

JURISDICTION

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. §§ 552(a)(4)(B) and (a)(6)(E)(iii) (FOIA citizen suit provisions).

VENUE AND INTRADISTRICT ASSIGNMENT

4. Venue lies in this judicial district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B) because Plaintiff Friends of the Earth resides in this district.

PARTIES

5. Plaintiff FRIENDS OF THE EARTH:

a. Plaintiff Friends of the Earth, Inc. (“FoE”) is a national, non-profit environmental advocacy organization founded in 1969 and incorporated in the District of Columbia, with its headquarters in Washington, D.C. FoE’s mission is to defend the environment and champion a healthy and just world. FoE “seeks to change the perception of the public, media and policy makers – and effect policy change – with hard-hitting, well-reasoned policy analysis and advocacy campaigns that describe what needs to be done, rather than what is seen as politically feasible or politically correct.”¹ FoE is the U.S. voice of the world’s largest network of environmental groups – Friends of the Earth International – a federation of grassroots groups working in 76 countries on today’s most urgent environmental and social issues.

b. FoE disseminates information to educate the public on current environmental policy issues. Almost all of FoE’s staff members are engaged in disseminating information to the public. In addition to press releases, they disseminate information through press briefings and radio and television interviews. FoE has a regularly updated website that

¹ *Who We Are - Our Strategy*, Friends of the Earth, <http://foe.org/who-we-are> (last visited Feb. 15, 2012).

disseminates information about key environmental issues. FoE staff members respond to questions from the public about environmental issues and disseminate information in responding to those questions. They distribute email messages with information on environmental issues several times per week, and letter mailings multiple times per year, release a quarterly “Newsmagazine,” and distribute information through multiple social networking sites and pages, and at public events.

c. The information FoE seeks from the State Department through the FOIA request will further FoE’s mission as a non-profit environmental advocacy organization. Through FoE’s dissemination, the information is likely to contribute significantly to the public’s understanding of the State Department’s activities in the Keystone XL permitting process, and will not be used for commercial purposes.

6. Defendant UNITED STATES DEPARTMENT OF STATE is a federal agency within the meaning of FOIA. The State Department processes requests for agency records under FOIA and, in carrying out its responsibilities, must comply with applicable requirements of FOIA.

BACKGROUND

The Keystone XL Permit Application Process

7. Plaintiff Friends of the Earth seeks disclosure of documents and information regarding State Department communications between the State Department and lobbyists or other individuals from McKenna Long & Aldridge; Bryan Cave LLP; DLA Piper; and TransCanada Pipelines, relating to the Keystone XL pipeline. The Keystone XL pipeline would transport tar sands crude oil from the Western Canadian Sedimentary Basin in Alberta, Canada to refineries in the Texas Gulf Coast area.

8. Because the Keystone XL pipeline would involve construction on the US-Canada border, the company seeking to build the pipeline, TransCanada, must obtain a Presidential permit from the State Department. *See* Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004). To reach this decision, the State Department must complete an environmental review, consult with certain other federal agencies, and determine whether issuance of a Presidential permit to the applicant “would serve the national interest.” *Id.* at 25,300.

9. In 2008, TransCanada applied to the State Department for a Presidential permit to build and operate the Keystone XL Project. *See Keystone XL Pipeline Project, Project Background*, U.S. Dep’t of State, www.keystonepipeline-xl.state.gov (last visited Feb. 18, 2012).

10. On November 10, 2011, the State Department announced that it could not make a national interest determination regarding the permit application without additional information, specifically calling for an “in-depth assessment of potential alternative routes” that would avoid sensitive terrain in Nebraska. *See* Media Note, U.S. Dep’t of State, *Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information* (Nov. 10, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

11. On December 23, 2011, Congress passed the Temporary Payroll Tax Cut Continuation Act of 2011, which required the President, acting through the Secretary of State, to grant a Presidential permit within 60 days of the passage of that Act unless he determined that the Keystone XL pipeline was not in the national interest. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280, 1289-90 (2011). On January 18, 2012, the President, upon the State Department’s recommendation, denied TransCanada’s application for a Presidential permit. Media Note, U.S. Dep’t of State, *Denial of the Keystone XL Pipeline Application* (Jan. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm>.

The State Department explained that it did “not have sufficient time to obtain the information necessary to assess whether the project, in its current state, [wa]s in the national interest,” noting that the denial of that permit “does not preclude any subsequent permit application or applications for similar projects.” *Id.*

12. On the same day the State Department denied its permit application, TransCanada announced that it would reapply for a Presidential permit. *TransCanada Will Re-Apply for a Keystone XL Permit*, TransCanada (Jan. 18, 2012), <http://www.transcanada.com/5928.html>. State Department consideration of TransCanada’s application is likely to begin soon and its decision-making process is likely to be rapid.

a. The State Department has estimated that “it could complete the necessary review to make a decision by the first quarter of 2013.” *Denial of the Keystone XL Pipeline Application, supra*. The State of Nebraska and TransCanada have agreed with that timeline. *See id.* TransCanada’s president and CEO has indicated that “[p]lans are already underway on a number of fronts to largely maintain the construction schedule of the project... [TransCanada] ... expect[s] a new application would be processed in an expedited manner to allow for an in-service date of late 2014.” *TransCanada Will Re-Apply for a Keystone XL Permit, supra*. *See also* Media Advisory, TransCanada, *TransCanada Pleased with Findings of Inspector General Review* (Feb. 9, 2012), www.transcanada.com/5941.html (TransCanada “will re-file for a Presidential Permit and expects that a new filing can be processed in an expedited fashion due to the work that has already been completed during the review process,” and continues to anticipate compliance with original construction schedule.).

b. The environmental and other reviews required for the permitting process may also be expedited. TransCanada has estimated that Nebraska’s process for determining the

safest pipeline route through that state will be completed in September or October of 2012.

TransCanada Will Re-Apply for a Keystone XL Permit, supra. Both the State Department and TransCanada anticipate that the use of existing environmental review documents could contribute to streamlining the review process. See Special Briefing, U.S. Dept. of State, *Briefing on the Keystone XL Pipeline* (Kerri-Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs) (Jan. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm> (NEPA and State Department regulations “outline how to make use of existing NEPA documents, such as the [final environmental impact statement] that [the State Department] completed in August, when reviewing a new application.”); *TransCanada Will Re-Apply for a Keystone XL Permit, supra* (TransCanada “expects that consideration of a renewed application will make use of the exhaustive record compiled over the past three plus years.”).

c. Two bills currently pending in Congress would facilitate or force an expedited permitting decision. Senate Bill S. 2041 would directly authorize TransCanada to build and operate the Keystone XL pipeline and would expressly remove the requirement for a Presidential permit (of Executive Order 13337) and any need for further environmental review under NEPA. “A bill to approve the Keystone XL pipeline project and provide for environmental protection and government oversight,” S. 2041, 112th Cong. (2012). Senate Bill S. 2100 would prohibit the government from “authoriz[ing] a sale of petroleum products from the Strategic Petroleum Reserve ...until the date on which all permits necessary under Executive Order 13337 ... for the Keystone XL pipeline project application filed on September 19, 2008 (including amendments) have been issued.” Strategic Petroleum Supplies Act, S. 2100, 112th Cong. (2012).

Friends of the Earth's FOIA Request

13. On October 6, 2011, Friends of the Earth submitted a FOIA request seeking copies of documents and information regarding all State Department records pertaining to communications between the State Department and lobbyists or other individuals from McKenna Long & Aldridge; Bryan Cave LLP; DLA Piper; and TransCanada Pipelines regarding the Keystone XL pipeline between 2008 and the present. Friends of the Earth requested expedited processing.

14. On November 18, 2011, the State Department informed Friends of the Earth that it would begin processing its request, that it had classified Friends of the Earth as “representatives of the news media” for the purposes of processing its request, and that it had denied its request for expedited processing.

15. On December 19, 2011, Friends of the Earth appealed the State Department's denial of expedited processing of its FOIA request.

16. On January 10, 2012, the State Department upheld its denial of Friends of the Earth's request for expedited processing.

17. As of the date of this complaint, the State Department has only responded that it would begin processing Friends of the Earth's request. The State Department has not informed Friends of the Earth whether it has responsive documents or when it expects to finish processing its request and release any responsive documents.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of FOIA: Failure to Respond within Twenty Days with a Determination Whether the State Department Has Responsive Documents

18. Friends of the Earth incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

19. Upon receiving a FOIA request, an agency must determine within twenty court days of the date of receipt “whether to comply with such request” and must “immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i); 22 C.F.R. § 171.12(d).

20. The State Department’s failure to determine within twenty days whether it has documents responsive to Friends of the Earth’s request, and its failure to immediately notify Friends of the Earth whether it intends to release such documents, violates section 552(a)(6)(A)(i) of FOIA and section 171.12(d) of the State Department’s implementing regulations.

SECOND CLAIM FOR RELIEF

Violation of FOIA: Failure to Make Responsive, Non-Exempt Documents Promptly Available

21. Friends of the Earth incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

22. FOIA requires that upon receiving a request for records that “reasonably describes” the records sought and complies with “published rules ... and procedures to be followed,” the agency “shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

23. The State Department's failure to make promptly available any non-exempt documents responsive to Friends of the Earth's FOIA request violates section 552(a)(3)(A) of FOIA.

THIRD CLAIM FOR RELIEF

Violation of FOIA: Failure to Expedite Processing of FOIA Request

24. Friends of the Earth incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

25. FOIA requires that agencies expedite processing of requests for records when the requester "demonstrates a compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). An agency must "process as soon as practicable any ... request" to which it has granted expedited processing. *Id.* § 552(a)(6)(E)(iii); *see also* 22 C.F.R. § 171.12(b).

26. The State Department classified Friends of the Earth as "representatives of the news media." Pursuant to State Department FOIA regulations, "[n]ews media requesters ... normally qualify" for expedited processing. 22 C.F.R. § 171.12(b)(2).

27. Friends of the Earth also meets the standard for expedited processing for non-news media requesters. "With respect to a request made by a person primarily engaged in disseminating information," FOIA defines "compelling need" as "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). Friends of the Earth is primarily engaged in disseminating information. Friends of the Earth achieves its mission of educating and engaging the public, media, and policy makers about environmental policy issues primarily by disseminating information about those issues.

28. There is an urgent need to inform the public concerning factors relevant to the State Department's process for reviewing and deciding on TransCanada's Keystone XL permit application. TransCanada has indicated its intention to reapply for a Presidential permit quickly; State and other relevant decision-makers have indicated that the review and decision-making will happen quickly; and Congress is considering legislation that would further expedite the decision-making process. In such circumstances, having relevant information early in the decision-making process is essential to an educated and engaged public. It is therefore urgent that Friends of the Earth receive information responsive to its FOIA request as quickly as possible.

29. The State Department's failure to expedite processing of Friends of the Earth's FOIA request violates section 552(a)(6)(E)(iii) of FOIA and section 171.12(b) of the State Department's implementing regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Friends of the Earth respectfully requests that this Court:

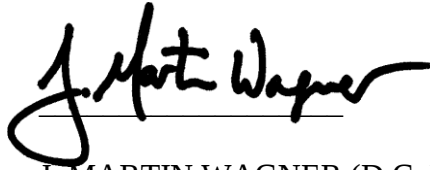
- A. Declare that the State Department's failure to respond to Friends of the Earth's FOIA request within the twenty-day period with a determination as to whether it has responsive documents, and failure to immediately notify Friends of the Earth whether it intends to release such documents, violates FOIA.
- B. Order the State Department pursuant to 5 U.S.C. § 552(a)(6)(E) to expedite processing of Friends of the Earth's request;
- C. Order the State Department pursuant to 5 U.S.C. § 552(a)(4)(B) to determine whether it has documents responsive to Friends of the Earth's request and to

produce, without charge and within 10 days from the date of such order, all such responsive documents;

- D. Award Plaintiff Friends of the Earth its costs of litigation, including reasonable attorneys' fees; and
- E. Grant Plaintiff Friends of the Earth such further and additional relief as the Court may deem just and proper.

Respectfully submitted,

Dated: February 23, 2012

A handwritten signature in black ink, appearing to read "J. Martin Wagner", written over a horizontal line.

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