

To: Nebraska County and City Leaders
Re: Background on State and County Role and the TransCanada Pipeline
From: Nebraska Non-Profit Leaders
Date: May 25, 2011

As county and city leaders, we understand you have many projects and decisions on your radar screen with limited time and limited resources.

The issues surrounding the Keystone 1 and Keystone XL pipelines are often confusing and complex. This is compounded with one-sided information given out by TransCanada.

We did our best to pull together some resources you can use while making decisions on what is best for your county and city in order to protect your economic and environmental interests.

You have tremendous power when it comes to regulations and emergency response plans. It is not too late to regulate the TransCanada Keystone XL pipeline and future oil pipelines. Additionally, despite what TransCanada says, regulations you put in place are not duplicative since Nebraska has no regulations on oil pipelines.

While the federal government is responsible for granting or denying a permit to TransCanada to build the Keystone XL pipeline (decision likely late 2011 from Sec. Clinton), you have a role in other key areas like siting, bonds for road construction and emergency response planning.

States, counties and cities have a role in routing oil pipelines, which means you and your fellow leaders can decide on pipeline routes or at the very least put a process in place to study and determine oil pipeline routes. Ideally this happens at the state level, but since our Unicameral has failed to act, your county and city can step in and ensure your economic and environmental interests are protected.

You also have jurisdiction in these regulation areas:

- Siting and routing of pipelines
- Eminent domain process and terms (state only)
- Easement abandonment of unused/out of service pipe
- Emergency response planning
- Liability for spills
- Regulation of neighboring land uses

We have experts who can answer questions about what other states have done to regulate oil pipelines and plenty of background information on the TransCanada pipeline and the potential risks to our land, water and our state's rights.

While we may not agree on all issues, all Nebraskans can agree we must protect our land, water and economic activity. By not passing regulations on oil pipelines our state is putting our way of life at risk and we cannot let that happen. We must act together.

Contact info for various Nebraska leaders who can answer questions:

- Jane Kleeb, Director, Bold Nebraska, 402-705-3622, jane@boldnebraska.org

Background for Nebraska's County and City Leaders

- John Hansen, President, Nebraska Farmers Union, 402-580-8815, john@nebraskafarmersunion.org
- Duane Hovorka, Executive Director, Nebraska Wildlife Federation, 402-804-0033, duanehovorka@windstream.net
- Ken Winston, Policy Director, Nebraska Sierra Club, 402-476-6583, ken.winston@nebraska.sierraclub.org
- Marian Langan, Director, Audubon Nebraska, mlangan@audubon.org

Included in this packet and email:

Nebraska's Role in Oil Pipelines: background document compiled by various Nebraska groups and national experts providing evidence of state's roles regarding oil pipelines

Pipeline Background Document: basics of the pipeline

Reports and Resources Available: list of various documents and reports

UNL Faculty Response to Unicameral: professors were asked a series of questions about the risks of the pipeline to water, re-vegetation, etc. (attached as a separate PDF)

UNL Ag Economics Report: document by UNL opposing pipeline (attached as a separate PDF)

Congressional Research Memo: non-partisan federal memo requested by Rep. Lee Terry on federal vs. state role in regards to oil pipelines (attached as a separate PDF)

Background for Nebraska's County and City Leaders

Nebraska's Role in Regulating Oil Pipelines

Information below was gathered by pipeline expert Paul Blackburn, 605-675-9268, paul@paulblackburn.net

What can Nebraska do when it comes to the route of the TransCanada Keystone XL as well as other regulatory areas of oil pipelines?

Nebraska can pass and implement a routing statute that TransCanada's Keystone XL, and any other future oil pipelines, must abide.

If the state does not pass a routing statute, a Nebraska county can also pass a routing ordinance.

A model county ordinance drafted for South Dakota is available upon request.

States and counties DO HAVE routing authority of oil pipelines. States and counties also have the authority to regulate:

- o Siting and routing of oil pipelines
- o Easement and eminent domain process and terms (state only)
- o Easement abandonment
- o Emergency response planning
- o Liability for spills
- o Bonding for road construction and/or repair
- o Regulation of neighboring land uses

Some states that have laws on the books include MT, ND, SD, MN and IA. Specific examples include:

- *South Dakota* has routing of oil pipelines on the books and just passed an additional 50 conditions on top of federal regulations, <http://tiny.cc/967au>
- *Montana Annotated Code*, Chapter 75-20, and specifically §75-20-211(1)(a)(iii). Contents of applications for pipeline and electric transmission lines includes alternative locations and § 75-20-301(1) which gives approval of alternatives to proposed pipeline and electric transmission line projects.
- *Mont. Power Co. v. Fondren*, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987). Montana Board of Environmental Review sets route for facilities defined under Montana Annotated Code § 75-20-104(8); although this decision is for an electric transmission line, the same routing requirements apply to large crude oil pipelines.

What role does the federal government have in oil pipeline routes?

Background for Nebraska's County and City Leaders

Unlike natural gas pipelines subject to the Natural Gas Act and regulated by FERC, Congress *has not passed any law that authorizes a federal agency to generally route a crude oil pipeline.*

What about the permit Sec. Clinton and President Obama have to issue for the TransCanada pipeline to start construction?

The President's authority in the Presidential Permit process, under Executive Order 13337, is limited to actions related to the President's Constitutional foreign affairs powers, specifically to determining the location and size of the border crossing for the pipeline.

The President's authority to regulate foreign affairs *does not extend to determining pipeline location within the borders of the United States*, because Congress has not authorized the President to route or site crude oil pipelines. Since Congress has passed no law authorizing a federal agency to route crude oil pipelines, this authority remains with the states and is the reason that Montana (and other states) can route crude oil pipelines.

Can you give us more detailed information on pipeline laws and what states and counties can do?

As an initial observation, state and local governments need to treat interstate natural gas pipelines differently from crude oil pipelines. Interstate natural gas pipelines are sited and routed by the Federal Energy Regulatory Commission (FERC) under the federal Natural Gas Act, which preempts most state regulation. As with crude oil pipelines, natural gas pipeline safety is regulated by the Pipeline and Hazardous Materials Safety Administration (PHMSA).

In contrast, the federal government has no general authority to permit and route crude oil pipelines, such that states, counties or even cities may do so. PHMSA, however, regulates crude oil pipeline safety so the area of pipeline safety is off-limits to state and local governments. Thus, as general rule, crude oil pipeline safety is regulated by the federal government, but most other aspects of crude oil pipeline regulation are not.

The following discussion relates primarily to crude oil pipelines. Some of these regulatory opportunities also apply to natural gas pipelines, but as noted there are differences. The primary exception is that the FERC routing process for natural gas pipelines preempts state and local routing of these pipelines.

The general areas where state and local governments may regulate crude oil pipelines include:

- Routing
- Use permitting
- Emergency response planning
- Pipeline easement abandonment
- Regulation of other land uses near existing pipelines.

Crude Oil Pipeline Routing: Federal law expressly prohibits PHMSA from routing pipelines. Further, no other federal agency has general routing authority. If anybody says otherwise, ask for a citation to the law. They won't find one. Although much has been made of federal authority over the Keystone Pipelines, in fact the federal government has no authority to decide

Background for Nebraska's County and City Leaders

where the pipeline goes, with the limited exception that the President may decide whether or not to allow a pipeline crossing at an international border, and if a crossing is allowed, the location and size of the border crossing only. This power over border crossings comes from the President's power in the Constitution to regulate foreign affairs. Since Congress has not granted the President power to regulate the routes of oil pipelines within the US, the President in fact has no power to control an oil pipeline's route within the borders of the US. The states of Montana and Minnesota (and probably others) have long-standing unchallenged laws under which they regulate crude oil pipeline routing.

One important caveat is that state and local governments cannot regulate pipeline safety, because federal law expressly preempts state and local regulation of pipeline safety. Thus, if a state or local government passed a law that sought to regulate the design, construction, or operation of a crude oil pipeline for the purpose of regulating safety, such law would be preempted. Counties cannot regulate the thickness of pipe steel, methods for preventing pipeline ruptures, or any other action that is intended to require pipeline operators to improve safety. This being said, a gray area of law relates to whether a county could route a pipeline based on safety concerns. Since federal law expressly prohibits PHMSA from using routing as a safety tool, an argument can be made that state and local governments are not preempted from considering safety when routing a crude oil pipeline, but this has not been tested in court.

To clearly avoid conflicts with federal law, a state or local government routing law or ordinance must focus on limiting economic and aesthetic impacts. For example, a state could consider how to minimize the economic impact of a crude oil pipeline route by limiting disruption to roads, homes and businesses. It could also require setbacks from pumping stations and/or noise limitations to limit the aesthetic impact of pipelines. It could find that a pipeline is not compatible with other land uses, by for example classifying a pipeline over a certain size as an industrial use. As discussed above, it might be possible to consider safety when making route decisions, but such law would probably end up in court.

Crude Oil Pipeline Siting: This includes matters not related to safety or routing. Such regulation could include, for example, mitigation after construction, easement maintenance for aesthetic values, filing of route maps, etc. To better understand the scope of possible state siting regulation, you might want to review recent South Dakota, North Dakota and Minnesota pipeline permits which impose substantial conditions on pipeline operators. The City of Austen, Texas, has an extensive local pipeline ordinance that it successfully defended in federal court.

Crude Oil Pipeline Emergency Response Planning: Crude oil pipeline spill planning is regulated under the federal Clean Water Act (CWA), but the CWA expressly states that it does not preempt state and local spill response requirements. Thus, a state or local government could impose almost any emergency planning requirements that it found reasonable and necessary without fear of preemption by federal law. The types of regulation that might be appropriate would be the filing of as-built maps with emergency responders, providing emergency response training to local first responders, requiring the location of spill response equipment in the county, requiring notice of leaks in the county that require spill response, filing of a spill response plan with the county and allowing county modification of the plan, etc. Washington state has a very good spill response law that is a great example of state enhancement of federal spill response requirements.

Background for Nebraska's County and City Leaders

Crude Oil Pipeline Easement Abandonment: Pipeline abandonment is important because the abandonment of very large pipelines can have substantial impacts on landowners. For example, after abandoned pipelines corrode, they can act as very large drainage pipes, to the point that they could move the water from entire lakes, ponds, or wetlands to lower properties. Also, a corroded pipeline can cause injury to humans, livestock and vehicles if it collapse under their weight. Abandoned pipelines may also cause sinkholes as earth enters the pipe, and if a pipe emerges above ground it can cause safety and aesthetic impacts, as well as interfere with animal and vehicle movement. Finally, abandoned pipelines interfere with future land uses, such as construction of buildings over an abandoned easement.

Crude oil pipeline easements are taken under state condemnation authority, not federal condemnation authority. Thus, what a state gives it can also condition and take away. For example, a state could decide:

What happens to a pipe after abandonment (removed/plugged at intervals/filled/otherwise mitigated/left as it)?

Who is responsible for paying the cost of mitigation?

Who has the right to decide the appropriate mitigation after abandonment?

Iowa has a fairly detailed state law that regulates abandoned pipelines. Michigan regulates abandoned pipelines under its underground tank law. The County of Santa Barbara in California has a very detailed pipeline abandonment ordinance due to the large number of abandoned pipelines that once serviced now capped oil wells, because these old pipelines were interfering with development.

Federal law does not regulate pipeline easement abandonment, because federal safety regulations apply only to operating pipelines. When a pipeline is taken out of service, federal law requires that it be purged of hazardous materials, capped and isolated from other operating pipelines. After a pipeline company takes these actions, the federal government has no laws related to when an easement is terminated or what happens to the pipe in the ground. Since crude oil pipeline easements are taken pursuant to state law, states may also determine when an easement may be terminated for nonuse and the conditions of such termination.

Regulation of Adjacent Land Uses: A county may regulate land uses adjacent to existing pipelines – including to improve safety. The distinction here relates to the nature of the regulated entity. A county may not regulate a pipeline operator to enhance safety because such direct regulation of pipeline safety is a matter of federal. However, a county may regulate other land uses near the pipeline, because this is regulation of local residents and local land uses and is not regulated by federal law. For example, a county could prohibit construction of a hospital, emergency service facility, nursing home or daycare center within a certain distance of a pipeline. It could also require that landowners notify and consult with the county and/or pipeline easement holders before undertaking new construction activities near a pipeline. The full range of county authority is generally described with the PIPA process, a voluntary federal program intended to help local governments take action to protect pipelines from construction and other activities. Brookings County recently passed an ordinance that incorporates some

Background for Nebraska's County and City Leaders

of the recommendations of the PIPA process. Again, the distinction here is that the county ordinance would restrict the activities of neighboring landowners and not the pipeline company.

Background for Nebraska's County and City Leaders

Pipeline Background Document

Nebraskans want to see the state have a clear role in state-based regulations and do not want to rely solely on the federal government. In fact, *74% of Nebraskans across party lines want to see state leaders regulate the pipeline* in areas such as safety, emergency response eminent domain and the siting of the pipeline. (Nebraska poll, conducted Jan 31-Feb 3, 2011)

While oil is necessary, there are too many questions around safety of tarsands oil as well as construction in the Sandhills and through Ogallala Aquifer not to put safeguards in place now.

Tarsands oil is inconsistent with where the United States and Nebraska is heading in terms ensuring America is energy independent.

TransCanada has never firmly stated the oil will stay in the United States. *The fact is, the oil will be sold on the international market.* TransCanada's ads referring to energy independence are misleading at best.

Additionally, only 12% of the jobs went to Nebraskans and that is what is estimated for the Keystone XL pipeline as well. This will translate to about 94-120 jobs for Nebraskans that are short-term and put at-risk stable, state-based jobs in new-energy fields such as ethanol.

Key Points:

Tarsands crude oil is not traditional oil and has increased risks of spills and damage to communities. The tarsands oil is mixed with diluted bitumen or "DilBit"—a highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas liquid condensate. *This oil is 16x more corrosive than traditional crude oil.*

Money invested in our state for clean, renewable, made-in-Nebraska energy (\$300 million just in the last two years) dwarfs the promises made by TransCanada of local taxes over the lifespan on the pipeline (\$150 million over 50 years).

The financial risks towns along the pipeline face on oil spills, road construction/repairs, pipe abandonment, etc. will far outweigh any local tax dollars they generate from the pipeline.

Twelve documented spills already in Nebraska and other states by TransCanada's first pipeline (i.e. Keystone 1).

Three areas of TransCanada's first pipeline had to be dug up because of "anomalies" found in the steel where it was expanding beyond allowable size. The results of those tests have not been shared with the public yet.

Both US Senators—Nelson and Johanns—as well as almost half of the Nebraska state senators have requested that Sec. Clinton conduct more studies on the Sandhills and Ogallala Aquifer before deciding on TransCanada's permit request.

If the Keystone XL pipeline gets approved, almost 1 million barrels of oil will be traveling through Nebraska's Sandhills, Ogallala Aquifer and the eastern part of our state at high temperatures

Background for Nebraska's County and City Leaders

and high pressure increasing all of the risks associated with oil pipelines.

While TransCanada says they can detect a spill within 3 minutes, other studies show the response time to be more like 18 minutes. The most recent spill on a TransCanada pipeline in North Dakota took anywhere from 9-13 minutes and officials in *ND are investigating the spill because landowner accounts of the response are different than what TransCanada is reporting.*

In TransCanada's emergency response plan, it is documented that a leak in their pipeline could spill 27,329 barrels or 1,147,818 gallons of Tarsands oil and chemicals into the ground and water. UNL professor thinks this figure is inaccurate and the risks are much more.

The sensors and technology that TransCanada is using have been cited to give false readings of spills because of the consistency of the tarsands oil (its heavier, mixed with much more chemicals).

The first tarsands oil pipeline built in Nebraska, Keystone 1, was TransCanada's first oil pipeline. They are experts in gas pipelines, but they are very new to oil pipelines.

The tarsands pipeline is not innovative, its not clean and it does nothing to make America energy independent.

States like MI, ND, KS have all encountered broken promises by TransCanada and other tarsands pipeline companies. Costs related to road repair (due to the big haulers for construction), spill clean-up never fully get paid for despite the promises made to officials.

Concerns from Nebraska Experts (excerpts taken from a longer document provided as a separate PDF attached):

"My review of the risk assessment leads me to conclude that a minimal amount of effort has been allocated to completion of a quantitative risk assessment for the subsurface/groundwater/drinking water. We need a greater understanding of the various risks and methods to clean up any leaks/spills...Studies are also needed to predict the thermal footprint of the pipeline and subsequent impacts on the ecosystem." -Professor Wayne Woldt

"The chances of oil real reaching groundwater would be high in the event of an oil pipeline release in the Sandhills...Pollutants are difficult to remove from aquifers and their chemical effects are long-lasting." -Professor John Gates

"We need to determine whether increased heat from the pipeline will have an impact on soil moisture and differences in heat conductivity based on soil type...Re-vegetation of native plant species is more difficult and expensive in the Sandhills compared to other soil types."

-Professor Jerry Volesky

Background for Nebraska's County and City Leaders

Reports and Resources Available

If you would like a copy of any of these reports that do not have web links, please email jane@boldnebraska.org

TransCanada Exaggerating Job Claims for Keystone XL a two-page overview issued by National Wildlife Federation documenting the exaggeration of job numbers by TransCanada with the first pipeline built by TransCanada, only 12% of the jobs went to Nebraskans.

UNL Dept. Ag Economics paper on the pipeline (also attached as a PDF):
<http://tinyurl.com/unlpipeline>

The Great North Plains at Risk: Oil Spill Planning Deficiencies in Keystone Pipeline System a report issued in Nov. 2010 by Plains Justice documenting the inadequate TransCanada emergency response plans on the current pipeline in the ground in our state. The report also gives a good overview of the pipeline and the risky type of oil that would be spilled into our land and water.

Dirty Business, a report on how TransCanada bullies landowners, manipulates oil markets, threatens fresh water and skimps on safety in the United States.

Keystone XL Pipeline Not Needed, Too Expensive, Better Solutions a policy briefing issued by Plains Justice on the economic impacts of the pipeline and why tarsands production will increase prices at the pump.

Request for Investigation of Possible Use of Substandard Steel in the Keystone Pipeline a report requesting an investigation of the type of steel used in the pipeline currently in the ground in Nebraska, these concerns were heightened by the recent "anomalies" under investigation. Initial findings suggest the steel was from India and China.

Tarsands Pipelines: Presenting Unaddressed Hazards to Public Safety a report by the Natural Resources Defense Council on the difference between tarsands oil being transported by TransCanada and traditional crude oil.

Toxic Tarsands: Profiles from the Front Lines a report told in the words of landowners, rural and urban citizens, native tribes and others who are living with the dangers and worries of tarsands. The report was issued by Sierra Club and profiles a Nebraskan with other Americans.

Tarsands Oil Means High Gas Prices an additional study, by Corporate Ethics International, on why the TransCanada pipeline will result in higher gas prices.

Staying Hooked on Dirty Fuel a report issued by the National Wildlife Federation that is a comprehensive overview of tarsands oil, TransCanada and the impact on wildlife.

Keystone XL: Local Options and National Need a Powerpoint presentation given to the Nebraska Farmers Union by Plains Justice filled with information on what states can do to help

Background for Nebraska's County and City Leaders

keep land and water safe.

Pipeline Poll last year Nebraska groups conducted a statewide poll that found the vast majority of Nebraskans want elected leaders, especially Governor Heineman and State Senators, to be asking questions about the pipeline and that over half would change their vote if a politician did not act on the pipeline.

Letter from almost half of the Nebraska State Senators to Sec. Clinton expressing concerns: <http://boldnebraska.org/nesenators/>

Bold Nebraska's pipeline resource page, includes links to reports oil going to China and more: <http://boldnebraska.org/pipeline-background-resources>