

# Intelligence MEMOS



From: Kristen van de Biezenbos  
To: Canadians Concerned about Pipelines  
Date: December 10, 2018  
Re: **UNPACKING THE KEYSTONE XL MESS**

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A few weeks ago, a US district court judge put the brakes on the Keystone XL pipeline project.

This was the latest wrinkle in the saga of the line, which is intended to carry heavy bitumen from Alberta oil sands to the US Gulf Coast refinery complex. It was first blocked by Barack Obama in 2015, only to be granted a presidential permit by President Trump via one of his first executive orders last year.

US pipeline projects must undergo a strict environmental review under the *National Environmental Policy Act* (NEPA), the result of which is an environmental impact statement or, when such a statement has been prepared but there is a change in conditions, a Supplemental Environmental Impact Statement (SEIS). A SEIS is multifaceted, detailing not just the specific impacts on the local ecosystem and possible threats to endangered species, but also its cumulative impacts on the environment, as well the project's economic justification. Additionally, when a permit like Keystone XL's has been denied for specific reasons, and is subsequently granted, the *Administrative Procedure Act* (APA) requires that the Department of State explain why the factual basis for the original denial has been called into question or obviated.

When Donald Trump directed the State Department, which has formal jurisdiction for international pipelines, to issue a Presidential Permit to give the go-ahead to Keystone XL, the department used the original SEIS, based on a route that had been altered in Nebraska. A federal judge in Montana ordered a new SEIS to take the environmental impacts along the alternate route into consideration. The department prepared this 388-page SEIS—a process that usually takes months or, not uncommonly, years—in just a few days. It also prepared a Record of Decision (ROD), as per the APA, explaining why the previously denied permit was now being issued.

Environmentalists and Indigenous groups challenged the new SEIS and the ROD. They argued that: 1) the SEIS failed to consider cumulative climate impacts, 2) it also failed to address new scientific information on oil spill risks, and 3) the ROD failed to adequately justify the reversal on issuing the permit.

District Court Judge Brian Morris agreed with the plaintiffs and ordered that a new SEIS be prepared and a new ROD be issued correcting the defects. The first SEIS, he said, failed to consider greenhouse gas emissions resulting from permitting Keystone along with another Canadian pipeline expansion, the Alberta Clipper. The two pipelines might cause an increase in oil sands production and, in turn, an increase in emissions contributing to global warming, which the court held should be addressed in the cumulative impacts section of Keystone XL's SEIS.

Second, Morris found that the SEIS should have included updated information on oil spills, given that a number of major spills occurred between 2014 (when the original SEIS was prepared) and 2017.

Finally, he agreed that the current administration's reversal of a prior executive decision and issuance of the Presidential Permit violated the APA's procedures. The APA requires that the accompanying ROD use "factual findings" to justify the reversal. The Obama administration's ROD rejecting Keystone XL made it clear that it was based on concerns over climate change. When the Trump administration gave its reasons for issuing the permit, it did not address climate change beyond stating that its policy is different. That, the court found, did not meet the APA standard.

While it's by no means certain that Keystone XL is doomed, there may not be much that TransCanada can do to in the short term to increase the chances of the department producing a more legally sound SEIS.

SEIS preparation can also take a considerable amount of time, although the court's specific guidance on what errors need to be addressed may speed the process. Alberta's relatively high environmental standards and carbon emissions caps in the oil sands may be helpful, as might a comprehensive plan to combat oil spills from TransCanada.

Because production in the oil sands is associated with higher emissions than more conventional sources, it may be difficult to pass SEIS muster on cumulative impacts.

No matter the outcome, Keystone XL remains the poster child for the difficult new era of pipeline approval in North America.

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