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Failing to Assess the Key Issue: The Unsatisfactory Approval Process for Keystone XL

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Decision Considered:

United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, Final Environmental Impact Statement for the Proposed Keystone XL Project (August 26, 2011); National Energy Board, TransCanada Keystone Pipeline GP Ltd., OH-1-2009 (March 2010)

For two weeks in August, thousands of protesters staged a sit-in at the White House to protest the imminent approval of TransCanada's Keystone XL pipeline expansion project. The project would connect the Alberta oilsands to the Gulf Coast market. In one of the biggest acts of environmental civil disobedience in decades, over 1,200 people were arrested and fined, including big names such as Daryl Hanna, Naomi Klein and NASA climatologist, James Hansen. While the Canadian regulatory process caused barely a ripple in the Canadian public conscience, American protesters have launched a full frontal attack drawing support from celebrities, Senators, Congress members, State Governors and Nobel Prize laureates. Keystone XL has become the next chapter in Alberta's increasingly hostile relationship with American environmentalists. This post explains the American context of the Keystone XL proposal. Why has it is inflamed environmentalists, and is this more than just politics?

The Proposal

The TransCanada Keystone XL project is the third phase in TransCanada's major international pipeline development that would connect the Alberta oilsands to the Texas Gulf Coast refineries. These refineries constitute approximately half of the United States' total refining capacity. The first two phases have already been implemented. Stages I and II of the Keystone project connected Hardisty, Alberta to Cushing, Oklahoma. These stages went commercial in June 2010 and February 2011. Keystone XL would extend the pipeline all the way to the Gulf Coast refineries in Texas (Final Environmental Impact Statement for the Proposed Keystone XL Project (August 26, 2011) "FEIS", ES-1). It would also upgrade pipe diameter along the entire

Keystone line from 30" pipe to 36." The overall expansion would almost double the volume of crude oil that TransCanada can transport from the oilsands into the U.S.

The Controversy

Two environmental concerns have driven this recent wave of environmental activism. First, and more concretely, much opposition focuses on Keystone XL's proposed route: right through the Ogallala Aquifer in Nebraska, one of the largest known freshwater aquifers in the world. Ogallala provides 78% of Nebraska's drinking water and 83% of its irrigation supply, and constitutes over 30% of the overall U.S. irrigation supply. There are over 200 public water supply wells within 1 mile of the proposed pipeline route. A particular concern with the pipeline crossing the Ogallala Aquifer is that at certain crossings, the aquifer is very superficial with highly permeable soils between the aquifer and surface (FEIS at ES-10). A spill in this area could be devastating.

Second, and more fundamentally, Keystone XL has provided an outlet for the growing U.S. opposition to the import of Alberta's "dirty oil". Most pipeline opponents are quick to point out that oilsands have a carbon footprint 3 to 4.5 times greater than conventional crude oil produced in the U.S. or Canada (see: National Energy Technology Laboratory, *Development of Baseline Data and Analysis of Life Cycle Greenhouse Gas Emissions of Petroleum-Based Fuels*, DOE/NETL-2009/1346 (2008) at 12). Indeed, Environment Canada just released a report stating that oilsand greenhouse gas emissions are expected to triple between 2005 and 2020 (Environment Canada, *Canada's Emissions Trends* (July 2011) at 24). Climate scientist, James Hansen, described Keystone XL as the "fuse" to the Alberta oilsands "carbon bomb" (reported in Solve Climate News). He argues that exploiting the oilsands would be "game over" for climate change because, if developed all at once, the oilsands would release enough greenhouse gas emissions to raise global atmospheric carbon by 150 ppm -- more than half of the total amount carbon dioxide present in the atmosphere before the industrial revolution (280 ppm), and enough to singlehandedly push the current global level (390 ppm) to the brink of what is generally thought to be the threshold for irreversible climate change impacts (550 ppm) (see, e.g. Nicholas Stern, Stern Review on the Economics of Climate Change (2006) at 3, World Bank online). Keystone XL opponents are casting this approval as a tipping point for American climate change policy; the New York Times called it the "most important environmental decision of the Obama era — the keystone of 21st century environmental policy, if you will".

The Regulatory Process

Keystone XL has cleared all regulatory obstacles in Canada. In March 2010, the National Energy Board approved the expansion to the Canada/U.S. border, concluding that the pipeline "is in the public interest and is and will be required for the present and future public convenience and necessity" (Reasons for Decision OH-1-2009 at 80.) The fate of the pipeline expansion, therefore, lies with the American regulatory process.

The pipeline falls under federal authority only because it connects the U.S. to a foreign country – normally pipeline development, even when interstate, is within the jurisdiction of the states (see: Paul W. Parfomak, Neelesh Nerurkar, Linda Luther, "Keystone XL Pipeline Project: Key Issues" Congressional Research Service (May 31, 2011) at 3). Keystone XL requires a "Presidential Permit", issued by the United States Department of State (Executive Order 13337, "Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States," 69 Federal Register 25299, as amended, and Department of State Delegation of Authority No. 118-2 of January 26, 2006). Issuance of a Presidential Permit requires a finding that granting the permit would serve the national interest:

> …if the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary's judgment require….

Much of the process is delegated to the Department of State, including mandatory consultation with a host of other federal government departments. However, the President retains ultimate approval authority in the event that one of these departments disagrees with the Department of State's determination. Since the issuance of a permit would be a "major federal action," the Department of State is also required to produce an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). NEPA, the forerunner to Canadian environmental assessment legislation, requires that all federal agencies

> to the fullest extent possible…. include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented…(42 USC § 4332).

The EIS process for Keystone XL has been long and controversial. The Environmental Protection Agency (EPA) was extremely critical of draft versions of the EIS and rebuked the State Department for insufficiently explaining the need for the project and assessing possible alternatives, failing to consider greenhouse gas emissions from upstream production or downstream refinement and use, and for failing to assess the implications of using diluents, which are needed to transport the heavy bitumen. However, after working with EPA, the Department of State released its much-anticipated final EIS on August 26, 2011. It concluded that Keystone XL *would not have significant adverse impacts to most areas along the route* (FEIS 3.15-1). It found that neither system alternatives (i.e. trucking or rail transport) nor route alternatives would be preferable to the Keystone XL proposal (FEIS at ES-14). The report found that any spills in the Ogallala region would only affect a "limited area of the aquifer around the spill site" and requested that TransCanada commission an independent consultant to review the company's risk assessment for the region (FEIS at ES-10). The Department of State commissioned study on greenhouse gas emissions, which found that oilsands crude oil is more emissions-intensive than the crude that it is replacing in the U.S. However, it concluded that the pipeline is not likely to affect upstream production in the oilsands over time. The EIS adopted these emissions findings (FEIS at ES-15).

Proponents of the pipeline celebrated Keystone XL clearing this major regulatory hurdle. But environmental commentators have argued there are numerous flaws in the EIS. One commentator titled her response: "It's Easy to Find "No Significant Impact" if You Do No Significant Study" (Danielle Droitsch, "State Department Keystone XL Environmental Review: It's Easy to Find "No Significant Impact" if You Do No Significant Study...", Switchboard (August 26, 2011)). The Sierra Club's press release stated: "The U.S. State Department's final report on the Keystone XL today is an insult to anyone who expects government to work for the interests of the American people". Criticism focused on several main components:

- Accepting TransCanada's unduly long alternative routes such that it could easily dismiss the alternatives as impracticable or not preferable, rather than independently canvassing alternative routes;
- Not discussing the dilution of bitumen for transport and the potential implications for spill remediation;

- Issuing a Final EIS while there are still outstanding independent studies on the potential impacts of the project;
- Concluding that the pipeline would have no affect on oilsands production and consequential greenhouse gas emissions by assuming that, if not Keystone XL, then other pipeline projects will allow production and distribution of oilsands crude to other markets.

The Future

The release of the final EIS means that Keystone XL has now entered the final stage of the approval process. After conducting a further 90 days of public consultation, including several open house events, and considering the findings of the EIS, the Department of State will determine whether granting the Presidential Permit serves the national interest.

The Department of State, and the President are unconstrained in their discretion to approve or deny the permit; there are no binding criteria for determining what serves the national interest. The Presidential Permit for TransCanada's first Keystone project was determined to be in the national interest primarily for energy security:

- It increases the diversity of available supplies among the United States' worldwide crude oil sources. …
- It shortens the transportation pathway for a portion of United States crude oil imports. …
- It increases crude oil supplies from a source region that has been a stable and reliable trading partner of the United States and does not require exposure of crude oil in high seas transport and railway routes that may be affected by heightened security and environmental concerns.
- It provides additional supplies of crude oil to make up for the continued decline in imports from several other major U.S. suppliers (Department of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, LP Application for Presidential Permit (Feb. 28, 2008) at 22).

These reasons would seem to all favour approving Keystone XL as well. In addition, TransCanada has argued that XL will provide an additional $5.2 billion in property taxes to the states through which the pipeline passes as well as "20,000 high-wage manufacturing and construction jobs in 2011-2012" arguments that are persuasive in the current American economy.

In the past, environmental impacts have not proven to be significant hurdles in obtaining Presidential Permits. The reasons for granting Keystone's first permit relied heavily on the EIS conclusions that no alternatives were preferable to TransCanada's proposal, and the project would have no significant adverse environmental impacts (at 9, 22). Nor have concerns over climate change mitigation been an obstacle. The first Keystone Presidential Permit made no reference to the project's impact on greenhouse gas emissions. Though, an earlier Presidential Permit – granted to the Alberta Clipper, an Enbridge pipeline that enters Minnesota from Manitoba – explicitly addressed greenhouse gas emissions. The reasons for the granting the permit addressed concerns about importing emissions-intensive crude oil from the Alberta oilsands (Department of State, Record of Decision and National Interest Determination: Enbridge, Limited Partnership – Alberta Clipper Pipeline Application for Presidential Permit (Aug 3, 2007) at 26). However, the Department of State dismissed these concerns and concluded that climate change mitigation is "best addressed in the context of the overall set of domestic policies that Canada and the United States will take to address their respective greenhouse gas emissions… [namely] increased Corporate Average Fuel Economy (CAFÉ) standards, as well as through the pursuit of comprehensive climate legislation and an ambitious global agreement on climate change…" (at 26).

If past practice is any indication, it seems that the TransCanada's Presidential Permit is all but granted. The prior two permits approving oilsand—U.S. pipelines demonstrate the U.S.'s eagerness to tap into Alberta's secure oil supply. And in the context of the still reeling U.S. economy, it seems unlikely that this time it will be different. Moreover, the environmental impact assessment of Keystone XL has failed to mount a compelling counterargument. Conclusions that the massive pipeline expansion will have no significant adverse environmental impacts provide little basis for determining that a project does not serve the national interest. Even in the face of the pressing climate change issue, it is easy to shift responsibility to another government department, policy or timeframe.

Opponents of the pipeline now have no choice but to put their faith in the President. The political nature of the decision puts the permit out of reach of the courts. Previous attempts to overturn Presidential Permits for Keystone I and the Alberta Clipper were unsuccessful. The U.S. courts ruled that a Presidential Permit is not subject to judicial review because it is not an "agency" action, nor the exercise of delegated statutory authority – it is the exercise of the President's inherent foreign policy jurisdiction (*Sisseton-Wahpeton Oyate v US Dept. of State*

659 F. Supp. 2d 1071, 1082 (D. S.D. 2009); *Sierra Club v Clinton*, 689 F.Supp.2d 1147 (D. Minn. 2010)). Protesters are wise to wage this war in the political arena because the President's decision will be final.

The Failure

But this is not simply politics. Serious legal concerns are buried beneath all of this political frustration. The State Department is required *by law* to conduct an environmental assessment of the impacts of issuing the permit. *By law* this assessment must consider the cumulative impacts of the project. And while the results of these legal requirements are not determinative of the granting of a presidential permit, past decisions indicate that the environmental assessment is highly influential.

This is not intended to be a comprehensive critique of environmental assessment legislation in Canada or the U.S. – there is no shortage of commentary on the merits and flaws of environmental assessment. Rather, what Keystone XL so aptly demonstrates is how easy it is for environmental assessment to not only to ignore, but actually obfuscate the impacts of climate change – arguably the most pressing environmental issue of the day and therefore the most in need of pre-development assessment.

The rhetorical trick that allows regulators to duck the real emissions issues is reliance on the fatalist assumption that, if this pipeline is not approved, then another will; thus, no increase in greenhouse gas emissions can be attributed to this particular project. For example, the NEB concluded:

> In the Board's view there is no evidence of a connection or nexus between the applied-for project and other projects or activities which would make emissions from upstream activities relevant to the Board's considerations in this Application. The operation of the upstream facilities is not contingent on the construction of the Keystone XL pipeline; they will presumably continue to operate whether or not KXL is ever built (at 75)**.**

Similarly, the report commissioned by the Department of State concluded:

> … studies indicate that building versus not building Keystone XL would not of itself have any significant impact on: U.S. total crude runs, total crude and product import levels or costs, global refinery CO2 or life-cycle GHG emissions. This is because changing WCSB [Western Canadian Sedimentary Basin] crude export routes would not alter either U.S., Canadian or total global crude supply, (other than a small impact under

> a No Expansion scenario), or U.S. and global product demand and quality. The same slate of crude oils would have to be refined even if reallocated geographically (Ensys Energy & Systems Inc., Keystone XL Assessment – Final Report (Dec. 23, 2010) at 116).

This assumption allows regulators to consider the pipeline in isolation – disconnected from its effect on upstream production and downstream use – making it much easier to ascribe no impact to what is, in actuality, only one small component of a much larger development project. Perhaps even more puzzling, is that the fatalist assumption also enables regulators to shift the baseline against which impacts are measured. Why aren't the impacts of emissions from Keystone XL measured against emissions today, not the wholly speculative emissions baseline that we assume will occur? In fact, what should be the conclusion of the assessment – "other than a small impact under a No Expansion scenario" – is relegated to parentheses, a trivial point only noted to ensure technical accuracy.

The fatalistic assumption is problematic on two levels. The first problem is that the assumption may well be entirely inaccurate in the case of Keystone XL. It will be extremely difficult for Canada to connect the oilsands to global markets in the absence of Keystone XL. Proponents of Keystone XL and passive observers alike readily point to pipeline alternatives, namely the Enbridge Northern Gateway proposal – an east-west pipeline that would connect the oilsands to Kitimat, British Columbia to allow marine export to both Asian and American markets. But the reality is that unresolved aboriginal land claims along the proposed route could prove to be a significant obstacle in obtaining approvals (see, e.g., West Coast Environmental Law, Legal Comment on Coastal First Nations Declaration "No Tar Sands tankers in our Waters" (March 24, 2010)). In addition, there is little doubt that if environmentalists successfully prevent TransCanada's approval, it will fuel environmental opposition to the Northern Gateway proposal. Even simply delaying oilsands export to the U.S. may achieve the protesters desired result: just enough time to set in motion climate change adaptation policies that wean the U.S. off of fossil fuels. The longer it takes to connect the oilsands to worldwide markets, the more time alternative energy resources have to establish themselves as viable. As potential buyers become less needy, the market signals to the oilsands will shift, perhaps increasing the threshold at which extraction becomes unprofitable. The result being that the deeper, harder to extract, oilsands stay in the ground (Danielle Droitsch, The link between Keystone XL and Canadian oilsands production (Pembina Institute, April 2011). In short, there is nothing predetermined about the development of the Alberta oilsands.

The second problem is much more fundamental: this fatalism rhetoric goes against the spirit of environmental assessment legislation. The one undisputed principle at the core of environmental assessment is information gathering: a way of making more informed and transparent policy decisions. The classic statement in Canada is that environmental assessment is "a planning tool that is now generally regarded as an integral component of sound decision-making" (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 71). Similarly, the defining American case on environmental assessment recognized that "[p]erhaps the greatest importance of NEPA is to require … agencies to *consider* environmental issues" (*Calvert Cliffs Coordinating Committee v Atomic Energy Commission*, 449 F.2d, 1112 (D.C. Cir. 1971)) and that "NEPA mandates a particular sort of careful and informed decisionmaking process" (at 1115). The court delivered strong statements on process even while simultaneously stripping NEPA of all substantive content. So, it seems that if we can agree on one thing, it is that environmental assessment is about informed decision-making. Yet what Keystone XL so nicely illustrates is that environmental assessment is failing miserably at injecting decision-making with meaningful information on climate change impacts. Rather than confronting the possibility of increased emissions, the assessment process has become an elaborate dance through narrow scoping (i.e. considering the pipeline in isolation from its beginning and endpoints), dismissing the "no expansion alternative" as the appropriate baseline for analysis, and labeling climate change impacts as "small" by considering their impacts relative to global emission levels. Keystone XL shows that, perversely, it can be easier to use environmental assessment to hide and deny the problem of climate change then it is to confront and meaningfully assess it. Rather than an information-forcing tool, environmental assessment becomes an information-obscuring tool that stifles debate and perpetuates denial of climate change impacts.

This is all the more curious considering that a finding that a project will have a significant environmental impact does not preclude development in Canada or the U.S. Under both countries' federal environmental assessment schemes, projects can be approved even where there are significant environmental impacts, so long as the responsible agency or decision-maker concludes that the project is otherwise justified (*Canadian Environmental Assessment Act*, SC 1992, c 37 s 20; 42 USC § 4332, *Calvert Cliffs*, *supra* at 1112). Yet past practice indicates that the norm is a conclusion of "no significant environmental impact," followed by a more-or-less automatic approval of the project (albeit, typically with some mitigation measures). For example, the Canadian Environmental Assessment Registry reported that approximately 90% of all environmental assessment resulted in a finding of "not likely to cause significant adverse

environmental impacts" in fiscal years 2008-2010. No assessments resulted in a finding of "likely to cause significant adverse environmental impacts, though 10% of the projects were terminated before a finding was reached (CEAA Registry, here). Similarly in the U.S., the vast majority of projects are dismissed at a preliminary stage with a finding of no significant impact, meaning a full EIS is not even required (one author states that there are approximately 500 EIS's produced by the federal government annually, while about 50,000 are dismissed at the preliminary stage: Bradley C. Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance" (2002) 102 Colum L Rev 903 at 909-910). Yet it is easy to conceive of an alternative norm where assessments readily acknowledge the possibility of significant adverse effects – including climate change impacts – but engage in a substantive discussion of whether those impacts are justified. This would not inherently require rejecting more projects and more development, but it would allow for a more transparent discussion of environmental risks that we are willing to take. Under this scenario, environmental assessment would be seen as the beginning of a discussion, not the end of it.

Finally, the failure of the Keystone XL approval process is not limited to the environmental assessment context. It is a lost opportunity in terms of broader climate change policy – a chance to take small, but significant steps toward climate change mitigation. Addressing climate change cannot be tackled in one fell swoop with the enactment of emissions regulations or carbon taxes. It will be achieved by internalizing the real impact on the atmosphere of *all* decisions – a daunting task, no doubt. But it's hard to think of a more obvious place to start than the approval of Keystone XL.