



U.S. Department of Transportation
**Pipeline and Hazardous Materials
Safety Administration**

1200 New Jersey Ave, S.E.
Washington, D.C. 20590

AUG 10 2009

Ms. Sarah Burt
Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612-2807

Dear Ms. Burt:

Thank you for your May 28 letters concerning the Pipeline and Hazardous Materials Safety Administration's (PHMSA) responsibilities with respect to Enbridge Energy, LP's (Enbridge) Alberta Clipper Pipeline Project and its Southern Lights Diluent Pipeline Project. As overseers of the Nation's 2.1 million miles of pipelines, PHMSA holds the people's trust to ensure that pipeline operators are in compliance with Title 49 of the Code of Federal Regulations (C.F.R.).

As your letter mentions, the crossing of the United States/Canadian border by the Alberta Clipper Pipeline requires Enbridge to apply for a Presidential Permit. The U.S. Department of State (DOS) reviews and recommends approval or denial to the Secretary of State. Due to the DOS's involvement in the Presidential Permit they have been designated as the lead agency to prepare the Environmental Impact Statement (EIS) for this project. DOS prepared and submitted the Final EIS on this project to the U.S. Environmental Protection Agency (EPA) on June 5. PHMSA participated in this EIS as an assisting agency. The Southern Lights Diluent project does not require a Presidential permit, but the Final EIS did have information on the project.

PHMSA does not have any authority with respect to the siting of a pipeline. PHMSA does prescribe design and operating requirements for any pipeline being constructed in the United States. Further, the Federal Pipeline Safety Regulations require Enbridge to submit a Facility Response plan (49 C.F.R. Part 194) and develop a written integrity management program (49 C.F.R. Part 195). The Final EIS states that PHMSA has approved the Part 194 oil spill response plan for the proposed Alberta Clipper Pipeline. This statement is incorrect. PHMSA has not yet received from Enbridge a Facility Response plan for the Alberta Clipper Pipeline Project or for the Southern Lights Diluent Project. Enbridge will need to file and PHMSA will review a Facility Response plan to determine if the Response Plan complies with the Oil Pollution Act of 1990 before Enbridge begins operating the proposed Alberta Clipper Pipeline or the Southern Lights Diluent Pipeline.

The Oil Pollution Act of 1990 (OPA) requires owners and operators of transportation-related pipeline facilities to prepare and submit oil spill response plans for approval prior to operation of a facility. The spill response plans must contain certain elements that demonstrate an operator's readiness to respond to a release of oil. Executive Order 12777 ordered that the Secretary of Transportation promulgate regulations to enact OPA. The Secretary delegated this responsibility to PHMSA. PHMSA then promulgated Part 194 to direct its review and approval of the plans.

PHMSA must approve response plans when all the required elements are present. See 49 C.F.R. § 194.119. (“For response zones of pipelines described in 194.103(c) OPS *will* approve the response plan if OPS determines that the response plan meets all requirements of this part. . .”) 49 C.F.R. §194.119(d) (emphasis added). Enclosed is a questionnaire that PHMSA uses to help determine whether a facility response plan meets the criteria described in Part 194. The questionnaire requires that the reviewer identify the location of each required element (e.g. description of mobilization and deployment of response equipment) in the plan. Once PHMSA identifies each required element, PHMSA must approve the plan. If all of the required elements are not present, PHMSA cannot approve the plan. Therefore, these approvals do not allow for the use of agency discretion; PHMSA must ensure that the required elements are present.¹

We disagree with your assertion that PHMSA’s approval of Part 194 oil spill response plans constitutes a “major federal action” requiring compliance with National Environmental Policy Act (NEPA). NEPA requires that federal agencies analyze and document their decision making processes when proposing to take a “federal action” that could impact environmental resources. 42 U.S.C. § 4332(C). The statute also requires that the public be given ample opportunity to weigh in on this decision making process 42 U.S.C. § 4332(C).

The Federal Courts have emphasized that NEPA applies to federal actions that an agency has discretion over because the public participation process does not add value when the law dictates how the agency must decide a question before it. It is an agency’s discretion in the decision making process that triggers NEPA. Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001) (“When an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA.”). In Atlanta Coalition of the Transportation Crisis v. Atlanta Regional Commission, the court found that because the Federal Highway Administration (FHWA) was required to approve funding for transportation projects that met the requirements of 23 C.F.R. Part 450, the agency lacked the discretion necessary to trigger NEPA. Atlanta Coalition of the Transportation Crisis v. Atlanta Regional Commission, 599 F.2d 1333, 1344-1345 (5th Cir. 1979) (“The federal decisions involved whether to certify and whether to fund do not entail the exercise of significant discretion. Certification is merely a method of assuring that Part 450 is complied with i.e., that the planning process is being conducted according to prescribed procedures.”) FHWA’s approval of funding for highway projects after establishing compliance with Part 450 is similar to PHMSA’s approval of oil spill response plans after establishing consistency with Part 194. Both agencies lack significant discretion; if the required elements are present, the agency must approve.² Because Part 194 establishes that PHMSA “will approve” response plans compliant

¹ To further demonstrate that PHMSA does not exercise significant discretion in its review and approval of Part 194 oil spill response plans, an operator may operate a pipeline for two years after the date of submission of a response plan, pending approval or disapproval of that plan, if the operator submits a certification attesting that the required elements of its plan are in place and that the operator has the means to respond to a “worst case” discharge as required by 49 C.F.R. §194.119(e). If significant discretion were required for the approval of a plan, PHMSA would not allow a pipeline to operate without reviewing the oil spill response plan. If PHMSA has certification that the operator is prepared to respond to a release as required in OPA, PHMSA allows the pipeline to operate.

² See also DOT v. Public Citizen, 541 U.S. 752 (2004) (holding that Federal Motor Carrier Safety Administration’s (FMCSA) issuance of trucking permits to applicants that complied with statutory safety and financial elements was not a federal action subject to NEPA because FMCSA had no discretion in issuing the permits as it was required to issue permits to those in compliance).

with that part, PHMSA lacks the “significant discretion” required to trigger NEPA or for the NEPA process to add value to PHMSA’s decision making process. As stated above, PHMSA also lacks statutory authority over the siting of pipelines. Therefore, it would also be inappropriate for PHMSA to perform a NEPA analysis for the siting of the Alberta Clipper Pipeline Project or for the Southern Lights Diluent Pipeline Project because PHMSA could not act on information gathered or alternatives considered.

A hazardous liquid operator must have an integrity management program (IMP) that complies with the requirements in 49 CFR § 195.452. Before a new pipeline begins operation an operator must identify all pipeline segments that could affect a high consequence area. Within a year of the date the pipeline begins operation, the operator must have a written integrity management program that addresses the risks on each segment and that fully complies with all requirements in §195.452. PHMSA does not approve IMP plans but inspects them for completeness and operational and regulatory compliance. Any decision that PHMSA makes regarding “the bringing [of] judicial or administrative civil or criminal enforcement actions” is not subject to NEPA, 40 C.F.R. § 1508.18(a).

Both of the plans must be continuously improved as conditions change or the operator gains new knowledge about its pipeline. Improvements and changes to these plans may also occur due to the results of an inspection performed by PHMSA personnel.

I appreciate your interest in pipeline safety. I hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact our Central Region CATS Program Managers, Harold Winnie or Elizabeth Komiskey, at 816-329-3800.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Wiese". The signature is fluid and cursive, with a large initial "J" and "W".

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

**Facility Response Plan Review
United States Department of Transportation
Pipeline and Hazardous Materials Safety Administration (PHMSA)
Office of Pipeline Safety (OPS)**

**OPS Sequence Number:
Facility Response Plan Version Date:
Pipeline Operator Name:
Contact Name:
Contact Office, Fax, and Cellular Telephone Numbers:
Contact Mailing Address:
Contact Electronic Mail Address:
If different from the Contact Name, Facility Response Plan Author Name:
Facility Response Plan Author Office, Fax, and Cellular Phone Numbers:
Facility Response Plan Author Mailing Address:
Facility Response Plan Author Electronic Mail Address:
Date of Review:**

**National Contingency Plan and Area Contingency Plan Certifications
For Sequence Number:**

1. A. Has the operator reviewed the National Contingency Plan (NCP) and each applicable Area Contingency Plan (ACP)? B. Does the Facility Response Plan follow the Area Contingency Plans? C. Please list the names of the Area Contingency Plans and the pages in the Facility Response Plan that relate to the Area Contingency Plans. (49 CFR 194.107(b))

Area Contingency Plans and Related Pages:

Comment:

Recommendation:

**Plan Information Summary
For Sequence Number:**

2. Does the Plan Information Summary contain the following? (49 CFR 194.107(c)(1), (c)(1)(i) and (c)(2) and 49 CFR 194.113)

- The Operator Name, Street Address, City, State, and Zip Code
- A list of response zones that meet the criteria for significant and substantial harm (49 CFR 194.113(a)(2)) and a list of response zones in which a worst-case discharge could cause substantial harm
- The basis for the operator's determination that the response zone meets the criteria for significant and substantial harm and a statement that a worst-case discharge in the

response zone can be expected to cause significant and substantial harm for each response zone.

- Description of each response zone, including the County(s) or Parish(es) and State(s)
-
- Explanation for each response zone designation
- Name(s), title(s), and office and cellular telephone number(s) for the Qualified Individual(s) twenty-four hours a day in each response zone
- Name(s), title(s), and office and cellular telephone number(s) for the Alternate Qualified Individual(s) twenty-four hours a day in each response zone
- List of line sections in each response zone by milepost, survey station number, or other operator designation
- If any response zone contains multiple pipeline systems, all pipeline systems are described and the oils they transport are listed
- The type of oil and the volume of the worst-case discharge in each response zone?

Page Reference:

Comment:

Recommendation:

Notifications
For Sequence Number:

3.1 What person, position, or facility is responsible for starting immediate notification? (49 CFR 194.107(c)(1)(ii)) Please list the person's, position's, or facility's mailing and electronic mail addresses and office, fax, and cellular telephone information.

Page Reference:

Comment:

Recommendation:

3.2 Is the person, position, or facility capable of starting immediate notification twenty-four hours a day, three hundred sixty-five days a year? (49 CFR 194.107(c)(1)(ii)) Please describe your immediate notification plan.

Page Reference:

Comment:

Recommendation:

3.3 Do the Facility Response Plan notification procedures include telephone numbers so that the qualified individual(s) and oil spill removal organization(s) can be reached twenty-four hours a day, three hundred sixty-five days a year? (49 CFR 194.107(b)(1) and (2), 194.107(c)(1)(ii) and 194.113(b)(2))

- Qualified Individual(s)? :
- Oil Spill Removal Organization(s)? :
- Are the National Response Center numbers correctly listed as 1-800-424-8802 and 202-267-2675 in the plan? :
- Company personnel? :

Page Reference:

Comment:

Recommendation:

3.4 Does the notification section include the following information? (49 CFR 194.107(b)(1) and (2), and 194.107(c)(1)(ii))

- Name of pipeline operator? :
- Time of discharge? :
- Location of discharge? :
- Name of oil involved? :
- Reason for discharge? :
- Estimated volume of oil discharged? :
- Weather conditions on scene? :

Page Reference:

Comment:

Recommendation:

3.5 Does the Facility Response Plan name and give the address(es) and telephone number(s) for the operator's oil spill removal organization(s)? (49 CFR 194.107(c)(1)(iv) and 194.115)

- Name(s)? :

- Address(es)? :

- Telephone Number(s)? :

Page Reference:

Comment:

Recommendation:

Spill Detection and Mitigation Procedures
For Sequence Number:

4.1 Does the Facility Response Plan contain procedures to name and mitigate or prevent a substantial threat of a worst-case discharge? (49 CFR 194.107(a) and (b)(2)(i))

Page Reference:

Comment:

Recommendation:

4.2 Does the Facility Response Plan name personnel, equipment, and procedures for detecting leaks and spills and locating spills throughout the response zone? (49 CFR 194.107(c)(1)(iii)) :

Page Reference:

Comment:

Recommendation:

4.3 Does the Facility Response Plan name the maximum time to detect the spill and shut down flow in affected pipeline(s) in bad weather? (49 CFR 194.105(b)(1)) :

Page Reference:

Comment:

Recommendation:

4.4 Does the Facility Response Plan have procedures to mitigate spills appropriate for the response zone(s) and consistent with applicable Area Contingency Plan(s)? (49 CFR 194.107(b)(2)(i), and (c)(1)(iii) and (v))

Page Reference:

Comment:

Recommendation:

Spill Containment
For Sequence Number:

5.1 Does the Facility Response Plan name spill containment strategies appropriate for the response zone(s) and consistent with applicable Area Contingency Plans? (49 CFR 194.107(b)(1)(iii), (b)(2)(i), and (c)(1)(v))

Page Reference:

Comment:

Recommendation:

5.2 Can planned spill containment activities be accomplished within the appropriate tier times? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

5.3 Are containment equipment capacities described in sufficient detail and does the Facility Response Plan identify enough spill containment equipment to respond to a worst-case discharge to the maximum extent practicable? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

Spill Recovery
For Sequence Number:

6.1 Does the Facility Response Plan identify the spill recovery strategies appropriate for the response zone(s) and consistent with applicable Area Contingency Plan(s)? (49 CFR 194.107(b)(1)(iii), (b)(2)(i) and (iv), and (c)(1)(v)) :

Page Reference:

Comment:

Recommendation:

6.2 Can planned spill recovery activities be accomplished within the appropriate tier times? (49 CFR 194.107(b)(2)(i) and(c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

6.3 Are recovery equipment capacities described in sufficient detail and does the Facility Response Plan identify sufficient spill recovery equipment to respond to a worst-case discharge to the maximum extent practicable? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

Disposal
For Sequence Number:

7.1 Does the Facility Response Plan identify disposal procedures, including temporary storage equipment for recovered oil appropriate for the response zone and consistent with applicable Area Contingency Plans? (49 CFR 194.107(b)(1)(iii), (b)(2)(i), and (c)(1)(v))

Page Reference:

Comment:

Recommendation:

7.2 Can planned temporary storage and waste disposal activities be accomplished within the appropriate tier times? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

7.3 Does the Facility Response Plan identify sufficient temporary storage capabilities to respond to a worst-case discharge to the maximum extent practicable? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

**Sensitive Area Protection
For Sequence Number:**

8.1 Does the Facility Response Plan identify the protection strategies appropriate for the response zone and consistent with applicable Area Contingency Plans? (49 CFR 194.107(b)(1)(iii), (b)(2)(i) and (ii), and (c)(1)(v))

Page Reference:

Comment:

Recommendation:

8.2 Can planned protection activities be accomplished within the appropriate tier times? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115)

Page Reference:

Comment:

Recommendation:

**Response Management
For Sequence Number:**

9.1 Is the response management system described in the Facility Response Plan based on an Incident Command System? (49 CFR 194.107(b)(1)(i), (b)(2)(iii), and (c)(3))

Page Reference:

Comment:

Recommendation:

9.2 Does the operator's response organization describe roles and responsibilities for (49 CFR 194.107(b)(1)(i), (b)(2)(iii), and (c)(3))

- Qualified Individual? :
- Other operator response personnel including the spill management team? :
- Contracted Oil Spill Removal Organization(s)? :

Page Reference:

Comment:

Recommendation:

9.3 Does the operator's response organization describe how the operator works with the Unified Command and with responders including (49 CFR 194.107(b)(1)(i), (b)(2)(iii), and (c)(3)):

- Oil Spill Removal Organization(s)? :
- State and Local responders? :
- Federal On-Scene Coordinator? :

Page Reference:

Comment:

Recommendation:

**Communications, Response Equipment and Transportation
For Sequence Number:**

10.1 Does the Facility Response Plan describe appropriate communications procedures and system(s) adequate for notifications and response operations? (49 CFR 194.107(c)(1)(ii) and (v))

Page Reference:

Comment:

Recommendation:

10.2 Does the Facility Response Plan identify response equipment that the operator owns and maintains? (49 CFR 194.107(c)(1)(v) and 194.115(a))

Page Reference:

Comment:

Recommendation:

10.3 Does the Facility Response Plan describe procedures for maintaining response equipment the operator owns? (49 CFR 194.107(c)(1)(viii))

Page Reference:

Comment:

Recommendation

10.4 Does the Facility Response Plan identify Oil Spill Removal Organization(s)' response equipment when the U.S. Coast Guard has not classified the Oil Spill Removal Organization? (49 CFR 194.107(c)(1)(v) and 194.115(a))

Page Reference:

Comment:

Recommendation:

10.5 Does the Facility Response Plan describe procedures for maintaining Oil Spill Removal Organization(s)' response equipment when the U.S. Coast Guard has not classified the Oil Spill Removal Organization? (49 CFR 194.107(c)(1)(viii))

Page Reference:

Comment:

Recommendation:

10.6 Does the Facility Response Plan identify location(s) for operator-owned and Oil Spill Removal Organization-owned response equipment? (49 CFR 194.115(b))

Page Reference:

Comment:

Recommendation:

10.7 Does the Facility Response Plan describe mobilizing and deploying response equipment within the appropriate tier times consistent with the plan's response activities? (49 CFR 194.107(c)(1)(v) and 194.115(b))

Page Reference:

Comment:

Recommendation:

10.8 Does the size of the response zone permit planned response activities, including equipment mobilization and deployment, within the appropriate tier times? (49 CFR 194.115(b))

Page Reference:

Comment:

Recommendation:

**Response Personnel and Mobilization
For Sequence Number:**

11.1 Does the Facility Response Plan identify enough trained personnel to respond to the worst-case discharge consistent with the Plan's response activities? (49 CFR 194.107(a), (c)(1)(v), and (c)(3), 194.115, and 194.117) :

Page Reference:

Comment:

Recommendation:

11.2 Does the Facility Response Plan describe procedures for mobilizing and deploying response personnel throughout the response zone(s) consistent with the Plan's response activities? (49 CFR 194.107(b)(2)(i) and (c)(1)(v), and 194.115) :

Page Reference:

Comment:

Recommendation:

**Response Documentation and Worst Case Discharge
For Sequence Number:**

12.1 Does the operator describe procedures the response management organization must use to document response decisions, activities, and costs? (49 CFR 194.107(c)(3))

Page Reference:

Comment:

Recommendation:

12.2 Does the Facility Response Plan provide the calculations and methodology used for determining the worst-case discharge for the response zone(s)? (49 CFR 194.105)

Page Reference:

Comment:

Recommendation:

12.3 Is the worst-case discharge volume calculated using the three specified methods in the Department of Transportation regulation? Are the calculations accurate and as prescribed?

(49 CFR 194.105(b))

Page Reference:

Comment:

Recommendation:

Training: Program and Procedures
For Sequence Number:

13.1 Does the Facility Response Plan describe a training program that teaches response personnel about the Plan and their responsibilities under the Plan? (49 CFR 194.107(b)(1)(ii), (c)(1)(vii) and (c)(3), and 194.117) :

Page Reference:

Comment:

Recommendation:

13.2 Does the Facility Response Plan describe a training program that teaches response personnel about matters including (49 CFR 194.117(a)(3)):

- Oil characteristics and hazards? :

- Conditions that are likely to worsen emergencies, including the consequences of facility malfunctions or failures and appropriate corrective actions? :

- Steps necessary to control an accidental discharge of oil? :

- Steps necessary to minimize the potential for fire, explosion, or environmental damage? :

- Proper fire-fighting procedures and use of personal protective equipment?
:

Page Reference:

Comment:

Recommendation:

13.3 Does the Facility Response Plan describe a response-training program that addresses the appropriate levels of training and the requirements in OSHA 29 CFR 1910.120? (49 CFR 194.107(b)(1)(ii) and 194.117(c))

Page Reference:

Comment:

Recommendation:

13.4 Does the Facility Response Plan describe the operator's procedures for maintaining records for response personnel? (49 CFR 194.117(b))

Page Reference:

Comment:

Recommendation:

**Spill Response Drill Program
For Sequence Number:**

14.1 Does the Facility Response Plan describe procedures for conducting internal and external drills that include (49 CFR 194.107(c)(1)(ix)):

- Responsibility for planning, carrying out, and monitoring drills? :
- Announced drills? :
- At least one unannounced internal drill? :
- Quarterly Qualified Individual notifications drills? :
- Annual spill management team tabletop drills? :

- Annual Oil Spill Removal Organization(s) equipment deployment drills of representative types and amounts of key equipment in the Facility Response Plan? :

- At least one drill that tests the entire response plan for each response zone at least once every three years? :

Page Reference:

Comment:

Recommendation:

14.2 Does the Facility Response Plan describe a three-year drill and exercise cycle and the frequencies for each type of drill in that cycle? (49 CFR 194.107(c)(1)(ix))

Page Reference:

Comment:

Recommendation:

14.3 Does the Facility Response Plan describe procedures for maintaining drill documentation for three years? (49 CFR 194.107(c)(1)(ix))

Page Reference:

Comment:

Recommendation:

**Response Plan Maintenance
For Sequence Number:**

15.1 Does the Facility Response Plan describe the requirements and procedures for the operator to (a) review the Facility Response Plans at least once every five years from the date the Office of Pipeline Safety approves the plan, (b) modify the Facility Response Plan to address new or different operating conditions or information in the Facility Response Plan, and (c) submit the plan for the Office of Pipeline Safety to review, require changes, and approve? (49 CFR 194.107(c)(1)(x) and 194.121(a))

Page Reference:

Comment:

Recommendation:

15.2 Does the Facility Response Plan identify key factors that may cause revisions to the response plan and require the operator to submit revisions to the Office of Pipeline Safety within 30 days of making the revisions for factors including: (49 CFR 194.121(b)):

- New pipeline construction or purchase? :
- Different worst-case discharge volume? :
- Change in commodities transported? :
- Change in Oil Spill Removal Organization(s)? :
- Change in Qualified Individual(s)? :
- Change in a National Contingency Plan or Area Contingency Plan that has a significant impact on the appropriateness of response equipment or response strategies?:
- Change in response procedures? :

Page Reference:

Comment:

Recommendation:

15.3 Does the Facility Response Plan describe procedures for incorporating improvements in the following? (49 CFR 194.121(b)(8))

- Post-drill evaluation results? :
- Post-incident evaluation results? :

Page Reference:

Comment:

Recommendation:

**National Contingency Plan and Area Contingency Plan Consistency
and Concept of Operations
For Sequence Number:**

16.1 Is the Plan consistent with the National Contingency Plan in effect at the time of submission? (49 CFR 194.107(b)(1)) Please answer yes or no.

Page Reference:

Comment:

Recommendation:

16.2 Is the Plan consistent with the Area Contingency Plans in effect for each response zone at the time of submission? (49 CFR 194.107(b)(2)) Please answer yes or no.

Page Reference:

Comment:

Recommendation:

16.3 Is the Plan's concept of operations adequate to carry out a response to the worst-case discharge under 49 CFR 194? (49 CFR 194.107) Please answer yes or no.

Page Reference:

Comment:

Recommendation: