



May 28, 2009

VIA CERTIFIED MAIL

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: Applicability of the National Environmental Policy Act to PHMSA's Approval of Enbridge Energy, LP's Southern Lights Diluent Project

Dear Mr. Wiese:

Earthjustice, on behalf the Indigenous Environmental Network, the Minnesota Center for Environmental Advocacy, Plains Justice, and the Sierra Club, is writing this letter to notify the Pipeline and Hazardous Materials Safety Administration ("PHMSA") of its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") with respect to the Southern Lights Diluent Project.

Enbridge Energy, LP ("Enbridge") has begun an expansion program to increase its pipeline transportation capacity in the Midwest. The expansion program is designed to increase petroleum transportation services from the tar sands fields in the Western Canadian Sedimentary Basin to refineries in the Midwest. One element of this expansion project is the Southern Lights Diluent Project which connects Manhattan, Illinois with Hardisty, Alberta, Canada and is designed to transport diluent from the United States to Canada for use in blending with heavy crude oil prior to transportation by pipeline.

There are two parts to Enbridge's Southern Lights Diluent Project. The first part of the project consists of reversing the flow of Enbridge's Line 13, an existing 18-inch-diameter crude oil pipeline that currently transports light sour crude north to south from Hardisty, Alberta to Enbridge's Clearbrook Terminal. Following the flow reversal, Line 13 will no longer transport crude but instead will transport diluent south to north from the U.S. to Hardisty, Alberta, Canada. The second part of the project entails the construction of 674 miles of new 20-inch-diameter

pipeline from Manhattan, Illinois to the existing Enbridge terminal in Clearbrook, Minnesota, where it would be connected to existing Line 13, forming a continuous diluent pipeline from Manhattan, Illinois to Hardisty, Alberta.

Congress promulgated the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (“NEPA”), to guarantee that: (1) agencies take a “hard look” at the environmental impacts of their actions before the actions occur by ensuring “that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” and that (2) “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). The mechanism Congress established to accomplish these purposes is the environmental impact statement (“EIS”). *Id.*

There is currently no federal agency preparing an EIS for either the construction of the new diluent pipeline or the reversal, change in operation, and change in transported material through Line 13 from light sour crude to diluent – a substantially different hazardous substance.¹ As the agency with regulatory authority over this project, PHMSA must comply with the requirements of NEPA in its review of Enbridge’s Oil Spill Emergency Response Plan and Integrity Management Program for the Southern Lights Diluent Project.

¹ The Department of State is preparing an EIS for construction of Enbridge’s Alberta Clipper Pipeline, a 36-inch-diameter pipeline to carry up to 450,000 barrels of crude oil a day from the Western Canadian Sedimentary Basin in Canada to refineries in the U.S. In the U.S., the Alberta Clipper Pipeline would extend 326 miles from the U.S.-Canadian border near Neche, North Dakota across northern Minnesota to an Enbridge terminal in Superior, Wisconsin. *See Draft Environmental Impact Statement for the Alberta Clipper Pipeline Project*, (Dec. 2008) available at <http://www.albertaclipper.state.gov>. The Department of State does not consider the Southern Lights Diluent Project to be connected to the Alberta Clipper project. *Id.* at 1-19. To the extent that 188 miles of the Southern Lights Diluent Pipeline between Superior, Wisconsin and Clearbrook, Minnesota will follow the same right of way as the Alberta Clipper Pipeline, the Department of State purports to also present the impacts of construction of this piece of the Southern Lights Diluent Pipeline with those of the Alberta Clipper Pipeline between Superior and Clearbrook. *Id.* at 1-20. However, the DEIS does not address the different risks and hazards presented by transporting diluent and does not otherwise reference the diluent pipeline. The other sections of the Southern Lights Diluent Pipeline and the impacts (direct and indirect) of the Reversal Project are not included in the Alberta Clipper DEIS.

I. PHMSA Is the Appropriate Lead Agency for NEPA Review of the Southern Lights Diluent Project.

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”), within the Department of Transportation’s Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of hazardous liquids by pipeline, including crude oil and refined petroleum products such as diluent. It is the agency with the specialized expertise necessary to assess environmental impacts posed by pipelines, identify mitigation measures, and consider alternatives to avoid or minimize potential significant impacts. Enbridge’s new proposal to transport diluent from the U.S. to Canada must comply with PHMSA’s pipeline safety regulations. Because PHMSA will be responsible for regulating the Southern Lights Diluent Project over the life of the pipeline, it is essential that PHMSA take the lead in identifying project alternatives and mitigation measures to avoid or minimize the on-going and potential future impacts of the pipeline. PHMSA is therefore the appropriate agency to act as the lead agency for purposes of NEPA. 40 C.F.R. § 1501.5.

Under PHMSA’s regulations governing pipeline safety, Enbridge is required to submit an Oil Spill Emergency Response Plan outlining the steps to be taken in response to a worst case discharge of oil² from a pipeline or the substantial threat of such a discharge. 49 C.F.R. Part 194. Enbridge must update its Emergency Response Plan to address new or different operating conditions or information *Id.* § 194.121. Enbridge may not handle, store, or transport oil in the pipeline until PHMSA has determined that the Emergency Response Plan meets the regulatory requirements. 49 C.F.R. §§ 194.7; 194.119. Enbridge is also required to submit and PHMSA is required to review and approve an Integrity Management Program (“IMP”) for the Alberta Clipper Pipeline. 49 U.S.C. §§ 60108, 60118(a)(4); 49 C.F.R. § 195.452(b). Regardless of whether there is an existing IMP for the Line 13 pipeline, the reversal and conversion of that line from a light crude to a diluent pipeline require Enbridge to complete a new IMP to reflect the changes in operation and new information concerning risks and hazards. 49 C.F.R. §§ 195.452(a)(3); 195.452(f). As described below, PHMSA’s approvals of these plans are major federal actions subject to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (NEPA).

² PHMSA’s regulations define oil as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, vegetable oil, animal oil, sludge, oil refuse, oil mixed with wastes other than dredged spoil.” 49 C.F.R. § 194.5. Diluent, predominantly naphtha or condensate, is a hydrophobic, refined petroleum product derived from crude oil. As such, it meets the regulatory definition of “oil of any kind or in any form.”

II. Approval of Enbridge’s Oil Spill Emergency Response Plan and IMP for the Southern Lights Diluent Project are Major Federal Actions that Require Completion of an EIS.

Section 102(2)(C) of NEPA requires that federal agencies prepare an environmental impacts statement (EIS) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Major federal actions include “new and continuing activities, including projects and programs entirely or partly ... regulated or approved by federal agencies.” 40 C.F.R. § 1508.18(a). As described above, PHMSA is the agency responsible for regulating and approving Oil Spill Emergency Response Plans and IMPs required for operation of oil pipelines.

At a minimum, PHMSA must prepare an environmental assessment (EA) to determine whether approval of the safety plans for the Southern Lights Diluent Project constitutes major federal action requiring preparation of an EIS. 40 C.F.R. §§ 1501.3, 1501.4(b), 1501.4(c). If PHMSA determines, after preparing the EA, that the action does not require preparation of an EIS, it must then prepare a Finding of No Significant Impact (“FONSI”) detailing why the action “will not have a significant effect on the human environment.” 40 C.F.R. §§ 1501.4(e), 1508.13

The threshold for requiring preparation of an EIS is low:

[A]n EIS must be prepared if substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor. The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared.

LaFlamme v. F.E.R.C., 852 F.2d 389, 397 (9th Cir. 1988) (citations omitted; emphasis in original).

The CEQ regulations implementing NEPA list a number of factors an agency is required to consider in determining whether an action “significantly” affects the quality of the human environment, and therefore whether an EIS must be prepared. *See* 40 C.F.R. § 1508.27. These include: the “degree to which the proposed action affects public health or safety”; whether the effects on the environment “are likely to be highly controversial”; whether the possible effects on the human environment “are highly uncertain or involve unique or unknown risks”; or whether the action is “related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(2), (4), (5), (7). The presence of just one of these factors may be sufficient to deem the action significant. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2004).

A decision by PHMSA to approve Enbridge's Emergency Response Plan and IMP for the Southern Lights Diluent Project would be a major federal action significantly affecting the quality of the human environment under 42 U.S.C. § 4332 and 40 C.F.R. § 1508.

The purpose of the Emergency 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. The Emergency Response Plan is the primary regulatory 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 contamination of drinking water sources; damage to agricultural and tribal lands; and destruction of large areas of habitat used for hunting, fishing, boating, bird watching, and other forms of recreation.

Similarly, the purpose of the IMP is to ensure the safe operation of the Southern Lights Diluent Project, particularly with regard to avoidance of spills in certain “high consequence areas.” *See* 49 U.S.C. § 60108; 49 C.F.R. § 195.452. The IMP requires the pipeline operator to: identify which pipeline segments could affect a high consequence area; complete a baseline assessment plan; analyze all available information about the integrity of the entire pipeline and the consequences of a failure; develop criteria for remedial actions to address integrity issues; and identify preventative and mitigative measures to protect high consequence areas. 49 C.F.R. § 195.452(f). The IMP for the Southern Lights Diluent Project is the primary spill prevention mechanism intended to protect areas along the pipeline where a spill could have severe environmental consequences.

Moreover, in light of the other pipeline expansion projects that Enbridge proposes in the project area, including the Alberta Clipper Pipeline and the Southern Lights LSr Project,³ the cumulative impacts of PHMSA's approval of the Southern Lights Diluent Project present significant risks to public health, safety and the environment. Accordingly, NEPA requires PHMSA to complete an EIS prior approving the Emergency Response Plan and the IMP for the Southern Lights Diluent Pipeline and Reversal Project.

³ The Southern Lights LSr Pipeline is a new petroleum pipeline designed to transport light sour crude oil between Cromer, Manitoba, Canada, and Clearbrook, Minnesota. This project replaces the capacity of the existing pipeline, Line 13, that is part of the Reversal Project. *See Alberta Clipper DEIS* at 1-22.

Thank you for your consideration of these issues.

Sincerely,



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