, including drinking water sources for millions of people and large areas of habitat used for hunting, fishing, boating, bird watching, and other forms of recreation prized by Americans. Approval of the Emergency Response Plan for the Keystone Crude Oil Pipeline requires PHMSA to apply general regulatory requirements to specific on-the-ground circumstances in an effort to anticipate and mitigate for the very real possibility of spills from the Keystone Crude Oil Pipeline.

Therefore, the PHMSA’s approval of a response plan for the Keystone Crude Oil Pipeline is a major federal action significantly affecting the quality of the human environment that required completion of an EIS before approval by the PHMSA. Moreover, completion of an EIS for action by the DOS should not have taken place absent the DOS’s consideration of the Emergency Response Plan, because the Emergency Response Plan is the primary mitigation measure to ensure that TransCanada properly cleans up spills from the Keystone Crude Oil Pipeline. Compliance with NEPA on the Emergency Response

Plan should have been completed before the DOS made a decision on TransCanada's Application for a Presidential Permit, but our inquiries to the agency indicate that it has not been completed.

NEPA Requires the PHMSA to Prepare an EIS for Approval of an Integrity Management Program for the Keystone Crude Oil Pipeline

TransCanada is required to submit and the PHMSA is required to review and approve an Integrity Management Program ("IMP") for the Keystone Crude Oil Pipeline. 49 C.F.R. § 195.452, 49 U.S.C. §§ 60109(c)(9), 60108(a)(1), 60118(a)(4). The purpose of the Keystone IMP is to ensure the safe operation of TransCanada Keystone Crude Oil Pipeline, particularly with regard to avoidance of spills in certain "high consequence areas." *See* 49 U.S.C. § 60109. Federal pipeline safety law and regulation contain a large number of detailed requirements for this program intended to identify and protect specific environmentally sensitive high consequence areas through pipeline-specific analysis and application of health and safety standards to protect these particular areas. 49 C.F.R. § 195.452.

For example, the IMP must assess the risk factors for particular high consequence areas when determining a schedule for inspection of the pipe segment in that area. 49 C.F.R. § 195.452(e)(1). These factors include existing or projected activities by others in the area, local environmental factors that could affect the pipeline, and site-specific geotechnical factors. *Id.* Further, the IMP must identify "preventive and mitigative measures" to protect specific high consequence areas. 49 C.F.R. § 195.452(f)(6). The regulations contain many more project and site-specific requirements intended to protect citizen safety and the environment.

As such, the Keystone IMP is the government's primary spill prevention mechanism intended to protect areas along the Keystone Crude Oil Pipeline where a spill could have severe environmental consequences. As such, it represents an essential part of the federal government's environmental mitigation effort. A failure of TransCanada's IMP could result in a catastrophic oil spill.

The requirement that PHMSA review and approve of the Keystone IMP is contained in 49 U.S.C. § 49 U.S.C. §§ 60118(a)(4), 60109(c)(9). Although law and regulation do not refer to this process as an "approval" process, in practice it is indistinguishable from other ordinary agency approval processes. First, TransCanada submits a proposed IMP, and then PHMSA reviews this program. Where TransCanada's program does not comply with the requirements of law and regulation, the PHMSA provides comments to TransCanada to ensure compliance with the law in the expectation that TransCanada will modify its program. Failing modification by TransCanada in accordance with PHMSA comment, the PHMSA is empowered to require TransCanada to include PHMSA terms within the IMP and to prohibit operation of the Keystone Crude Oil Pipeline until TransCanada's IMP complies with law. 49 U.S.C. § 60118(b). That PHMSA must seek to enforce its authority via compliance order under 49 U.S.C. § 60118(b) does not render this process any less an approval process. The only thing missing from the PHMSA's IMP approval process is the word "approve."

Therefore, the PHMSA's review and modification of TransCanada's IMP for the Keystone Crude Oil Pipeline is a major federal action significantly affecting the human environment such that the PHMSA must complete an EIS prior to its approval.

Moreover, completion of an EIS for action by the DOS was not proper absent the DOS's consideration of the terms of the Keystone IMP, because the IMP is the primary mitigation measure to prevent spills from the Keystone Crude Oil Pipeline from happening in the first place. It would not be possible to complete a meaningful EIS for the Keystone Crude Oil Pipeline absent a clear understanding of the spill prevention measures proposed by TransCanada and the PHMSA. Therefore, PHMSA should have prepared the IMP before the DOS made a decision on TransCanada's Application for a Presidential Permit.

Finally, the TransCanada IMP is also integrally related to the Special Permit requested by TransCanada, because the Special Permit would modify the IMP in high consequence areas. As such, to the extent the Special Permit and IMP affect either major federal action, they reinforce the need for the PHMSA to complete an EIS prior to the approval of either action.

The PHMSA Must Participate in the Preparation of an EIS for the Keystone Crude Oil Pipeline

The PHMSA is *the* federal agency charged with ensuring hazardous material pipeline safety and limiting the risk that such pipelines pose to the people and the environment. No other federal agency has greater responsibility for and knowledge of the environmental risks posed by crude oil pipelines. If any agency's special expertise is needed in the preparation of an EIS for this project, it is the PHMSA's.

40 C.F.R. § 1501.5 requires that agencies coordinate their responsibilities under NEPA. Since the PHMSA's Special Permit, Emergency Response Plan, and IMP decisions are directly related to the DOS Presidential Permit decision, the PHMSA's actions falls within 40 C.F.R. § 1501.5(a), which requires that the PHMSA undertake a NEPA review either as a lead agency or a cooperating agency, depending on a number of factors. The PHMSA should have been the lead agency in preparation of the Keystone Crude Oil Pipeline EIS (Keystone EIS) because:

- as demonstrated by its responsibilities for approving the Special Permit, Emergency Response Plan, and IMP, the PHMSA has far greater involvement in pipeline permitting, safety, and construction than the DOS, and the DOS is involved in actual permitting for only a small segment of pipeline;
- the PHMSA has far greater expertise than the DOE concerning the environmental effects of crude oil pipelines;
- the PHMSA is and will be involved in the Keystone Crude Oil Pipeline during permitting, construction, and operation of the pipeline, whereas the DOS has no involvement in regulation of the pipeline once permitted; and
- the PHMSA is required to regulate the design, construction, operation, and potential risks of the Keystone Crude Oil Pipeline throughout the permitting process.

The PHMSA, however, only assumed the role of an "assisting agency" and its responsibilities were limited to "provid[ing] technical expertise to DOS in the assessment of the Keystone Project and in determination of appropriate mitigating measures." Keystone EIS, at 1-11 (2008). The DOS has no special knowledge of pipeline design, construction, operation, or environmental impacts, yet acted as the lead agency in the preparation of the EIS. *Id.* at 1-7.

The role of the lead agency is to ensure the proper preparation of an EIS for all of the federal and state agencies that will rely on it. Due to the technical nature of pipeline regulation, spill mitigation, and spill impact analysis, and given DOS's utter lack of expertise in this area, the DOS is poorly suited to supervise the preparation of an EIS for this or any other pipeline. As between the PHMSA and the DOS, under 40 C.F.R. § 1501.5(c), the PHMSA is the appropriate lead agency for this EIS. The PHMSA's failure to assume this role, or at least the role of co-lead agency, is in violation of 40 C.F.R. § 1501.5(c).

Given the PHMSA's unique duty to protect the public from crude oil, its special expertise in pipeline safety, its active regulation of the design, construction, and operation of the Keystone Crude Oil Pipeline, and its authority to issue a Special Permit for the Keystone Crude Oil Pipeline that would significantly impact the environment, we respectfully submit that PHMSA must initiate new or supplemental NEPA review of the Keystone project and serve as lead agency or co-lead agency in the preparation and approval of such NEPA analyses.

Thank you for your consideration of the foregoing matters.

Very truly yours,



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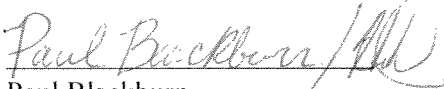
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