

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

MICHAEL BISHOP

Plaintiff Pro Se

v

Lieutenant General Thomas P.
Bostick (in his official capacity as
Commanding General and Chief of
Engineers), Major General Michael
J. Walsh (in his official capacity as
U.S. Army Commanding General
for Civil and Emergency Operations),
Colonel Michael Teague, (in his official
capacity as Tulsa District Commander
of the U.S. Army Corps of Engineers),
Col. Charles H. Klinge, Jr. (in his
official capacity as Ft. Worth District
Commander of the U.S. Army Corps
of Engineers), Colonel Christopher
W. Sallese (in his official capacity as
Galveston District Engineer of the U.S.
Army Corps of Engineers) and the
United States Army Corps of Engineers;

Defendants

}
}
} Case No. Civ.
}
}

}
}
} COMPLAINT FOR
} DECLARATORY RELIEF
} AND PETITION FOR WRIT OF
} MANDAMUS
}

I. STATEMENT OF JURISDICTION

Plaintiff is a land owner, taxpayer and resident of Nacogdoches County, Texas and directly affected by the issuance of a permit for the construction of a pipeline under Nationwide Permit 12, (NPW-12). Plaintiff will show that Defendants failed to abide by statutory law in the issuance of the permit and excluded public participation and comment in the decision process. Plaintiff will also show evidence that Defendants violated existing statutory law in failing to consider indirect effects of the permit; violated Plaintiff's rights under the Texas Constitution and resulted in the loss of wetland and damage to property occurred that exceeds the permitted limits.

II. INTRODUCTION

1. TransCanada Keystone Pipeline XL, L.P. is a Canadian based private corporation that applied for a permit via the U.S. Department of State to cross the Canadian border for the purpose of building a pipeline from Hardisty, Alberta, Canada to Port Arthur, Texas. The permit was denied by the State Department due to massive public concern and outcry regarding the potential environmental impact to the Ogallala aquifer in Nebraska. TransCanada then switched horses in the middle of the stream and applied to the U.S. Army Corps of Engineers (the "Corps") for a permit to construct a pipeline from Cushing, Oklahoma to terminal facilities in Houston and Port Arthur, Texas. This project was titled the Keystone Gulf Coast Project or "Gulf Coast Segment".

A Nation Wide Permit (NPW-12) was issued to TransCanada on June 25, 2012 from the Galveston District Office of the Corps and on July 16, 2012 from the Ft. Worth District. The project was assigned Project Number SWF-2012-00143.

2. The Gulf Coast Segment or Project is approximately 485 miles and includes a 48-mile Houston Lateral Project. The purported capacity of the line is 700,000 barrels per day, with a potential of 830,000 barrels per day. The original application for the project was proposed as a 1,980 mile, 36 inch "**crude oil pipeline**", originating in Hardisty, Alberta, Canada and ending in terminals in the locations described above. According to documentation filed by the applicant (TransCanada Pipelines Limited), the entire Keystone project will be operated as "**one integrated system which includes the Keystone XL pipeline project**". Plaintiff argues that segmenting the project to by-pass statutory regulations is illegal.

III. STATUTORY OBLIGATION

3. NEPA (the National Environmental Protection Act, 1969) is the law of the land, superseding all other laws. 42 USC 4321 defines the purpose of the law, which includes the promotion of "**efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;**". The NEPA process is well established and requires agencies to determine if environmental effects are likely to be significant. If the action or requested permit is not categorically excluded, then that agency is required to develop an

environmental assessment (EA). This requires public involvement, is mandatory and non-discretionary.

4. Public participation in the permitting process of projects affecting or potentially affecting the environment is confirmed in 40 CFR 1506.6. **"Public hearings" or "public meetings" are required, especially when there is "substantial environmental controversy concerning the proposed action.."**

The statute is clean and unambiguous in stating that **"Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures, (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected."**

5. The responsibility of the Corps of Engineers is documented in 33 Code of Federal Regulations, Part 330.1, which requires the Corps to give public notice and **"opportunity to comment"**. No notification or period of public comment was given nor allowed prior to the issuance of permit. This is mandated again in 33 Code of Federal Regulations, part 327.1 and states **"This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the**

evaluation of a proposed DA permit action.." Under 33 Code of Federal Regulations, Definitions (Part 327.3), Public Hearing **"means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action and which affords the public an opportunity to present their views, opinions, and information on such permit actions.."**

6. Nationwide Permits are authorized by Congress, but are not intended to, nor do not replace existing statutory laws. There are no exceptions to following the regulations, mandated by Congress. Concern for the **"public interest"** and the statement that **"the Regulatory program has been established to protect the water resources of the United States."** can be found on the Army Corps of Engineers Galveston District web site.

IV. NATIONWIDE PERMITS/EXECUTIVE ORDERS

7. The Corps, using the authority of Nation Wide Permits, issued a permit to construct the Gulf Coast Project or Segment to TransCanada Keystone Pipeline. According to the statutes they are issued after **"consideration of the full public interest by balancing the favorable impacts against the detrimental impacts"**. The **"public interest review"** is mandated in 33 CFR 320.1. It is further described in 33 CFR 325.3 which states that **" public notice is the primary method of advising all interested parties of the proposed activity for which the permit is sought and of soliciting comments and information necessary to evaluate the**

probable impact on the public interest". Nationwide permits are intended to "streamline" the permitting process and "**provide expedited review of projects that have minimal impact on the aquatic environment"**. Plaintiff will show that the Corps is guilty of abuse of discretion in issuing Nation Wide Permit-12 and ignored massive, overwhelming and irrefutable evidence to the contrary.

To reiterate NEPA (42 USC 4321-4347), the Corps is obligated to consider all aspects of direct, indirect and cumulative effects and to ensure that the agency (the Corps), "**will have available, and will carefully consider, detailed information concerning significant environmental impacts"**.

8. The Corps also relied on several Executive Orders, issued by various presidents, but most recently by President Obama. Executive Order 13563, issued on January 18, 2011 for the purpose of producing "**a regulatory system that protects 'public health, welfare and safety, and our environment while promoting economic growth, innovation, competitiveness and job creation"**. This Executive Order also backs up existing statutory law and states that "**Regulations shall be adopted through a process that involves public participation"**. President Obama followed this Executive Order with Order 13579, which stated that "**Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation"**.

9. **Denial of the Original TransCanada Keystone Pipeline XL Permit**

On January 18, 2012, President Barack Obama issued a statement to the American public explaining that the denial of the permit by the State Department was due to the **"rushed and arbitrary deadline insisted on by Congressional Republicans"** and saying that it **"prevented a full assessment of the pipeline's impact, especially the health and safety of the American people, as well as our environment"**. In an interview with Omaha, Nebraska television station KETV on February 10, 2011, the President reiterated his environmental concerns regarding the pipeline: **"Folks in Nebraska like all across the country aren't going to say to themselves, 'We'll take a few thousand jobs if it means our kids are potentially drinking water that would damage their health'. We don't want, for example, aquifers to be adversely affected. Folks in Nebraska obviously would be directly impacted."** However, the President reversed his concerns and 40 days later issued Executive Order 13604, "Improving Performance of Federal Permitting and Review of Infrastructure Projects Memorandum of March 22, 2012- Expediting Review of Pipeline Projects From Cushing, Oklahoma to Port Arthur, Texas and Other Domestic Pipeline Infrastructure Projects. In this Executive Order, the President reiterates the language of other Orders by stating that **"projects are designed, built, and maintained in a manner that is consistent with protecting our public health, welfare, safety, national security, and environment"**.

The Corps issued permits to construct the Gulf Coast Segment or Project to TransCanada on June 25, 2012 and July 16, 2012 from the Galveston and Ft. Worth District offices respectfully, ignoring mandated statutory law and massive public concern as well as the language in the Executive Orders regarding public health and safety and environmental concerns.

V. STATUTORY AND CONSTITUTIONAL VIOLATIONS

10. Executive Orders are not legal and violate Article I, Section 8 of the United States Constitution. In spite of the legality question of Executive Orders, the Corps ignored the language directing them to account for "**public health and safety**" and "**environmental**" concerns. The Corps "expedited" the permitting process without regard for "**affected communities**" and without public hearings, public comment, input and ignoring the massive information circulating in the media and publicly regarding the material to be transported by TransCanada. The Corps ignored the fact that the Keystone Pipeline, Gulf Coast Project is not a "separate" project" but an extension of the original Keystone Pipeline that was denied by the State Department. Given that the President, as well as the State Department had concerns about the Ogallala Aquifer in Nebraska and the "environmental sensitivity" of the region, the Corps was negligent in permitting the Gulf Coast Project or Segment. In Texas, the proposed pipeline would traverse 18 counties and 13 of those in East Texas proper. This line would be laid directly over the Carrizo-Wilcox Aquifer, classified by the U.S. Department of Transportation as a

"semi-consolidated, high-yield aquifer classified as a Class 1c Ultra Sensitive Area (USA) and therefore considered sensitive in regard to ground water contamination".

This is the same classification as the Ogallala Aquifer but human health and safety factors and consideration of environmental protection and impact were ignored by the Corps.

The residents of Texas, along the pipeline route and that rely on the Carrizo-Wilcox Aquifer, were not allowed input or comment in the permitting process, as residents of Nebraska were given, constituting a violation of Section I, Article XIV of the United States Constitution. Permitting the pipeline without public comment and consideration, not only denied landowners equal protection under the law, but deprived landowners of liberty and property as guaranteed by the Constitution of the United States and the Texas Constitution.

11. The Texas Constitution was amended in November 2009 in response to the Kelo decision and the attempted TransTexas Corridor, I-69 project. Article I, Bill of Rights, Section 17 (a) states that **"No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person, and only if the taking, damage, or destruction is for: (1) the ownership, use and enjoyment of the property, notwithstanding an incidental use, by: (A) the State, a political subdivision of the State or the public at large; or (B) an entity granted the power of eminent domain under law"**. Without the opportunity for public hearings and comment, there was no evidence

presented to show that this pipeline is a private and not a public project. The Corps, in failing to consider public comments, permitted a pipeline that does not meet regulatory guidelines in the State of Texas. 33 CFR 320.4 clarifies "Public Interest Review" and states that permits do **"not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations"**. The issuance of NPW-12 violates Plaintiff's rights as delineated in this section.

VI. HEALTH AND SAFETY/ENVIRONMENTAL ASPECTS OF NPW-12

12. The Corps failed to investigate the implications of this pipeline in terms of health and safety; particularly the effects of a leak or leaks on communities, ground water, surface waters and the health of children. Executive Order 13045, issued by President Bill Clinton and titled "Protection of Children from Environmental Health Risks" applies to any rule that (1) is determined to be 'economically significant' as defined under Executive Order 12866 and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects on the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives."

The Corps, in the re-issuance of Nationwide Permits, stated in the Federal Register, Volume 76, Number 32, Wednesday, February 16, 2011, that "**the proposed NWP's are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the proposed NWP's do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children**".

Plaintiff argues that this is in direct conflict with and contrary to statements made by President Obama and ignores empirical evidence to the contrary. Without public notification or the opportunity for public comment or involvement, the Corps failed to consider not only the environmental impact of the project, but ignored the potential effects to the health and safety of children, senior adults, schools and communities along the permitted line.

13. In Nacogdoches County, Texas, the unincorporated town of Douglass is one site of the permitted line and that line is less than 800 feet from Douglass Independent School property. In the event of a leak along the pipeline route and potentially in the vicinity of the school, the effects would be immediate and would necessitate the evacuation of the school. The track record of TransCanada Keystone Pipeline is clear and Plaintiff will argue that the Corps ignored their history of leaks. TransCanada's first pipeline, running from Canada to Oklahoma, became operational in June 2010, and leaked 14 times in the first year of operation. The largest of these leaks or spills was 21,000 gallons, occurred in 2011 and prompted the Department of

Transportation (DOT), Pipeline and Hazardous Materials Safety Administration (PHMSA) to issue a corrective action order shutting down TransCanada's entire pipeline system. The report, issued by PHMSA, stated that "**continued operation of the pipeline without corrective measures would be hazardous to life, property and the environment**". Although acutely aware of this information, the Corps failed to consider the information.

14. A spill in Michigan, of similar material that will be transported by the Keystone Pipeline, occurred in July 2010 and was estimated by the EPA at nearly 1 million gallons, with a cleanup cost approaching one (1) billion dollars (\$1 billion). The nature of this material is described in the TransCanada Keystone Pipeline XL, State Department Final Environmental Impact Statement (EIS) and is a mixture of **diluted bitumen and synthetic crude oils**.

The rupture of the 30 inch pipeline in Calhoun County, Michigan forced the evacuation of a least one town, threatened the local drinking water, threatened nearby lakes and forced the closure of 35 miles of the Kalamazoo River. Given the nature of the material, and with full knowledge of the operational history of the firm, the Corps issued the permits to construct. The material, bitumen, is highly viscous, heavier than water and must be heated and diluted with solvents prior to transporting via pipeline. The spill in Michigan is still undergoing remediation and dredging operations are on-going, three years after the initial spill or leak.

15. In Canada, where the material is mined is in Alberta and there are reported increases in

cancer rates among the population in the area. A study by the Alberta Cancer Board, released in February 2009, investigated cancer rates in Ft. Chipewyan from 1995-2006 and found a demonstrable rise in specific cancers with an overall rise in cancers in general. Additionally, studies by various universities and the Canadian government proper documented the effects of mining bitumen in the region on wildlife; especially aquatic life. The result was that sedimentary deposits of the components of bitumen from mining were causing bio-accumulation in aquatic life and that the accumulation of carcinogens found in bitumen had increased by 40% between the study years of 1995-2006. The Athabasca region, where bitumen is mined, is home to the Athabasca River and there are government reports of avian deaths (waterfowl) in contaminated waters. In the United States, these constituents and components comprising bitumen are collectively known as polynuclear aromatic hydrocarbons (PAH's or PNA's) and are classified under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Clean Water Act (CWA), the Toxic Substances Control Act, the National Toxicology Program of reasonably anticipated to be human carcinogens, the International Agency for Research on Cancer (IARC) list of substances carcinogenic to humans, the National Institute for Occupational Safety and Health (NIOSH) and the U.S. Environmental Protection Agency (EPA) of probable human carcinogens and the Emergency Planning and Community Right-To-Know Act (EPRCA) as

hazardous and toxic substances. This material, when mined in solid form, is diluted and heated to temperatures for liquification and diluted with petroleum distillates for transportation.

Given the classification of this material by the United States regulatory agencies, the history of spills, known toxicity and the consideration of re-routing the pipeline to avoid sensitive environmental areas and aquifers, the Corps failed in their mandatory obligation to consider all factors relating to the project; especially the responsibility to hear public comment. NEPA (42 USC 4321-4347) is clear and unambiguous requiring **"all federal agencies to consider the effects of all actions on the environment, consider alternatives that reduce impacts and prepare detailed statements for public and federal agency review where significant impacts may occur. Agencies are required to solicit and respond to comments from the public, affected interests and relevant government agencies on the impacts of proposed actions before and after environmental documentation is developed. Documentation consists of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).**

If the Environmental Assessment (EA), developed with public involvement and participation, concludes that there are no significant environmental effects, the agency may release a finding of no significant impact (FONSI). No Environmental Assessment was performed by the Corps. Public comment is mandated in 33 CFR 324, NEPA Implementation Procedures for the Regulatory Program administered by the Corps for the issuance of permits and reiterated in

40 CFR 1506.6. This section, titled "Public Involvement" mandates "public hearings " or "public meetings" whenever there is "**substantial environmental controversy concerning the proposed action or substantial interest in holding the meeting**". It further mandates that "**Agencies shall (a) make diligent effort to involve the public in preparing and implementing their NEPA procedures**". Given the fact that the Corps was involved in the preparation of the TransCanada Keystone Pipeline XL for the State Department, knowledgeable of the firm's history of leaks, knowledgeable of the toxic nature of the material to be transported and massive public opposition to the project, public hearings should have been held in accordance with the law as prescribed in 40 CFR 1508.9. The language is clear: "**Environmental assessment (a) Means a concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact**". (FONSI). The Corps issued a FONSI without following the mandatory process.

16. The Corps is obligated by statute to consider all factors in the permitting process that could directly or indirectly affect ecological systems, economic, social or health of a community.

Multiple studies and public concern regarding the permitting of the TransCanada Keystone Pipeline have been published and discussed. Cornell University's Global Labor Institute released a report on March 20, 2012 that concluded the pipeline would actually harm agricultural and tourism in the states along the pipeline route. The Cornell report also referenced an independent study by the University of Nebraska which predicts that over the 50-year life span of the pipeline, there could be an expectation of 91 "significant spills". A recent public admission by President Obama that the project would create only 35 permanent jobs, disputed the claim by TransCanada that "thousands of jobs" would result from the pipeline. As required by the law, the Corps failed in its mandatory duty to consider all factors required by NEPA and that with public comment or public hearings, a more complete picture would have been available for the decision process.

17. The Corps, in issuing findings of no significant impact (FONSI) failed landowners by treating the TransCanada Keystone Pipeline Gulf Coast Project as a distinctly separate project and in the nearly 1,000 crossings of bodies of water in Texas alone, failed to accurately identify the potential loss by treating each crossing as an individual project and not accounting for the cumulative effects, as directed by NEPA, 40 CFR 1508.8. The pipeline from Cushing, Oklahoma to Port Arthur, Texas is approximately 485 miles long and effects numerous land owners along the path. It is a continuous and contiguous pipeline; not segmented and therefore

is one complete project and not individual projects as the Corps has determined.

18. The Corps also failed in its ministerial duty to consider other factors involved in the Finding of No Significant Impact (FONSI). One such critical factor is the Congressional Order of December 15, 2011, directing the Secretary of Transportation to "**complete a comprehensive review of hazardous liquid pipeline facility regulations to determine whether the regulations are sufficient to regulate pipeline facilities used for the transportation of diluted bitumen**". Given the dismal operational history of TransCanada, the history of serious leaks of diluted bitumen and the extreme negative publicity surrounding this project, the Corps failed to comply with its mandated obligations under the law.

VII. SUMMARY

19. The Army Corps of Engineers did not follow statutory law relating to the permitting of the TransCanada Keystone Pipeline Gulf Coast Project. The controversy surrounding this permit is well publicized and the Corps yielded to political pressure and expedited the permit. This was done so without public comment or hearings as mandated by law. The use of Nation Wide Permit-12 is not a substitute for following NEPA and the Corps, while having some degree of latitude, failed in its ministerial duty. Having participated in the preparation of the Final EIS for the State Department, the Corps was acutely aware of many factors that would preclude the issuance of a finding of no significant impact (FONSI).

There was a blatant disregard for established environmental law and although they are not the law, the Corps failed to follow the directives in the Executive Orders, which not only included public input, but also directed the agency to consider human health and safety. This failure has resulted in a violation of the rights of landowners and has resulted in damage to properties. Plaintiff has sustained damage and loss in excess of the limits of Section 404 of the Clean Water Act and NPW-12.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and requests the Court find for Plaintiff and to enter a judgment:

- (a) Declaring the issuance of Nation Wide Permit 12 by the U.S. Army Corps of Engineers in violation of the National Environmental Policy Act and other federal regulations as described in this petition.
- (b) Order the Corps of Engineers to revoke the existing permit issued to TransCanada and mandating that the Corps of Engineers hold public hearings and follow NEPA and other statutory regulations for the protection of public health and the environment;
- (c) To award Plaintiff the costs and expense of filing and,
- (d) To provide for such other relief as the Court deems just.

DATED: April 25, 2013

Respectfully submitted,

Michael Bishop
Plaintiff Pro Se
684 CR 785
Douglass, Texas 75943
936-715-9338