

MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

JEFFREY H. WOOD, Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
SETH M. BARSKY, Section Chief
BRIDGET KENNEDY McNEIL (CO Bar 34299)
Wildlife and Marine Resources Section
LUTHER L. HAJEK (CO Bar 44303)
Natural Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1484, (303) 844-1376; Fax: (303) 844-1350
bridget.mcneil@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

<p>INDIGENOUS ENVIRONMENTAL NETWORK, <i>et al.</i>,</p> <p>and</p> <p>NORTHERN PLAINS RESOURCE COUNCIL, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p>	<p>CV 17-29-GF-BMM CV 17-31-GF-BMM</p> <p>Consolidated</p> <p>DEFENDANTS' PROPOSED SCHEDULE FOR COMPLETING A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT</p>
---	---

UNITED STATES DEPARTMENT OF
STATE, *et al.*,

Defendants,

and

TRANSCANADA CORPORATION, *et
al.*,

Defendant-Intervenors.

On August 15, 2018, the Court issued a partial order on summary judgment regarding one of Plaintiffs' National Environmental Policy Act ("NEPA") claims. *See* Partial Order on Summary Judgment Regarding NEPA Compliance (ECF No. 210). The Court ordered Defendants to supplement the final supplemental environmental impact statement issued in 2014 ("2014 SEIS") to analyze the environmental impacts along the Mainline Alternative Route selected by the Nebraska Public Services Commission. *Id.* at 12. The Court instructed Defendants to submit a proposed schedule for supplementation of the 2014 SEIS that would allow for review of the supplement prior to TransCanada's planned commencement of construction activities in the second quarter of 2019. *Id.* The Court also indicated that, if it could not review a supplement prior to the planned commencement of construction activities, it would consider additional remedies.

In response to the Court's order, Defendants now submit a schedule for preparing a supplemental environmental impact statement ("SEIS") to supplement

the 2014 SEIS.¹ It should be noted that the dates given are estimates and that certain tasks that must be conducted during the NEPA process can take longer or shorter than expected. Nevertheless, the schedule reflects Defendants' best estimate as to how long the preparation of the SEIS will take. The schedule is as follows:

Federal register notice announcing intent to prepare an SEIS:	Early September 2018
Circulation of a draft SEIS for public comment:	September 2018
Publication of final SEIS:	December 2018

Defendants will notify the Court when the draft SEIS is circulated for public

¹ Ordinarily, if there is uncertainty over whether a proposed project will cause significant impacts, the court should remand to the agency and allow the agency to determine in the first instance whether it is appropriate to prepare an environmental assessment ("EA") or an environmental impact statement ("EIS"). *See Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1226-27 (9th Cir. 2008). Here, the agencies announced in May 2018 that an EA would be prepared to analyze the mainline alternative route through Nebraska. An extensive draft EA has been prepared and circulated for public comment, and the public comment period closed on August 29, 2018. That administrative process has not yet concluded, so no final determination has been made by the agencies as to whether the route change would have significant effects that would require an SEIS. Nonetheless, Defendants read the Court's order as requiring the preparation of an SEIS, as opposed to an EA, regardless of whether the agencies determine that the alternative route would cause significant environmental impacts. Therefore, to comply with the Court's order, the agencies plan to pivot from the ongoing EA process and turn toward the preparation of an SEIS. In submitting this schedule in compliance with the Court's order, Defendants do not concede that an EIS is required by statute in this instance, nor do Defendants waive any right to appeal the Court's decision if Defendants determine an appeal may be appropriate.

comment and when the final SEIS is published. Defendants anticipate that the U.S. Bureau of Land Management (“BLM”) and the U.S. Army Corps of Engineers (“Corps”) will issue decisions regarding their respective permitting actions relating to the Keystone XL Pipeline in January or early February 2019. As the process moves farther along, the parties can confer and propose a schedule for the Court’s review of the SEIS and the briefing of any additional claims involving the actions by BLM and the Corps.

Respectfully submitted this 4th day of September, 2018,

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY, Section Chief

/s/ Bridget K. McNeil
BRIDGET KENNEDY McNEIL (CO Bar 34299)
Senior Trial Attorney
Wildlife and Marine Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1484; Fax: (303) 844-1350
bridget.mcneil@usdoj.gov

/s/ Luther L. Hajek
LUTHER L. HAJEK (CO Bar 44303)
Trial Attorney
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, a copy of the foregoing Defendants' Proposed Schedule for Completing a Supplemental Environmental Impact Statement was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek

LUTHER L. HAJEK
U.S. Department of Justice