

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NATURAL RESOURCES DEFENSE	)	
COUNCIL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No.: 08-CV-01363 (RJL)
	)	
UNITED STATES DEPARTMENT OF	)	
STATE, et al.,	)	
	)	
Defendants,	)	
	)	
and,	)	
	)	
TRANSCANADA KEYSTONE PIPELINE, LP,	)	
	)	
Intervenor-Defendant.	)	
	)	

**DEFENDANTS’ STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE**

The parties in this case are currently briefing cross-motions for summary judgment under Federal Rule of Civil Procedure 56. Local Rules 7(h) and 56.1 require the submission of a statement of material facts as to which the moving party contends that there is no genuine issue. For the reasons explained below, however, a statement of facts is inappropriate in this case.

It is well established that, in cases such as this one – where Plaintiff seeks judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 – the scope of that judicial review is properly limited to the administrative record that was before the agencies at the time the decisions were made. See, e.g., Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 142 (1973). “The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.” Florida Power & Light Co., 470 U.S. at 743-44.

Accordingly, judicial review of final agency action on summary judgment is different in nature from the procedures used to resolve civil actions within the original jurisdiction of the federal district courts. See Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 124 (D.D.C. 2001) (“Summary judgment is an appropriate procedure for resolving a challenge to a federal agency’s administrative decision when review is based on the administrative record . . . , even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P.”). In APA cases, the district court sits as an appellate tribunal. University Medical Center of Southern Nevada v. Shalala, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999) (citing Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1225-26 (D.C.Cir.1993)). Thus, judicial review is confined to the administrative record already in existence, and does not contemplate a factual record developed *de novo* in federal district court. Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 998 (D.C. Cir. 1990). “As all material facts are within the administrative record, no material facts are in dispute.” LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham, 215 F. Supp. 2d 73, 84 (D.D.C. 2002); see also National Ass'n of Home Builders v. U.S. Army Corps of Engineers, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (recognizing that the D.C. Circuit has repeatedly held that claims asserting “an agency’s action is arbitrary and capricious or contrary to law present purely legal issues”).

Because there are no material facts for the Court to resolve in the first instance here, a Statement of Material Facts as contemplated by Local Rules 7(h) and 56.1 is inapposite. The Court should confine its review of Defendants’ actions to the certified Administrative Record filed with the Court on December 22, 2008 (referred to herein as “AR”) (Docket No. 40). Nonetheless, to ensure strict compliance with the local rules, the Defendants submit the

following Statement of Material Facts As To Which There is No Genuine Issue in support of their Motion for Summary Judgment:

1. This case involves the issuance by the State Department of a Presidential Permit to TransCanada Keystone Pipeline, L.P. (“Keystone”) granting permission for a border-crossing for an oil pipeline. The Presidential Permit was issued pursuant Executive Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004).

2. On April 19, 2006, Keystone submitted its Application for a Presidential Permit to the State Department. AR 1331. Upon receipt of the application, the State Department, in consultation with other federal agencies, conducted an environmental review of Keystone’s application, which included the preparation of the State Department’s environmental impact statement (“EIS”) under NEPA, consultation with Indian tribes under Section 106 of the National Historic Preservation Act (“NHPA”), and consultation with the Fish and Wildlife Service under Section 7 of the Endangered Species Act (“ESA”). AR 564 (ROD) at 4418-20, 4424-37; AR 1230 (EIS) at 15293-96. The State Department requested substantial additional information, which Keystone provided. See, e.g., AR 888, 893.

3. On October 11, 2006, the State Department initiated the NEPA process for the Keystone Pipeline Project by issuing its notice of intent to prepare an EIS. 71 Fed. Reg. 59849 (Oct. 11, 2006). The State Department conducted 13 different scoping meetings in various geographic locations in October and November 2006 and received and considered numerous comments from the public regarding the scope of the EIS. AR 1230 at 15288-89, AR 1249 at 15943-52.

4. On August 10, 2007, the State Department released its draft environmental impact statement (“DEIS”) for the Keystone Pipeline Project. AR 1230 at 15289. The State

Department held 13 public comment meetings on the DEIS in September 2007 and accepted comments on the DEIS up through September 24, 2007. Id. Hundreds of comments were submitted orally and over a thousand comments were submitted in writing from the public, agencies, Keystone, and other interested groups and considered by the State Department. Id. at 15289-92, AR 1249 at 15955-16034.

5. On January 11, 2008, after addressing the comments submitted on the DEIS, the State Department issued its final EIS. AR 1225.

6. On February 28, 2008, the State Department issued a Record of Decision and National Interest Determination (“ROD”), which allowed the Keystone Pipeline to cross the U.S.-Canada border. AR 564 (ROD). The State Department’s decision to issue the permit, which was signed by the Under Secretary of State for Economic, Energy, and Agricultural Affairs, was based on a determination under Exec. Order 13337 that the issuance of a Presidential Permit for the Keystone Pipeline would serve the national interest. Id. at 4439-40.

7. On March 11, 2008, the State Department issued the Presidential Permit for the Keystone Pipeline authorizing the border crossing. See AR 567 (Permit).

8. All material facts in this action are contained in the AR.

Respectfully submitted this 22nd day of December, 2008.

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