



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 Alberta Clipper Pipeline**

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 Alberta Clipper Pipeline.

Enbridge Energy, LP ("Enbridge") is proposing to construct and operate a crude oil pipeline from Hardisty, Alberta, Canada, to Superior, Wisconsin. The 36-inch Alberta Clipper Pipeline would carry up to 450,000 barrels of crude oil a day from the Western Canadian Sedimentary Basin in Canada to refineries in the United States. In the United States, 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.¹ Because the Alberta Clipper Project would require a crossing of the U.S.-Canadian border, Enbridge has applied to the Department of State for a Presidential Permit.

¹ Details of the project can be found here: <http://www.albertaclipper.state.gov>. See also, *Draft Environmental Impact Statement for the Alberta Clipper Pipeline Project*, (Dec. 2008) ("Alberta Clipper DEIS"), available at <http://www.albertaclipper.state.gov/clientsite/clipper.nsf?Open>.

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 petroleum products. 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 oil from the pipeline or the substantial threat of such a discharge. 49 C.F.R. Part 194. 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).

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.*

I. Approval of Enbridge’s Oil Spill Emergency Response Plan and IMP for the Alberta Clipper Pipeline 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 projects and programs “entirely or partly ... regulated or approved by federal agencies.” 40 C.F.R. § 1508.18. As described above, PHMSA is the agency responsible for regulating and approving Oil Spill Emergency Response Plans and IMP required for operation of oil pipelines.

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 Alberta Clipper Pipeline 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 Alberta Clipper Pipeline, 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 Alberta Clipper IMP 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 Southern Lights Diluent Project, the Southern Lights Reversal Project,² and the Southern Lights LSr Project,³ the cumulative impacts of PHMSA’s approval of

² 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 Pipeline and Reversal Project which together connect Manhattan, Illinois with Hardisty, Alberta, Canada and

the Alberta Clipper Pipeline presents 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 Alberta Clipper Pipeline.

II. PHMSA Must Participate in the NEPA Process for the Alberta Clipper Pipeline Conducted by the Department of State.

As a result of Enbridge's application for a Presidential Permit, the Department of State has conducted a Draft Environmental Impacts Statement (DEIS) for the Alberta Clipper Pipeline. *See Draft Environmental Impact Statement for the Alberta Clipper Pipeline Project*, (Dec. 2008) ("Alberta Clipper DEIS"), available at <http://www.albertaclipper.state.gov>. To the extent that PHMSA intends to adopt the DEIS prepared by the Department of State, PHMSA should be aware that the Department's DEIS does not fully address the environmental risks of leaks and spills from the Alberta Clipper Pipeline but instead defers to PHMSA's regulations requiring the development of an Oil Spill Emergency Response Plan and an IMP. Thus PHMSA would have to supplement the Department's DEIS in order to meet NEPA's EIS requirements.

In addition, PHMSA should cooperate actively with the Department of State to ensure that the EIS for the Alberta Clipper Pipeline adequately analyzes potential environmental impacts, identifies potential mitigation measures, and considers alternatives to avoid or minimize potential significant impacts. PHMSA is the federal agency charged with ensuring pipeline safety and limiting the risk that such pipelines pose to public health and the environment. No other federal agency has equivalent expertise in the environmental risks posed by crude oil pipelines. Because PHMSA will be responsible for regulating the Alberta Clipper Pipeline over the life of the pipeline, it is essential that PHMSA participate in identifying project alternatives and mitigation measures to avoid or minimize the on-going and potential future impacts of the pipeline.

Finally, the Department of State can not complete an EIS that meets all the requirements of NEPA without considering the Oil Spill Emergency Response Plan and the IMP for the Alberta Clipper Pipeline. Because these plans are the primary preventative and mitigation measures to ensure that Enbridge takes the necessary precautions to avoid and remedy any leaks

are designed to transport diluent from the United States to Canada for use in blending with heavy crude oil prior to transportation by pipeline. *See* Alberta Clipper DEIS at 1-19-22.

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.

and spills from the Alberta Clipper Pipeline, the Department of State cannot adequately assess the project's impacts, alternatives and mitigation measures without examining the Oil Spill Emergency Response Plan and IMP. Thus PHMSA must approve the Oil Spill Emergency Response Plan and the IMP for the Alberta Clipper Pipeline before the Department of States makes a final decision on Enbridge's application for a Presidential Permit.

Thank you for your consideration of these issues.

Sincerely,



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