

**NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER  
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

**TransCanada Corporation &  
TransCanada PipeLines Limited**  
*Disputing Investors,*  
v.  
**The Government of the  
United States of America**  
*Respondent.*

January 6, 2016

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and TransCanada PipeLines Limited:*

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## EXECUTIVE SUMMARY

*I would venture to say that there's probably no infrastructure project in the history of the United States that's been as politicized as this one.*

— White House Press Secretary Josh Earnest, November 3, 2015

1. On September 19, 2008, TransCanada Keystone Pipeline, LP (“Keystone”) submitted an application to the U.S. Department of State (“State Department”) for a Presidential Permit to build the Keystone XL Pipeline, which would carry crude oil from Canada to the United States. There was nothing unusual about the proposed pipeline or the oil it was intended to carry. In fact, the State Department has granted permits for three pipelines that carry oil produced from the same location (*i.e.*, the oil sands in northeastern Alberta, Canada) and carry the same product (*i.e.*, Western Canadian Sedimentary Basin (“WCSB”) crude oil) to the United States. Two of those permits were issued in 2008-2009, approximately two years after the applications were filed. Environmental activists, however, turned opposition to the Keystone XL Pipeline into a litmus test for politicians—including U.S. President Barack Obama—to prove their environmental credentials. The activists’ strategy succeeded. Seven years after Keystone filed its application, the United States denied the permit even though the Administration had concluded on six occasions that the pipeline would not have a significant impact on climate change. Stated simply, the delay and the ultimate decision to deny the permit were politically-driven, directly contrary to the findings of the Administration’s own studies, and not based on the merits of Keystone’s application. The Administration’s actions violated U.S. obligations under the North American Free Trade Agreement (“NAFTA”).

2. Constructing a pipeline as large and complex as the Keystone XL Pipeline is not a simple task. Even before construction can begin, it is necessary, for example, to secure thousands of land easements, purchase equipment and hundreds of miles of pipe, and enter into long-term contracts with shippers to transport their oil. Keystone could not wait for the issuance of a permit to begin this long lead time work because, under State Department rules, if construction of a pipeline does not begin within five years after a permit is issued, the permit expires. TransCanada Corporation (“TransCanada”) and TransCanada PipeLines Limited (collectively the “Disputing Investors”) through their affiliates, including Keystone, invested billions of dollars in the pipeline project while

the Keystone XL Pipeline application was pending, all with the reasonable expectation that the Administration would process Keystone's application fairly and consistently with past actions. The U.S. Government knew this was happening. It kept close tabs on the pipeline route and the state-level litigation over the necessary land easements, and worked with Keystone to develop at least 57 changes to the proposed pipeline project to ensure that the pipeline would be built and operated in a manner that would protect health, safety, the environment, and local communities.

3. More than two-years after Keystone submitted its application, then-Secretary of State Hillary Clinton stated that the State Department was "inclined" to approve the permit. As the controversy over the pipeline intensified, however, the Administration began to stall for time. For more than seven years, it made use of every conceivable excuse to delay a decision. It cited ongoing state-level litigation, claimed the U.S. Congress was exerting undue political pressure, and continually asserted the need for more technical work and analysis. Meanwhile, the political controversy built to a fever pitch. Environmental activists turned the pipeline into a campaign issue in Congressional elections, and politicians on both sides of the issue continued to fight over the disposition of the application.

4. More than three years after Keystone filed its initial application, and in the face of continued delays in the permitting process, legislation forced the Administration to make a decision within 60 days. The Administration denied the permit, pleading that it needed more time to review the merits of the application. Keystone filed a new application, but the Administration continued to dither. While this was going on, the Administration continued to approve—indeed, to expedite approval of—new domestic pipelines to carry domestically produced oil.

5. As this saga continued, the primary focus of the debate became whether the pipeline would somehow contribute to climate change by encouraging the extraction, transportation, and processing of oil from Canada's oil sands. As President Obama stated in June 2013, "Our national interest will be served only if [the Keystone XL Pipeline] project does not significantly exacerbate the problem of carbon pollution." The Administration's own analysis expressly concluded that the pipeline would have no such impact. The State Department completed no fewer than five environmental studies, and each one found that the pipeline would not have a significant impact on climate change.

6. On November 6, 2015, President Obama announced the decision to deny the permit. To Keystone's knowledge, this was the first time in history that the United States had denied an application to construct a pipeline across an international border. Secretary Kerry stated that the "decision [to deny the permit] could not be made solely on the numbers." Indeed, it was not, as the numbers would have led to the conclusion that the pipeline should have been approved. In the very press statement where Secretary Kerry announced the denial of the permit, he also stated that "[t]he proposed project by itself is unlikely to significantly impact the level of crude extraction or the continued demand for heavy crude oil at refineries in the United States." This was the sixth time that the State Department had reached this conclusion. The State Department's Record of Decision and National Interest Determination ("ROD")—the document providing the reasons for the State Department's finding that the pipeline is not in the U.S. national interest—further concluded that (a) even if the pipeline were never built, the Canadian oil would likely find its way to market through alternative, more costly, less environmentally-friendly, and significantly less safe modes of transportation; (b) construction of the pipeline would have created over 42,000 jobs over a two year period; and (c) the pipeline would have generated significant tax revenues for local communities and resulted in meaningful economic benefits to the United States. The State Department nevertheless denied the permit.

7. The Administration concluded that the denial was necessary to demonstrate U.S. leadership on climate change, even though the Administration concluded multiple times that the pipeline would have no significant impact on climate change. The Administration sought to explain this perverse decision by saying that the pipeline was **perceived** to be bad for the environment, and the Administration had to appease those in the international community who held that (false) belief.

8. The denial was based on politics, not the merits of the application. The politically-driven denial of Keystone's application was contrary to all precedent; inconsistent with any reasonable and expected application of the relevant rules and regulations; and arbitrary, discriminatory, and expropriatory. The denial substantially deprived the Disputing Investors of the value of billions of dollars of investment in the project. When it signed the NAFTA, the U.S. Government committed to provide all Canadian investors with core investment protections, including national treatment (Article 1102), most-favored-nation treatment (Article 1103), treatment in accordance with international law (Article 1105), and protection against uncompensated expropriations (Article

1110). The U.S. Government failed to meet those commitments. The NAFTA entitles the Disputing Investors to full compensation for these failures.

## I. Introduction

9. Executive Order 11423 (“EO 11423”),<sup>1</sup> as amended, and Executive Order 13337 (“EO 13337”),<sup>2</sup> delegate authority to the State Department to review applications for a Presidential Permit to construct an oil pipeline that crosses an international boundary. Pursuant to those Executive Orders, the Secretary of State shall grant a Presidential Permit if he or she determines that the proposed pipeline is in the U.S. national interest.

10. On September 19, 2008, Keystone submitted an application to the State Department for a Presidential Permit to construct the Keystone XL Pipeline, an oil pipeline that would cross the boundary between Canada and the United States.<sup>3</sup> Keystone had every reason to expect that its application would be granted given that, among other things, (a) the application met the same criteria that the State Department had applied when approving applications to construct other pipelines (including Keystone’s own application for the Keystone I pipeline); (b) between 2008 and 2015, the State Department concluded **five times** that the Keystone XL Pipeline would not result in increased production and consumption of crude oil, and therefore would not significantly increase global greenhouse gas (“GHG”) emissions; (c) EO 11423 and EO 13337 state that the purpose of the State Department’s review of applications for a Presidential Permit is to expedite approval unless a proposed pipeline raises environmental, health, or safety concerns—none of which were present with respect to the Keystone XL Pipeline; and (d) throughout the process, Keystone worked closely with the State Department, and other federal and state agencies, to mitigate any concerns that were raised. Keystone also expected that the permit would be granted in a reasonable period of time, given that the State Department reviewed and granted applications for Presidential Permits for similar pipelines in approximately 27 months or less. Keystone’s reasonable expectations were not met.

11. Throughout the process, the State Department made various excuses for the long delay, including pleading that it needed more time to assess the environmental impact of the pipeline.

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<sup>1</sup> See 33 Fed. Reg. 11741, August 16, 1968.

<sup>2</sup> See 69 Fed. Reg. 25299, April 30, 2004 (“Exec. Order 13337”).

<sup>3</sup> See Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, September 19, 2008, Art. 2, available at <http://keystonepipeline-xl.state.gov/documents/organization/189504.pdf>.

Those excuses were false. The reality is that, over the years-long review of Keystone's applications, the review became highly politicized, as politicians and environmental activists denied the facts and continued to assert that the pipeline would have dire environmental consequences. Facing a political backlash regardless of the way it decided, the State Department simply stalled for time.

12. In total, the State Department took over seven years to make a decision on Keystone's applications. When it finally denied the second application, it did so for symbolic reasons, not because of the merits. The Administration's rejection of Keystone's application deprived the Disputing Investors of the value of the billions of dollars of investments they had made in, and expected revenues from, the Keystone XL Pipeline project. The delays in processing Keystone's two applications, and the denial of Keystone's second application, breached U.S. obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of the NAFTA.

## **II. Procedural Details**

13. The Disputing Investors in this matter are two Canadian enterprises: (i) TransCanada Corporation; and (ii) TransCanada PipeLines Limited. The Disputing Investors intend to bring claims on their own behalf pursuant to NAFTA Article 1116, and on behalf of enterprises that they own or control pursuant to NAFTA Article 1117. The Disputing Investors have appended proof of their Canadian nationality to this submission.<sup>4</sup>

14. The contact information for both of the Disputing Investors appears below:

450 1st Street, SW  
Calgary, Alberta, Canada T2P5H1  
Tel: 403-920-7680  
Fax: 403-920-2467  
E-mail: [brenda\\_hounsell@transcanada.com](mailto:brenda_hounsell@transcanada.com)

15. The Disputing Investors intend to bring claims on behalf of the following enterprises: (i) TransCanada PipeLine USA Ltd.; (ii) TC Oil Pipeline Holdings Inc.; (iii) TC Oil Pipeline Operations Inc.; (iv) TransCanada Oil Pipelines Inc.; (v) Marketlink, LLC; (vi) TC Terminals LLC;

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<sup>4</sup> See TransCanada Corporation's Canadian Certificate of Compliance (Annex 1); TransCanada PipeLines Limited's Canadian Certificate of Compliance (Annex 2).

(vii) TransCanada Keystone Pipeline, LLC; (viii) TransCanada Keystone Pipeline GP, LLC; and (ix) TransCanada Keystone Pipeline, LP. The contact information for each of these enterprises appears below:

700 Louisiana Street, Suite 700  
Houston, Texas, USA 77002-2700  
Tel: 832-320-5864  
Fax: 832-320-6864  
E-mail: [charlotte.smith@transcanada.com](mailto:charlotte.smith@transcanada.com)

16. Documentation proving the U.S. nationality of each of the above-listed enterprises,<sup>5</sup> as well as the Disputing Investors' ownership of each of these enterprises,<sup>6</sup> has been annexed to this Notice.

17. The Disputing Investors directly and indirectly own assets that qualify as U.S. investments under subsections (a)-(h) of the definition of "investment" under NAFTA Article 1139, including, *inter alia*, enterprises, and equity and other interests in enterprises, tangible and intangible property, loans, pipelines, contractual rights, equipment, and an array of land easements in the United States. Documentation proving ownership of these specific investments will be provided in due course.

18. The Disputing Investors are represented in these proceedings by Sidley Austin LLP, as shown in the Powers of Attorney annexed to this Notice.<sup>7</sup>

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<sup>5</sup> See TransCanada PipeLine USA Ltd. – Certificate of Incorporation (Annex 3); TC Oil Pipeline Holdings Inc. – Certificate of Incorporation (Annex 4); TC Oil Pipeline Operations Inc. – Certificate of Incorporation (Annex 5); TransCanada Oil Pipelines Inc. – Certificate of Incorporation (Annex 6); Marketlink, LLC – Certificate of Formation and Certificate of Amendment (Annex 7); TC Terminals LLC – Certificate of Formation (Annex 8); TransCanada Keystone Pipeline, LLC – Certificate of Formation (Annex 9); TransCanada Keystone Pipeline GP, LLC – Certificate of Formation (Annex 10); TransCanada Keystone Pipeline, LP – Certificate of Limited Partnership (Annex 11).

<sup>6</sup> See TransCanada PipeLine USA Ltd. – Share certificates issued to TransCanada PipeLines Limited (Annex 12); TC Oil Pipeline Holdings Inc. – Share certificate issued to TransCanada Pipeline USA Ltd. (Annex 13); TC Oil Pipeline Operations Inc. – Share certificate issued to TC Oil Pipeline Holdings Inc. (Annex 14); TransCanada Oil Pipelines Inc. – Share certificates issued to TransCanada Pipeline USA Ltd. (Annex 15); Marketlink, LLC – Excerpt of Limited Liability Company Agreement (Annex 16); TC Terminals LLC – Excerpt of Limited Liability Company Agreement (Annex 17); TransCanada Keystone Pipeline, LLC – Excerpt of Limited Liability Company Agreement (Annex 18); TransCanada Keystone Pipeline GP, LLC – Texas Franchise Tax Public Information Report (Annex 19); TransCanada Keystone Pipeline, LP – Excerpt of Third Amended and Restated Limited Partnership Agreement (Annex 20) (BCI); Organizational Chart of TransCanada Corporation and TransCanada PipeLines Limited, Keystone Pipeline – USA Corporate Structure (Annex 21) (BCI).

<sup>7</sup> See TransCanada Corporation – Power of Attorney Granted to Sidley Austin LLP (Annex 22); TransCanada PipeLines Limited – Power of Attorney Granted to Sidley Austin LLP (Annex 23).



### III. Background on the State Department’s Seven-Year Review of Keystone’s Applications for a President Permit for the Keystone XL Pipeline

19. The proposed Keystone XL Pipeline would have transported up to approximately 900,000 barrels per day (bpd) of WCSB crude oil from an oil supply hub near Hardisty, Alberta to delivery points in Oklahoma and Texas. The pipeline was to consist of three segments in the United States: (1) the “Steele City Segment,” which would run from the Canadian border near Morgan, Montana to Steele City, Nebraska, where it would connect with the existing “Cushing Extension,” which runs from Steele City to Cushing, Oklahoma; (2) the “Gulf Coast Segment,” which would run from Cushing to Nederland, Texas; and (3) the “Houston Lateral,” which would run from the Gulf Coast Segment in Liberty County, Texas to Moore Junction, near Houston, Texas.

20. Keystone had expected that the State Department would render a decision within approximately two years after Keystone’s first application (of September 2008) for the Keystone XL Pipeline. That expectation was reasonable given that the State Department had taken only 23 months to review and approve Keystone’s application for a Presidential Permit for the Keystone I pipeline in 2008,<sup>8</sup> and, under the Obama Administration, had taken only 27 months to review and approve Enbridge Energy, Limited Partnership’s application for a Presidential Permit to construct the Alberta Clipper pipeline in 2009.<sup>9</sup> Compared to the proposed Keystone XL Pipeline, the Keystone I and Alberta Clipper pipelines originate in the same location (*i.e.*, the oil sands in Alberta, Canada), carry the same product (*i.e.*, WCSB crude oil), and are similar in size. A third pipeline, the Express Pipeline, also transports oil from the Alberta oil sands into the U.S.<sup>10</sup> The State Department approved that pipeline in 1996.

21. In April 2010, the State Department issued a Draft Environmental Impact Statement (“DEIS”), which concluded, *inter alia*, that “the proposed Keystone XL Project would result in

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<sup>8</sup> See Media Note, Keystone Pipeline Presidential Permit, March 14, 2008, available at <http://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102254.htm>.

<sup>9</sup> See Media Note, Permit for Alberta Clipper Pipeline Issues, August 20, 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/aug/128164.htm>.

<sup>10</sup> See National Energy Board – Canadian Environmental Assessment Agency, Report of the Joint Review Panel on the Express Pipeline Project, May 1996, p. 92, available at [http://www.ceaa.gc.ca/Content/D/F/B/DFBF51A8-EE56-4CE8-9F41-FB2E95B7E7AD/report\\_e.pdf](http://www.ceaa.gc.ca/Content/D/F/B/DFBF51A8-EE56-4CE8-9F41-FB2E95B7E7AD/report_e.pdf).

limited adverse environmental impacts during both construction and operation”<sup>11</sup> and that “since the crude oil delivered by the Project would be replacing similar crude oils from other sources, the incremental impact of these emissions would be minor.”<sup>12</sup> While certain environmental activists and members of Congress demanded that the Administration nevertheless deny the permit on grounds that the pipeline would promote extraction of crude oil from Canada’s oil sands, and therefore result in greater GHG emissions,<sup>13</sup> the State Department appeared focused on the actual facts regarding Keystone’s application. In October 2010, then-Secretary of State Hillary Clinton publicly stated that the State Department was “inclined” to approve the permit.<sup>14</sup>

22. In January 2011, Keystone agreed to adopt 57 project-specific conditions recommended by the U.S. Department of Transportation, Pipeline and Hazardous Material Safety Administration (“PHMSA”), and developed with the State Department, for the design, construction, and operation of the Keystone XL Pipeline. These conditions are described in detail in the State Department’s April 2011 Supplemental DEIS (“SDEIS”).

23. In the SDEIS, the State Department concluded for the **second time** that the proposed pipeline would not significantly affect GHG emissions, finding that “on a global scale, emissions are not likely to change [as a result of the pipeline].”<sup>15</sup> According to the State Department’s Office of the Spokesman, the State Department “expect[ed] a decision on whether to grant or deny the permit before the end of 2011.”<sup>16</sup>

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<sup>11</sup> United States Department of State, Draft Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, April 16, 2010, p. ES-6.15 (“DEIS”).

<sup>12</sup> DEIS at ES.6.14.2.

<sup>13</sup> For example, in a July 2, 2010 letter to the State Department, Congressman Henry Waxman (D-Calif.), the Chairman of the House Energy Committee, expressed concern that the Keystone XL Pipeline “would have a major adverse impact on the carbon intensity of U.S. transportation fuel.” Henry Waxman, Letter to Secretary of State Hillary Clinton, July 2, 2010, available at <http://www.circleofblue.org/waternews/wp-content/uploads/2010/08/State.070210.Clinton.Keystone.pdf>.

<sup>14</sup> Elana Schor, “Labor Uses Automated Calls to Tout Controversial Oil Pipeline,” *The New York Times*, October 21, 2010, available at <http://www.nytimes.com/gwire/2010/10/21/21greenwire-labor-uses-automated-calls-to-tout-controversi-58386.html>.

<sup>15</sup> United States Department of State, Supplemental Draft Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, April 22, 2011 (“SDEIS”), p. 3-197.

<sup>16</sup> “State Department Announces Next Steps in Keystone XL Pipeline Permit Process,” Office of the Spokesman, March 15, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/03/158402.htm>.

24. After two years and eight months without a decision from the State Department, Congressman Lee Terry (R-Neb.) introduced legislation in May 2011 that set a November 1, 2011 deadline for the State Department to decide whether to grant Keystone's application.<sup>17</sup> On July 25, 2011, the Administration issued a Statement of Administration Policy that opposed the legislation but explained that "the Department of State has been working diligently to complete the permit decision process for the Keystone XL Pipeline and has publicly committed to reaching a decision before December 31, 2011."<sup>18</sup> The legislation was not adopted.

25. In August 2011, the State Department issued its Final EIS ("FEIS"), which concluded for a **third time** that the pipeline would not significantly increase GHG emissions. The State Department found that, "on a global scale, the decision whether or not to build the Project will not affect the extraction and combustion of WCSB oil sands crude on the global market."<sup>19</sup> The FEIS also raised concerns about the portion of the proposed route running through the Nebraska Sand Hills area.<sup>20</sup> TransCanada subsequently proposed a new route to avoid the Sand Hills region.

26. Despite the State Department's findings, environmental activists, state politicians, and the U.S. Congress continued to politicize the review process. As the Associated Press reported in September 2011, the Keystone XL Pipeline had become a "flashpoint" for environmentalists fixated on the incorrect notion that the pipeline would result in higher GHG emissions.<sup>21</sup> On November 10, 2011, four days after a demonstration at the White House urging the President to deny the application,<sup>22</sup> and ostensibly in response to the Nebraska Governor's objection to the proposed Keystone XL Pipeline route,<sup>23</sup> the State Department announced that it would not make a

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<sup>17</sup> See North American-Made Energy Security Act, May 23, 2011, H.R. 1938.

<sup>18</sup> Statement of Administration Policy, H.R. 1938 – North American-Made Energy Security Act, July 25, 2011, available at [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1938r\\_20110725.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1938r_20110725.pdf).

<sup>19</sup> United States Department of State, Final Environmental Impact Statement for the Keystone XL Project, Applicant for Presidential Permit: TransCanada Keystone Pipeline Project, August 26, 2011 ("FEIS"), p. 3.14-53.

<sup>20</sup> See FEIS at ES-10.

<sup>21</sup> See Matthew Daley, "Steven Chu Talks Keystone XL Pipeline, Suggest U.S. Support," *Associated Press*, September 1, 2011, available at [http://www.huffingtonpost.com/2011/09/01/steven-chu--keystone-xl-pipeline\\_n\\_945508.html](http://www.huffingtonpost.com/2011/09/01/steven-chu--keystone-xl-pipeline_n_945508.html).

<sup>22</sup> See, e.g., Thousands in D.C. Protest Pipeline, *CBS/AP*, November 6, 2011, available at <http://www.cbsnews.com/news/thousands-in-dc-protest-pipeline/>.

<sup>23</sup> See John M. Broder and Dan Frosch, "U.S. Delays Decision on Pipeline Until After Election," *The New York Times*, November 10, 2011, available at <http://www.nytimes.com/2011/11/11/us/politics/administration-to-delay-pipeline-decision-past-12-election.html? r=1>.

decision on the Keystone XL Pipeline until it had evaluated alternative routes in Nebraska.<sup>24</sup> It also announced that “it is reasonable to expect that this process including a public comment period on a supplement to the final EIS consistent with NEPA [*i.e.*, the National Environmental Policy Act] could be completed as early as the first quarter of 2013.”<sup>25</sup>

27. In December 2011—over three years after Keystone submitted its first application—Congress passed, and the President signed, legislation that required the President to decide within 60 days whether to approve the application.<sup>26</sup> Despite the Administration’s earlier assurances in July 2011 that it would complete its review by December 2011, President Obama concluded that the State Department needed more time and therefore denied the application. On January 18, 2012, he found that, “based on [Secretary Kerry’s] recommendation, including the State Department’s view that 60 days is an insufficient period to obtain and assess the necessary information, . . . the Keystone XL Pipeline project, as presented and analyzed at this time, would not serve the national interest.”<sup>27</sup> The White House press release issued on the same day made it clear that “[t]his announcement is not a judgment on the merits of the pipeline, but the arbitrary nature of a deadline that prevented the State Department from gathering the information necessary to approve the project and protect the American people.”<sup>28</sup>

28. The Report to Congress on the President’s decision to deny the application stated that “the determination does not preclude any subsequent permit application or applications for similar projects.”<sup>29</sup> The President provided assurances at the time he denied the application that the State Department had been well advanced in conducting a meaningful assessment of the merits of the application, and that the State Department’s final national interest determination would be based on

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<sup>24</sup> See Media Note, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information, November 10, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

<sup>25</sup> Media Note, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information, November 10, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

<sup>26</sup> See Sec. 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, December 23, 2011.

<sup>27</sup> Presidential Memorandum – Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, January 18, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/01/18/presidential-memorandum-implementing-provisions-temporary-payroll-tax-cu>.

<sup>28</sup> Statement by the President on the Keystone XL Pipeline, January 18, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>.

<sup>29</sup> Report to Congress Under the Temporary Payroll Cut Continuation Act of 2011, Section 501(b)(2), Concerning the Presidential Permit Application of the Proposed Keystone XL Pipeline, January 18, 2012, p. 5, available at <http://www.state.gov/documents/organization/182453.pdf>.

that assessment. He noted that, “[b]ased on [the State Department’s] experience and in order to consider relevant environmental issues and the consequences of the project on energy security, the economy, and foreign policy, the State Department indicated that its review could be complete as early as the first quarter of 2013.”<sup>30</sup> Nevertheless, the State Department took advantage of the situation to prolong the process even further by arguing that the review would have to start anew if Keystone filed a new application. The Assistant Secretary of the State Department’s Bureau of Oceans and International Environmental and Scientific Affairs explained as follows:

[I]f TransCanada comes in with a new application, it will trigger a new review process, a completely new review process. We cannot state that anything would be expedited . . . . It would just have to go through all of the requirements that are needed for this kind of application review. So I couldn’t really speak to when such a review could be finished. However, I could mention that we do have guidelines that would allow us to use information that’s out there. So there is information out there from the process we’ve been through, but we would also have to look at this as a completely new application, and that’s how it would be treated.<sup>31</sup>

29. The State Department had no explanation regarding why, given that it could take into account “information out there from the process we’ve been through,” it could not expedite a review of a new application from Keystone by simply picking up where it left off.

30. Given the Administration’s assurances that the first denial was procedural and not a decision on the merits, Keystone continued to invest in the Keystone XL Pipeline project. By letter dated February 27, 2012, Keystone notified the State Department of its intention to file a second application for a Presidential Permit for the Keystone XL Pipeline, and subsequently to supplement that application with plans for an alternate route through Nebraska.<sup>32</sup> Keystone thereafter proceeded to construct two segments of the Keystone XL Pipeline—the Gulf Coast Segment and the Houston Lateral. Keystone did not require a Presidential Permit to construct these two segments, as neither of them crossed an international boundary. Keystone still needed a

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<sup>30</sup> Presidential Memorandum – Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, January 18, 2012, *available at* <https://www.whitehouse.gov/the-press-office/2012/01/18/presidential-memorandum-implementing-provisions-temporary-payroll-tax-cu>.

<sup>31</sup> Briefing on the Keystone Pipeline by Kerri-Ann Jones, Assistant Secretary of the State Department’s Bureau of Oceans and International Environmental and Scientific Affairs, January 18, 2012, transcript *available at* <http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm>.

<sup>32</sup> See Letter from Kristine L. Delkus to Deputy Secretary of State William J. Burns, February 27, 2012.

Presidential Permit to construct the northern segment of the pipeline (the Steele City Segment), however, because that segment would cross from Canada into the United States.

31. At a press conference held at a pipe storage yard owned by TransCanada in Cushing, Oklahoma, President Obama praised Keystone's plan to build the Gulf Coast Segment, stating as follows:

I've come to Cushing, an oil town ... because producing more oil and gas here at home has been, and will continue to be, a critical part of an all-of-the-above energy strategy....

Now, under my administration, America is producing more oil today than at any time in the last eight years....That's important to know. Over the last three years, I've directed my administration to open up millions of acres for gas and oil exploration across 23 different states. We're opening up more than 75 percent of our potential oil resources offshore. We've quadrupled the number of operating rigs to a record high. We've added enough new oil and gas pipeline to encircle the Earth and then some.

So we are drilling all over the place -- right now. That's not the challenge. That's not the problem. In fact, the problem in a place like Cushing is that we're actually producing so much oil and gas in places like North Dakota and Colorado that we don't have enough pipeline capacity to transport all of it to where it needs to go -- both to refineries, and then, eventually, all across the country and around the world. There's a bottleneck right here because we can't get enough of the oil to our refineries fast enough. And if we could, then we would be able to increase our oil supplies at a time when they're needed as much as possible.

Now, right now, a company called TransCanada has applied to build a new pipeline to speed more oil from Cushing to state-of-the-art refineries down on the Gulf Coast. And today, I'm directing my administration to cut through the red tape, break through the bureaucratic hurdles, and make this project a priority, to go ahead and get it done....

...So, yes, we're going to keep on drilling. Yes, we're going to keep on emphasizing production. Yes, we're going to make sure that we can get oil to where it's needed.<sup>33</sup>

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<sup>33</sup> Remarks by the President on American-Made Energy, Cushing Pipe Yard, Cushing, Oklahoma, March 22, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/03/22/remarks-president-american-made-energy>.

32. Thus, in 2012, the Administration fully supported the production and transportation of oil through the Keystone XL Pipeline, at least oil produced in the United States. In fact, the same day President Obama held his press conference in Cushing, he also issued a Memorandum regarding the review of domestic (rather than international) pipeline infrastructure projects. Under the subject heading “Expedited Review of Pipeline Projects from Cushing to Port Arthur and Other Domestic Pipeline Infrastructure Projects,” the Memorandum stated that, “[i]n expediting reviews..., agencies shall, to the maximum extent practicable and consistent with applicable law, utilize and incorporate information from prior environmental reviews and studies conducted in connection with previous applications for similar or overlapping infrastructure projects so as to avoid duplicating effort.”<sup>34</sup> The approach outlined in the Memorandum for the review of domestic pipeline applications contrasted sharply with the State Department’s decision in January 2012 that it could **not** expedite a review of the portion of the Keystone XL Pipeline that crossed the Canadian border, based on information that the State Department had previously received.

33. Keystone submitted its second application for a Presidential Permit for the Keystone XL Pipeline in May 2012.<sup>35</sup> In March 2013, the State Department released a new Draft SEIS (“DSEIS”), which concluded, for the **fourth time**, that the pipeline would **not** significantly worsen carbon pollution.<sup>36</sup> The DSEIS concluded “there would be no substantive change in global GHG emissions” if the pipeline were constructed.<sup>37</sup>

34. Despite the State Department’s findings, environmental groups continued to make the Keystone XL Pipeline a test of the Administration’s commitment to the cause of climate change. President Obama responded in June 2013, stating that “[o]ur national interest will be served only if [the Keystone XL Pipeline] project does not significantly exacerbate the problem of carbon

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<sup>34</sup> Presidential Memorandum – Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, March 22, 2012 (emphasis added), *available at* <https://www.whitehouse.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla>.

<sup>35</sup> See Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border, May 4, 2012.

<sup>36</sup> See United States Department of State, Draft Supplemental Environmental Impact Statement for the Keystone XL Project, March 1, 2013 (“DSEIS”).

<sup>37</sup> DSEIS at p. 4.15-107.

pollution.”<sup>38</sup> Of course, President Obama already knew that the Keystone XL Pipeline would not “significantly exacerbate the problem of carbon pollution,” because the State Department had already concluded on four separate occasions that the pipeline would have no significant impact on carbon pollution.

35. In January 2014, the State Department issued its Final Supplemental EIS (“SEIS”), which affirmed the conclusions from the DSEIS and concluded for the **fifth time** that the pipeline would not significantly worsen carbon pollution. Specifically, the SEIS concluded that “approval or denial of any one crude oil transport project, including the proposed Project, is unlikely to significantly impact the rate of extraction in the oil sands or the continued demand for heavy crude oil at refineries in the United States (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios).”<sup>39</sup>

36. The issuance of the SEIS began a period of interagency consultation, as required by Executive Order 13337. Agencies were expected to provide their views within 90 days, by early May 2014.<sup>40</sup> The issuance of the SEIS also triggered a period of public comments on the national interest determination, beginning on February 5, 2014 and closing on March 7, 2014.<sup>41</sup>

37. On April 18, 2014, the State Department announced that it was suspending the deadline for submission of interagency views on the Keystone XL Pipeline application, citing ongoing litigation addressing the constitutionality of the Nebraska Governor’s approval of the Keystone XL Pipeline route.<sup>42</sup> While the State Department continued to stall, Keystone’s application became ever more politicized and emerged as an important issue in the 2014 federal mid-term elections. The very first bill introduced in the U.S. Senate in January 2015, after the mid-term elections, was a measure

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<sup>38</sup> Remarks by the President on Climate Change, Georgetown University, Washington, D.C., June 25, 2013, *available at* <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>.

<sup>39</sup> United States Department of State, Final Supplemental Environmental Impact Statement, January 2014 (“SEIS”), p. 4.14-5.

<sup>40</sup> *See* Exec. Order 13337 at Section 1(c); Background Briefing on the Review of the Presidential Permit Application for the Proposed Keystone XL Pipeline Project by Senior State Department Officials, April 18, 2014, p. 3, *available at* <http://www.state.gov/r/pa/prs/ps/2014/04/224994.htm> (“April 2014 State Department Background Briefing”).

<sup>41</sup> *See* Department of State Keystone XL Pipeline Project Homepage, *available at* <http://www.keystonepipeline-xl.state.gov/>.

<sup>42</sup> *See* Media Note, Keystone XL Pipeline Project Review Process: Provision of More Time for Submission of Agency Views, April 18, 2014, *available at* <http://www.state.gov/r/pa/prs/ps/2014/04/224982.htm>; April 2014 State Department Background Briefing.



to authorize the development of the Keystone XL Pipeline.<sup>43</sup> President Obama vetoed the legislation the same day he received it, asserting that the legislation “conflicts with established executive branch procedures and cuts short thorough consideration of issues that could bear on our national interest—including our security, safety, and environment.”<sup>44</sup>

38. On January 9, 2015, the Nebraska Supreme Court resolved the litigation concerning the pipeline route. The State Department subsequently lifted its suspension of the review of Keystone’s application and requested additional comments from other federal agencies. But still it did not make a decision on the application.

39. On September 22, 2015, Hillary Clinton—at that point, no longer Secretary of State but a candidate to be the next U.S. President—stated that she opposed the pipeline, not because of the merits of Keystone’s application or the impact of the proposed pipeline on the environment, but because the pipeline had become “a distraction from important work we have to do on climate change.”<sup>45</sup> The same day, Tony Clark, a sitting Commissioner on the U.S. Federal Energy Regulatory Commission, stated in an interview with the *Wall Street Journal*:

This particular pipeline has clearly been held up over political reasons, not because it is any different than any of those other pipelines...In an administrative practices act, that’s not how you want a functional government to operate. You want a much more clear process by which any pipeline developer or intervenors who are opposed to it know the process by which that takes place—to have one sort of plucked out and held up for fairly arbitrary and capricious reasons primarily related to politics is not a good system of regulation.<sup>46</sup>

40. After the Nebraska Supreme Court resolved the state-level litigation, TransCanada initiated eminent domain proceedings in Nebraska. That action led to a new challenge in state courts to the constitutionality of the Nebraska governor’s approval of the proposed pipeline route. On

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<sup>43</sup> See Keystone XL Pipeline Act, January 12, 2015, H.R.3.

<sup>44</sup> Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, February 24, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/02/24/veto-message-senate-s-1-keystone-xl-pipeline-approval-act>.

<sup>45</sup> See, e.g., Hillary Clinton Opposes Keystone XL Pipeline, *CNN*, September 22, 2015, available at <http://www.cnn.com/2015/09/22/politics/hillary-clinton-opposes-keystone-xl-pipeline/>.

<sup>46</sup> *Wall Street Journal* interview with Tony Clark, September 22, 2015, available at <http://www.wsj.com/video/should-politics-be-kept-out-of-pipeline-decisions/EDCAF9D2-0781-4F57-BC4D-57424F8DCBD4.html>.

September 30, 2015, Keystone announced that it would terminate the eminent domain proceedings and the state court litigation, and would instead seek approval of the route through a different administrative proceeding before the Nebraska Public Service Commission (“PSC”).<sup>47</sup> On November 2, 2015, TransCanada requested that the State Department suspend its review of the Presidential Permit application during the 7-12 months it would take to complete the proceedings before the PSC.<sup>48</sup> TransCanada noted that the State Department had previously suspended its review of the application pending the resolution of the earlier Nebraska litigation.

41. Despite delaying for over seven years, the Administration did an abrupt about-face and took the position that waiting a few additional months to allow the Nebraska proceedings to run their course was unwarranted. On November 3, 2015, White House Press Secretary Josh Earnest stated that “given how long it’s taken, it seems unusual to me to suggest that somehow it should be paused yet again.”<sup>49</sup> That very same day, Secretary Kerry signed the ROD, which concluded that the pipeline was not in the U.S. national interest. The White House and the State Department announced the denial of Keystone’s permit application on November 6, 2015.

42. FERC Commissioner Tony Clark summed up the process as follows: “[T]he idea of having linear infrastructure sit around as a matter of politics and not be decided for seven years...is not how the industries we deal with can move forward...Exactly how you do not want infrastructure development to happen is how the Keystone XL permitting process went through at the State Department.”<sup>50</sup>

#### **IV. The State Department’s Stated Reasons for Denying the Application**

43. Throughout the time that the State Department was reviewing Keystone’s application, the focus of the public debate had been on whether construction of the Keystone XL Pipeline would result in higher GHG emissions. Indeed, as stated in the ROD, “President Obama has made clear

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<sup>47</sup> See TransCanada Press Release, TransCanada Will Apply to Nebraska Public Service Commission to Approve Keystone XL Route, September 30, 2015, available at <http://www.transcanada.com/news-releases-article.html?id=1988664&t>.

<sup>48</sup> See Letter to Secretary of State John Kerry from Kristine Delkus, Executive Vice President, Stakeholder Relations and General Counsel, November 2, 2015, available at <http://keystone-xl.com/wp-content/uploads/2015/11/TransCanada-KXL-Presidential-Permit-Application-Letter-Nov-2.pdf>.

<sup>49</sup> Press Briefing by Press Secretary Josh Earnest, November 3, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/11/03/press-briefing-press-secretary-josh-earnest-1132015>.

<sup>50</sup> Clark: Independent Regulatory Model Attacked, *Gas Daily*, November 11, 2015, p. 6.

that “[t]he net effects of the pipeline’s impact on our climate will be absolutely critical to determining whether this project can go forward.”<sup>51</sup> Yet, at least since the State Department issued the DEIS in April 2010, the Administration had known that the pipeline would have no significant impact on climate change. As noted, the State Department reached that same conclusion five times over seven years, but still continued to delay a decision on Keystone’s application, ostensibly to allow more time to assess the issue. In the end, that issue played no role in the Administration’s decision.

44. During the press conference announcing the denial of the permit, President Obama admitted that politics had disrupted the review process, stating that, “for years, the Keystone Pipeline has occupied what I, frankly, consider an overinflated role in our political discourse.”<sup>52</sup> The State Department explained that President Obama was referring to the “over-inflated perception” regarding “the extent of material impact on emissions, among other things that this pipeline would entail.”<sup>53</sup>

45. Secretary Kerry was even clearer that the pipeline would not have a significant impact on GHG emissions. According to Secretary Kerry’s November 6, 2015 press statement, “[T]he proposed project by itself is unlikely to significantly impact the level of crude extraction or the continued demand for heavy crude oil at refineries in the United States.”<sup>54</sup> Thus, at the same time it issued the denial, the Administration stated for the **sixth time** that the Keystone XL Pipeline would not have a significant impact on climate change. In its November 6, 2015 Background Briefing, a State Department official explained:

We actually – in our analysis, we do not conclude that this project denial will impact, on its own, production in Alberta or in Canada. The production increases that are already scheduled to occur are likely to continue, and future decisions on investment in that area for production are like – are more – are going to be more reliant on global oil markets, global oil prices, and the condition of the

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<sup>51</sup> Record of Decision and National Interest Determination, November 3, 2015 (“ROD”), p. 31.

<sup>52</sup> Statement by the President on the Keystone XL Pipeline, November 6, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline>.

<sup>53</sup> Background Briefing on the Keystone XL Pipeline, Special Briefing, Office of the Spokesperson, November 6, 2015, *available at* <http://www.state.gov/t/pa/prs/ps/2015/11/249266.htm>.

<sup>54</sup> Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, *available at* <http://www.state.gov/secretary/remarks/2015/11/249249.htm>.

individual companies and their ability to make those investments. Because – what we’ve said before: Because there are alternative methods of transportation and an ability to get to the U.S. market and U.S. refineries, we don’t believe that this project denial will affect production.<sup>55</sup>

46. Similarly, the ROD, which provided the formal reasons for the State Department’s conclusion that the Keystone XL Pipeline was not in the national interest, recognized that the January 2014 Supplemental EIS found that the Keystone XL Pipeline “would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States.”<sup>56</sup> The ROD went on to conclude that, “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project.”<sup>57</sup> The ROD even concluded that the Keystone XL Pipeline would be **less** GHG intensive than alternative means of transporting oil from Alberta to the Gulf Coast, and would reduce the risk of oil spills compared to rail transportation.<sup>58</sup>

47. The State Department decided to deny the permit nonetheless. That decision was based not on the Keystone XL Pipeline’s actual or anticipated impact on the environment, but on the desire to prove U.S. leadership credentials to environmental activists and foreign governments who believe, incorrectly, that the pipeline actually would result in greater GHG emissions. As the ROD explained, “While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States, it is critical for the United States to prioritize actions that are not **perceived** as enabling further GHG emissions globally.”<sup>59</sup> Secretary Kerry reiterated this sentiment in his November 6, 2015 press statement, where he stated that “[t]he reality is that this

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<sup>55</sup> Background Briefing on the Keystone XL Pipeline, Special Briefing, Office of the Spokesperson, November 6, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm>.

<sup>56</sup> ROD at 11.

<sup>57</sup> ROD at 11.

<sup>58</sup> “Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed [Keystone XL Pipeline] Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of trucks to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods... Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released.” ROD at 23.

<sup>59</sup> ROD at 29 (emphasis added).

decision could not be made solely on the numbers – jobs that would be created, dirty fuel that would be transported here, or carbon pollution that would ultimately be unleashed.”<sup>60</sup> In other words, the decision would **not** be made based on objective considerations of the anticipated benefits and costs of the proposed Keystone XL Pipeline; it would be made on a very different basis. While the President and the State Department raised various other points,<sup>61</sup> Secretary Kerry concluded that “[t]he critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combating climate change.”<sup>62</sup> President Obama concluded that, “[f]rankly, approving this project would have undercut that global leadership ... and that’s the biggest risk that we face.”<sup>63</sup>

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<sup>60</sup> Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm>.

<sup>61</sup> Secretary Kerry’s November 6, 2015 press statement summarized these other points as: (1) “The proposed project has a negligible impact on our energy security”; (2) “The proposed project would not lead to lower gas prices for American consumers”; (3) “The proposed project’s long-term contribution to our economy would be marginal”; (4) “The proposed project raises a range of concerns about the impact on local communities, water supplies, and cultural heritage sites”; and (5) “The proposed project would facilitate transportation into our country of a particularly dirty source of fuel.” Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm>. However, the impact on gas prices would have been no different with the proposed Keystone XL Pipeline than with other pipelines that the State Department has approved. Similarly, the impact on communities, water, etc. would have been no different with the proposed Keystone XL Pipeline than with other pipelines, and, indeed, the ROD explains that Keystone agreed to mitigate those effects. See ROD at 17-20. Point (3) in Secretary Kerry’s statement conflicts with the ROD, which concluded that spending on the Keystone XL Pipeline project would support approximately 42,100 jobs over a two-year construction period (ROD at 15); the “proposed Project would also generate tax revenue for communities in the pipeline’s path” (ROD at 30); “pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics” (ROD at 30); and the “economic benefits [of the pipeline] are meaningful” (ROD at 30). The relevance of point (5) is unclear given that that ROD concluded that “[t]he Supplemental EIS indicates that in most scenarios the proposed Project is unlikely to change significantly the pattern of U.S. crude oil consumption” (ROD at 24); “[i]n so far as U.S. demand continues to be met in part by foreign crude oil imports, domestic refineries capable of processing heavy crude will likely maintain access to Canadian crude oil, which will compete with comparable foreign heavy crudes to meet domestic needs” (ROD at 24-25); “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project” (ROD at 11); and “[u]nder current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada” (ROD at 12).

<sup>62</sup> Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm>. See also, Background Briefing on the Keystone XL Pipeline, Special Briefing, Office of the Spokesperson, November 6, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm> (“The decision to approve or deny a presidential permit for the proposed project will be understood by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a broader effort to address climate change. The decision to approve the proposed project would have been *viewed* internationally as inconsistent with the broader U.S. effort to transition to less polluting forms of energy; it would have undercut the credibility and influence of United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change”; “it’s absolutely true that the *perception* of U.S. leadership on climate change, the *perception* of what this President and this

48. Concerns over “perceptions” and “understandings” of the international community, and the way the decision would be “viewed,” permeate the ROD, even though those perceptions and understandings are incorrect.<sup>64</sup> According to the ROD, “While the permitting decision involves weighing many different policy considerations, a key consideration at this time is that granting a Presidential Permit for this proposed Project would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement.”<sup>65</sup> In his November 6, 2015 press statement, Secretary Kerry summed up the Administration’s position with the conclusion that “[t]he United States cannot ask other nations to make tough choices to address climate change if

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Administration have been doing, and the resolve that they have been *showing* over the course of the last number of years has been enormously important to the U.S. posture internationally”) (emphases added).

<sup>63</sup> Statement by the President regarding the Keystone XL Pipeline, November 6, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline>.

<sup>64</sup> ROD at 30-31 (“The decision to approve or deny a Presidential Permit for the proposed Project will be *understood* by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a broader effort to address climate change. In the judgment of the Secretary of State, the *general understanding* of the international community is that a decision to approve the proposed Project would precipitate the extraction and increased consumption of particularly GHG-intensive crude oil”) (emphases added); ROD at 26-27 (“How the U.S. is *viewed* as addressing climate change may affect the U.S. relationship with many of those countries, especially those that are vulnerable to climate change impacts, across a range of foreign policy priorities”) (emphasis added); ROD at 28 (“As such, it is strategically important for the U.S. to continue to play a leadership role in the worldwide fight against climate change, and the *perception* of U.S. leadership is enhanced when the United States Government is *seen* as taking strong action to combat climate change. It is important, therefore, to understand that the decision on whether to approve the permit application for the proposed Project is not just a matter of high domestic interest and scrutiny, but also one that is likely to have international ramifications. Many will *see* it as a test of U.S. willingness to take significant and difficult decisions as part of a broader effort to address climate change”) (emphases added); ROD at 28 (“The broad *perception* of the oil that would be carried by the proposed Project is that it would be ‘dirty’ – more GHG-intensive over its lifecycle than alternate sources of crude, owing to the combination of the use of the heavy crude itself with the far more GHG-intensive process of extraction. This *perception* is supported by the findings in the SEIS. Whether or not that oil would still find other transport to market in the absence of the proposed Project (that complex issue is analyzed in the Supplemental EIS), the general *perception* is that a decision to approve the pipeline would pave the way for the long-term and intensive extraction and importation of that oil into the United States. Issuing a permit for the proposed Project would thus be *understood* at this time as a decision to facilitate particularly GHG-intensive crude imports into the United States for the long term, undermining the power of U.S. example as a leader in promoting the transformation to low-carbon economies”) (emphases added); ROD at 28 (“Therefore, a decision to approve this proposed Project would undermine U.S. objectives on climate change; it could call into question internationally the broader efforts of the United States to transition to less-polluting forms of energy and would raise doubts about the U.S. resolve to do so. In turn, this could raise questions for some countries about how aggressively they should combat climate change domestically, and potentially reduce the United States’ ability to advance climate and broader objectives with allies and other partners in various bilateral and multilateral contexts”); ROD at 28-29 (“Conversely, a decision to deny the permit would support U.S. relationships with countries where climate issues are important and encourage actions that combat climate change and benefit the United States”).

<sup>65</sup> ROD at 31.

we are unwilling to make them ourselves. Denying the Keystone XL Pipeline is one of those tough choices....”<sup>66</sup>

49. This, then, was the basis of the Administration’s reasoning: Keystone’s application should be denied so that the United States could show leadership on climate change by (i) appeasing those who held a view on the environmental impact of the Keystone XL Pipeline that the Administration itself concluded on six different occasions was wholly unsubstantiated; and (ii) making a “tough choice” to deny Keystone a Presidential Permit for the Keystone XL Pipeline, even though denying the permit would, based on the Administration’s own analysis, have no beneficial impact on the environment. In short, the decision elevated perceptions over reality, which is the hallmark of a decision tainted by politics.

**V. The Administration’s Review and Denial of Keystone’s Applications for a Presidential Permit for the Keystone XL Pipeline Breached Articles 1102, 1103, 1105 and 1110 of the NAFTA and Caused the Disputing Investors Damage**

50. As discussed above, the Disputing Investors reasonably expected that Keystone’s application for a Presidential Permit for the Keystone XL Pipeline would be granted within a reasonable period of time. In delaying the processing of the application for an extraordinarily long period, denying the application for symbolic reasons rather than the merits of Keystone’s application, and applying new and arbitrary criteria to deny Keystone’s application, the United States breached Articles 1102, 1103, 1105 and 1110 of the NAFTA.

**A. The United States Unjustifiably Delayed Processing Keystone’s Applications for a Presidential Permit for the Keystone XL Pipeline**

51. The United States delayed its decision on the Presidential Permit for the Keystone XL Pipeline for seven years—far longer than average<sup>67</sup>—before finally announcing the denial of Keystone’s second application on November 6, 2015. Throughout its consideration of Keystone’s applications, the Administration asserted that the delays were due to, *e.g.*, the need to collect additional technical information, conduct additional analysis of the environmental impact of the proposal, or allow state-level procedures regarding the routing of the pipeline to run their course.

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<sup>66</sup> Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm>.

<sup>67</sup> See Josh Lederman, “Keystone XL Review Drags on 5 Times Longer than Average,” *Associated Press*, August 12, 2015.

Those excuses were arbitrary and contrived. In fact, none of that technical analysis or legal wrangling was material to the Administration's final decision. Instead, the rejection was symbolic, and based merely on the desire to make the U.S. **appear** strong on climate change even though the denial would have no significant impact on the environment. It is inexplicable that the State Department needed seven years to make that determination.

52. Days before it announced its decision rejecting the application, the Administration admitted that the seven-year delay was politically motivated. On November 3, 2015, the day after TransCanada requested that the State Department temporarily suspend its review of the application, White House Press Secretary Josh Earnest stated:

We've talked about how aggressively advocates on both sides of this issue have politicized this particular infrastructure project. I would venture to say that there's probably **no infrastructure project in the history of the United States that's been as politicized as this one**...And [in] my experience when things that are worthy of technical consideration get politicized, that rarely speeds up the technical consideration. That typically has the effect of slowing it down.<sup>68</sup>

53. Yet, the politicization upon which the Administration had become so fixated was largely of its own making, as the Administration allowed the controversy over the pipeline to fester and become ever more virulent for seven years.

54. The State Department's delays have had serious consequences for the Disputing Investors, even apart from the revenues that they lost due to the inability to begin operations in a reasonably timely fashion. As with any pipeline of this type, construction on the Keystone XL Pipeline could not begin until after a substantial amount of advance work had been completed, and that work had to begin while the application for the Presidential Permit was pending. The preparatory work for building a pipeline typically takes many years, particularly with large scale projects like the Keystone XL Pipeline, because there are a number of long lead time items. Throughout the seven-year delay, TransCanada had no choice but to continue making capital expenditures, and investing in land easements, pipe, materials, equipment, etc. so that it would be in a position to start construction as soon as possible after the permit was granted. Indeed, that is exactly what the

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<sup>68</sup> Press Briefing by Press Secretary Josh Earnest, November 3, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/11/03/press-briefing-press-secretary-josh-earnest-1132015>.



review process contemplates. Public Notice 6590 explains that “[i]t is not in the U.S. national interest to commit scarce government resources...as well as private resources (*e.g.*, land, capital, etc.) for border crossing projects that cannot successfully be implemented within a reasonable time period.”<sup>69</sup> For that reason, Public Notice 6590 provides that cross-border pipeline permits expire “five (5) years after issuance unless the permittee notifies the [State] Department within that timeframe that construction has begun.”<sup>70</sup> Thus, Keystone understood, as did the applicants before it, that if it did not begin making significant investments prior to the issuance of the permit, it risked losing the permit once it were granted.

55. The decision the Administration eventually made—*i.e.*, that the Keystone XL Pipeline was not in the U.S. national interest because approving the pipeline would hurt the perception of the United States as a leader on climate change—could have been made immediately after Keystone submitted its application. For political reasons, however, the State Department delayed its decision for seven years, with full knowledge that TransCanada was continuing to invest billions of dollars in the pipeline project in the legitimate but ultimately false belief—a belief that had been based on the Administration’s assurance—that the Administration would decide Keystone’s application based on the merits. The delay thus resulted in significant damage to the Disputing Investors. The Administration’s actions breached U.S. obligations under Articles 1105 and 1110 of the NAFTA.

### **B. The United States Unjustifiably Denied Keystone’s Application for a Presidential Permit for the Keystone XL Pipeline**

56. The preamble to Executive Order 13337 states that the purpose of the review process for assessing applications for Presidential Permits is to “expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects, and to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings...while maintaining safety, public health, and environmental protections...”<sup>71</sup> The preamble also states that Executive Order 13337 was designed to “further the policy” set forth in Executive Order 13212, which is “that executive departments and agencies (agencies) shall take

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<sup>69</sup> Department of State Public Notice 6590, “Inclusion of Expiration Dates in Presidential Permits for International Border Crossings,” April 24, 2009.

<sup>70</sup> Department of State Public Notice 6590, “Inclusion of Expiration Dates in Presidential Permits for International Border Crossings,” April 24, 2009.

<sup>71</sup> Exec. Order 13337 at Preamble.

appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.”<sup>72</sup> Public Notice 6590, which the State Department issued in April 2009, confirmed the purpose of the permitting process, stating that, “[w]ithin the context of appropriate border security, safety, health, and environmental requirements, it is in the U.S. national interest to facilitate the efficient movement of legitimate goods and travelers across U.S. borders.”<sup>73</sup>

57. The purpose of the review process is thus clear—the State Department should grant applications for a Presidential Permit unless the proposed pipeline raises serious safety, public health, or environmental concerns. The State Department’s consideration of previous applications for Presidential Permits was consistent with that overall purpose. For example, in March 2008, the State Department approved Keystone’s application for the Keystone I pipeline based on its finding that the pipeline would (i) increase the diversity of U.S. energy supplies; (ii) shorten the transportation pathway for a portion of U.S. crude imports; (iii) increase crude supplies from a stable and reliable trading partner; (iv) provide additional supplies to make up for the continued decline in imports from several other major U.S. suppliers; and (v) have limited adverse environmental impacts.<sup>74</sup> The State Department, under the Obama administration, relied on similar factors when it approved the permit to construct the Alberta Clipper pipeline in August 2009. While the State Department noted that some comments had raised concerns that the Alberta Clipper pipeline might result in higher GHG emissions, it also noted that (i) the United States and Canada were cooperating on environmental issues; (ii) construction of the pipeline would send a positive economic signal in a difficult economic period about the reliability and availability of energy; (iii) the project would provide construction jobs in the immediate term; and (iv) concerns regarding GHG emissions would be best addressed in other fora rather than through the permit process.<sup>75</sup>

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<sup>72</sup> 66 Fed. Reg. 28357, May 22, 2001, Section 1.

<sup>73</sup> Department of State Public Notice 6590, “Inclusion of Expiration Dates in Presidential Permits for International Border Crossings,” April 24, 2009.

<sup>74</sup> See Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, LP Application for Presidential Permit, February 28, 2008, p. 22.

<sup>75</sup> See Action Memo for Deputy Secretary Steinberg, Enbridge Energy Alberta Clipper Pipeline Permit Record of Decision, August 3, 2009, pp. 25-27.

58. The stated purpose of Executive Order 13337, and the State Department's handling of the previous applications for Presidential Permits to construct international pipelines, informed Keystone's expectations about how the State Department would handle Keystone's application for a Presidential Permit for the Keystone XL Pipeline. If the State Department had followed the same approach in assessing Keystone's application for the Keystone XL Pipeline that it followed in reviewing earlier applications, and based its decision on objective evidence rather than symbolic and political factors, there is no question that the State Department would have issued the Presidential Permit. Instead, the State Department radically altered its approach and based its decision on factors that had never before served as the basis to deny an application, and that were based on perceptions of uninformed third parties rather than the conclusions established by a detailed review of the facts by the State Department and supporting agencies.

59. Secretary Kerry used his authority under Executive Order 13337 to block the Keystone XL Pipeline despite the fact that the State Department, itself, concluded on multiple occasions that the pipeline would not raise any significant safety, public health, and environmental concerns that could not be mitigated. Secretary Kerry's decision was not based on the merits of Keystone's application, but rather on how the international community might react to an approval in light of its erroneous perception that the pipeline would result in higher GHG emissions. The Administration's unjustified denial of Keystone's application significantly damaged the Disputing Investors. The Administration's actions breached U.S. obligations under Articles 1105 and 1110 of the NAFTA.

### **C. The United States Unjustifiably Discriminated Against Keystone**

60. To the Disputing Investors' knowledge, the State Department had never denied an application for a Presidential Permit for a cross-border pipeline until it denied Keystone's application for the Keystone XL Pipeline. The United States has previously approved pipelines from other investors, including from the United States and Mexico, based on factors that, if applied to Keystone's application, would have resulted in approval of the application. The United States had also approved those other applications in a significantly shorter period of time than it took the United States to review, and ultimately deny, Keystone's application. By delaying the processing of Keystone's application for the Keystone XL Pipeline, and applying new and arbitrary criteria in deciding to deny the application, the United States discriminated against, and significantly

damaged, the Disputing Investors. The Administration's actions breached U.S. obligations under Articles 1102 and 1103 of the NAFTA.

## **VI. DAMAGES CLAIMED**

61. The Disputing Investors seek damages of over US\$ 15 billion arising from the United States's breach of its NAFTA obligations. The Disputing Investors reserve the right to adjust the claimed damages during the course of the arbitration.

Respectfully submitted,



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