

June 6, 2011

Willem H. Brakel, Director  
Office of Environmental Policy  
Bureau of Oceans and International, Environmental and Scientific Affairs  
Department of State

via email: kestonexl@cardno.com

RE: Supplemental Draft Environmental Impact Statement for the Proposed TransCanada  
Keystone XL Pipeline Project

Dear Mr. Brakel:

The Western Organization of Resource Councils (WORC) appreciates this opportunity to comment on the State Department's Supplemental Draft Environmental Impact Statement for the Proposed TransCanada Keystone XL Pipeline Project. However, we renew our objection to the State Department's unusually short comment period, which hampers our ability to submit thorough comments on the SDEIS.

WORC is a regional network of seven grassroots community organizations with 10,000 members and 45 local chapters. Members in three of those organizations – the Northern Plains Resource Council in Montana, the Dakota Resource Council in North Dakota, and Dakota Rural Action in South Dakota – would be directly affected as landowners or neighbors of the proposed pipeline.[1]

WORC joins with many other organizations in repeating our call for an extension of the comment period, in light of the Corrective Action Order (CAO) issued by the Pipeline and Hazardous Materials Safety Administration of the Department of Transportation (PHMSA) last Friday. In that corrective order, PHMSA took the unprecedented step of branding a pipeline that has been in operation barely one year to be an immediate threat to life, property and the environment. Only forty-eight such orders have been issued by regulators for any part of the hundreds of thousands of miles of hazardous liquid pipelines in the U.S. in the last 25 years. On average, pipelines that have been subject to such orders are 45 years old, and the newest such pipeline was 25 years old. The information TransCanada must report under the Corrective Action Order issued last Friday will help regulators evaluate how raw tar sands pipelines like Keystone and Keystone XL can be built and operated properly. It would be unconscionable for the State Department to conclude its environmental review of Keystone XL until it may be informed by the findings of federal regulators studying the Keystone pipeline and its risks.

PHMSA's Corrective Action Order highlights the safety issues and analysis WORC, landowners along the pipeline route, and other organizations have been demanding since the beginning of the permitting and environmental review process for the Keystone XL pipeline. As these comments show, most of the analysis we have requested remains to be done, and the issues we have raised remain to be resolved. The analysis of the proposed pipeline project in the Supplemental EIS, taken together with the draft, is still inadequate to show that the proposed Keystone XL pipeline project is needed, or that it can and will be built and operated safely. The State Department

should not find the Keystone XL pipeline to be in the national interest on the basis of the information and analysis available in the DEIS and SDEIS. WORC renews its call for a new draft or another supplemental EIS, so that affected landowners and others concerned with the potential impacts of this project have a chance to comment on full and complete analysis of the need for and safety of this pipeline.

The SDEIS, like the DEIS, fails to demonstrate a need for the pipeline sufficient to justify condemnation of landowners or a finding that the pipeline is in the national interest. It fails to consider the risks specific to pipelines carrying tarsands or carefully assess the potential for contamination of land and water. The SDEIS is based on a clearly faulty spill risk analysis prepared by TransCanada. TransCanada's Emergency Response Plan for the XL pipeline is still unavailable for review and comment by affected landowners, nearby residents, first responders, and local government officials. Finally, the SDEIS fails to clearly set out the procedures, agency responsibilities and liability at abandonment of the pipeline.

In our comments on the DEIS, WORC argued that the DEIS (1) did not demonstrate need for the pipeline; (2) did not analyze the risks of giving TransCanada a waiver of limits on pipeline operating pressure; (3) did not have TransCanada's Emergency Response Plan for responding to spills and leaks; and (4) had no analysis of abandonment. We asked for a new DEIS, to include:

- Analysis of the impacts of granting, or not granting, TransCanada's request for a waiver of pressure regulations, allowing it to use thinner pipe;
- TransCanada's Emergency Response Plan, so that local governments, first responders, and landowners can know what the plans are for preventing and cleaning up leaks and spills that would directly affect them, and suggest improvements;
- A life-cycle analysis of the greenhouse gas emissions of tar sands, including the impacts on the climate and other impacts of producing the tar sands in Canada;
- A thorough, independent, and detailed analysis of the need for the pipeline, including alternatives and evaluating the affect of potential climate change regulations on the economic competitiveness of tar sands; and
- A clear analysis of the impacts at abandonment of the pipeline, including a description of which government agencies will be responsible for oversight and enforcement of actions at abandonment, including the division of liability between TransCanada and property owners.

The SDEIS is inadequate as a response to each of these requests from our initial comments. TransCanada withdrew its application for a pressure wavier from the Pipeline and Hazardous Materials Safety Administration last August, but the SDEIS fails to provide information about safety issues related to the original waiver request or other issues under PHMSA's jurisdiction that is critical to analyzing the potential impacts and ensuring the safety of the proposed pipeline. The SDEIS fails to provide the other information WORC requested in its initial comments. The SDEIS and DEIS together are inadequate, and a new draft or supplemental EIS much be issued for public comment.

Waiver of pipeline pressure limits, High Consequence Areas and Safety:

Last August, TransCanada withdrew its application for a pressure waiver from the Pipeline and Hazardous Materials Safety Administration (PHMSA). According to the SDEIS, TransCanada has agreed to 57 special conditions it would have had to meet to get the waiver. These should provide more protection for landowners, so their inclusion in an appendix to the SEIS is an improvement. However, the SDEIS does not acknowledge that TransCanada can apply for a special permit at any time after the pipeline is built, or consider whether the State Department could condition the permit on agreeing not to apply for a waiver. In the absence of a decision to condition any Presidential Permit on agreement by TransCanada to forego application for a pressure waiver from PHMSA for the life of the pipeline, there is no basis for restricting analysis of the impacts and risks of pipeline operation to the lower operating pressures required by DOT regulations. The SDEIS should analyze the potential risks and impacts of alternative pressure regulation regimes, with and without approval of a waiver.

The SDEIS asserts that adoption of the 57 conditions would make landowners along the route as safe as if their land was considered a “High Consequence Area”. This assertion is false, since some important conditions among the 57 only apply to High Consequence Areas (see for example conditions 37 and 38). The SDEIS analysis is further flawed by its failure to identify what lands along the route are High Consequence Areas and which are not. WORC and other groups have repeatedly asked PHMSA for an analysis of TransCanada’s compliance with a similar conditions in its agreement with PHMSA in exchange for a pressure waiver on the Keystone I Pipeline, including a request under the Freedom of Information Act. The State Department should make such an analysis available as part of the record of decision over the Presidential Permit for Keystone XL, especially in light of the fact that despite the conditions adopted for this pipeline, which are very similar to the conditions imposed here, Keystone I has had 12 spills and an unprecedented Corrective Action Order in its first year of operation.

As landowners and neighbors affected by the proposed pipeline know, PHMSA regulations provide greater protection for High Consequence Areas (particularly under the integrity management program regulations at 49 CFR 195.452). These increased regulatory protections apply to the manufacture, assembly, installation, monitoring, inspection, and operation of the pipeline. The State Department cannot adequately analyze the potential environmental impacts of the pipeline or alternative actions to prevent or mitigate those impacts without knowing which parts of the proposed right of way are considered to be High Consequence Areas and which are Low Consequence Areas. Landowners along the pipeline have demanded and deserve to know whether their land is considered to be of low consequence or high consequence, and to comment on that designation, before the State Department makes decisions directly affecting their land and livelihood, and before TransCanada is allowed to condemn their land or threaten them with condemnation. The DEIS and this SDEIS do not identify High Consequence Areas along the route of the pipeline, including which if any sources of drinking water or agricultural water will be considered High Consequence Areas or Special Use Areas. The Department should issue a new draft or supplemental draft EIS identifying High Consequence Areas and Special Use Areas on a map for public review and comment.

According to chapter 2 of the SDEIS, if TransCanada implements the 57 conditions outlined in the appendix, the level of protection provided landowners on the entire pipeline route will be the same as the protection for High Consequence Areas. This statement is contradicted in Table

2.3.1-1 on p. 2-11, which makes clear that thicker pipe will be used in High Consequence Areas than in other (low) consequence areas, and on page 3-84, which lists extra protections that will be taken for High Consequence Areas. The SDEIS admits here that we won't know which areas will get these protections until TransCanada prepares an Integrity Management Plan, which will not be until during its first year of operation.

The analysis of TransCanada and Keystone's operating history beginning at p. 3-191 is an out of date whitewash, which should be completely rewritten in light of the six additional spills on Keystone I since it was written, and particularly in light of the Corrective Action Order issued by PHMSA on June 3, 2011.<sup>1</sup>

The State Department should issue a new draft or supplemental EIS with a proposed Integrity Management Plan from TransCanada. Failing that, at a minimum, TransCanada should condition any permit issued to TransCanada on publication for public review and comment, and PHMSA approval, of an Integrity Management Plan under PHMSA regulations, before it may proceed with pipeline construction.

### Emergency Response Plan

The SDEIS does not have an Emergency Response Plan for the Keystone XL pipeline. Instead, it repeats past PHMSA practice, that PHMSA must approve an Emergency Response Plan before TransCanada can begin operating the pipeline, but TransCanada need not submit one before then, and no public review or comment is required. (The SDEIS actually says there are two Emergency Response Plans that PHMSA must approve -- but there is no public comment period for either of them, and neither is included in this EIS.)

As WORC and other groups argued in comments on the DEIS, failure to provide a proposed Emergency Response Plan specific to the proposed route of the Keystone XL pipeline is contrary to the spirit and purpose of NEPA. This failure is particularly egregious in the wake of the Gulf oil spill, which exposed offshore drilling permitted on the basis of absurd and useless emergency response plans cut and pasted together without regard to geography. It is reprehensible in light of subsequent oil and tarsands pipeline spills in the U.S. and Canada. Potential environmental impacts and mitigating measures for leaks and spills from Keystone XL cannot be analyzed without TransCanada's specific plans for location of equipment and personnel and for operation of and response to the leak detection systems. Affected landowners, neighbors, local elected officials, and local health and environmental officials all deserve the right to see and comment on

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<sup>1</sup> In response to criticism of TransCanada's risk analysis for Keystone I, which failed to predict anything like the number and magnitude of spills as actually occurred during its first year of operation, a TransCanada spokesperson said the risk analysis did not count the potential risk for leaks from pumphouses. This is flatly contradicted by the Keystone I EIS. The State Department should clarify what pipeline sections, equipment and facilities are included in the risk analysis in this EIS. If pumphouses are not included, that should be explained, and a separate analysis done covering the risk of leaks from pumphouses. If pumphouses are included, the final EIS should explain how the risk analysis for Keystone XL reflects the abysmal record of leaks and spills from Keystone I in its first year.

TransCanada's emergency response plan before the State Department issues a permit granting the company the right to bury a potentially dangerous pipeline in their communities.

Beginning on page 3-104, the SDEIS dodges arguments made by the Natural Resources Defense Council and others, which WORC has joined, concerning the nature of tarsands oil (bitumen) and diluent that will be shipped by the pipeline and the resultant safety risks. Rather than analyze the properties of the product that will actually flow in the pipeline, the State Department first compares tarsands fluid to an imprecise amalgam of liquids flowing in existing pipelines, and then analyzes the potential impacts and risks of spills of those fluids. This dodge allows the State Department to miss the fact that in the event of a spill, bitumen will separate from diluent, and become heavier, not lighter, than water. That would mean completely different kinds of impacts and spill response procedures and equipment in the event of a spill into an important aquifer or surface water body.

The State Department should issue a new draft or supplemental draft EIS after the Department of Transportation has an opportunity to analyze the unique and serious safety risk posed by expanded shipment of tarsands oil in the U.S. pipeline system generally, and in systems dedicated to transporting tarsands oil, such as the Keystone I and XL pipelines.

### Greenhouse Gases

The Supplemental EIS acknowledges that the carbon footprint of fuel from tarsands over its lifecycle is 17% higher than fuel derived from other kinds of oil, but it doesn't analyze the impacts of climate change caused by those emissions, or seriously analyze the implications for the economic viability of tar sands if carbon is seriously priced or regulated. In our comments on the DEIS, WORC argued that carbon emission limits or policies setting prices on carbon emissions, which are likely within the lifetime of the pipeline, could render tarsands oil uncompetitive with lower carbon alternatives. Alternatives could include automobile efficiency investments, electric cars, advanced biofuels, and other energy sources that can substitute for tarsands imported from Canada. The SDEIS, like the draft EIS, fails to acknowledge or analyze this possibility. The State Department should issue a new draft or supplemental draft EIS that analyzes the impacts of increased carbon emissions from the proposed project, and analyzes the potential impact of regulation or pricing of carbon emissions on the competitiveness of high-carbon fuels such as tar sands.

### Need for the project

The SDEIS references a few projections of global oil demand and expands its discussion of the potential demand for heavy oil from Gulf Coast refineries, but it does not seriously consider the "no-action alternative" or analyze the relative cost of tarsands compared to investments in increased energy efficiency and alternative fuels. Instead, the SDEIS claims that oil from the tarsands will replace imports from Venezuela, Mexico, and Saudi Arabia. It then argues that, even if increased efficiency and alternatives lower total U.S. demand for oil, Canadian tarsands oil will still be needed to replace imports. The SDEIS fails to address the possibility that existing

overseas suppliers of oil to the Gulf Coast will lower prices to keep their Gulf Coast markets, forcing tarsands from the pipeline to be exported from the Gulf Coast.

A representative of the State Department assured landowners and others at a hearing on the Draft EIS that if product shipped on the Keystone XL pipeline was exported from the Gulf Coast, the State Department would pull the permit for the pipeline. If that statement was incorrect, the State Department needs to explain how it is in the national interest to facilitate the transportation of fuel from Canada to the Gulf Coast for export to China or other markets overseas. If it is correct, the final EIS needs to include an analysis of the need for product refined from tar sands oil by U.S. consumers, and not on need for exports of tarsands oil or product refined from tar sands oil from Gulf Coast ports.

### Abandonment and liability

The SDEIS says PHMSA regulations will require TransCanada to have a decommissioning and abandonment plan, as part of its operating plan, before it begins operating. This new information is a welcome supplement to the information available in the DEIS, but it is far less than what is needed to assess the potential impacts at abandonment or to inform potentially affected landowners and communities about the processes of abandonment and commissioning, regulation, and associated liabilities.

As with the description of the emergency response plan, there is no decommissioning plan included for review and comment in the SDEIS or the appendices. The fact that there will be a decommissioning plan at some point is of very little comfort to landowners and communities concerned today about the costs and liabilities on their communities and properties at abandonment. As with the Emergency Response Plan, landowners, local communities and the public do not get to see or comment on an a decommissioning plan before the State Department OK's construction of the pipeline. This is like permitting a coal mine without a reclamation plan, or permitting a nuclear power plant without a waste storage plan.

The SDEIS fails to deal with the issues raised in our comments on the DEIS, concerning what agencies will be responsible for overseeing the pipeline at and after abandonment. Instead it says, in effect, we'll cross that bridge when we come to it.

The SDEIS says TransCanada could be liable for spills that contaminate water supplies, but as to liability in other circumstances, and liability for contamination at or after abandonment, the SDEIS says that is (1) a matter for negotiation with landowners, and (2) beyond the scope of the EIS.

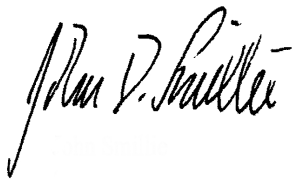
Mere assertion that liability is beyond the scope of the EIS does not meet the State Department's responsibilities. Liability for clean-up at abandonment of the pipeline is integrally related to the potential affects of pipeline siting on the human environment and therefore well within the scope of the EIS. The issue was raised by commenters in scoping, and in comments on the Draft EIS.

The State Department cannot push off the responsibility for assessing liability in the NEPA process by asserting that it is a matter of negotiation between landowners and TransCanada.

There are many issues with environmental consequences that may be the subject of negotiations with landowners analyzed elsewhere in this EIS. The purpose of the NEPA process is, in part, to provide information for use by TransCanada and landowners to inform those negotiations. The EIS could, and should, analyze the potential impacts if (1) landowners are stuck with liability for the pipeline at abandonment, (2) TransCanada maintains liability for impacts of the pipeline at abandonment, or (3) there is no clear assignment of liability at abandonment or a government agency to hold a responsible party accountable for liability at abandonment.

The State Department should issue a new draft or supplemental draft EIS that deals adequately with the potential environmental impacts of decommissioning and abandonment.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Smillie". The signature is written in a cursive, flowing style.

John Smillie  
Campaign Director  
Western Organization of Resource Councils

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[1] Impact to members of Dakota Resource Council in North Dakota depends on the alternative routes, and on construction of an “on-ramp” to transport domestic oil from North Dakota and Montana to the proposed Keystone XL pipeline project.