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The Advocacy Strategies and Efforts of Opponents to the Oil Sands and the Keystone XL Pipeline

I. Introduction

The Oxford dictionary defines advocacy as public support for or recommendation of a particular cause or policy and an advocate as a person who publicly supports or recommends a particular cause or policy.[1] In a legal sense these concepts have largely been associated with an attorney advocating on behalf of his/ her client through written and oral advocacy in the context of a judicial proceeding.[2] However, by its very definition, an advocate does not have to be an attorney, nor is advocacy pigeonholed into merely a judicial context. Just as an advocate can take many forms, so too can advocacy. Indeed in the modern day political, legal and social landscapes a successful advocacy strategy requires an imagination big enough to embrace advocacy in all of its forms. This means that in addition to litigating in the justice system, advocating on behalf of or for a particular cause or policy must be done at administrative/executive agencies, the legislatures of federal, state, and local governments, and media outlets where the public may access your message.

This paper explores and attempts to provide insight into the various advocates against and advocacy strategies employed by opponents to the Keystone XL Pipeline. The Keystone XL Pipeline is just one part of a bitumen oil sands pipeline system proposed by Canadian infrastructure company TransCanada that would run through the heart of the United States from Canada to the Gulf Coast. As the paper will demonstrate, the opponents to the pipeline are

[1] Oxford Dictionaries, Oxford University Press (2011); available at http://oxforddictionaries.com/view/entry/m_en_us1220128#m_en_us1220128
[2] Gerald Lebovits, Persuading the Judge Through Writing, 81-FEB N.Y. St. B.J. 64 (2009).

extremely diverse and include national and local environmental groups, politicians, municipalities, lawyers, property owners, and concerned citizens. This paper will also reveal how the pipeline's opponents have engaged in advocacy through all of the aforementioned channels, using litigation, notice and comment at administrative agencies, legislation, lobbying, public relations, grassroots organization, and social media such as Facebook, YouTube, blogs, and newspapers to educate and inform relevant decision makers and the general public as to why they too should oppose the pipeline. Finally, the paper will show that while the fate of the Keystone XL pipeline has yet to be determined the advocacy efforts of the opponents have been significant and achieved measurable success.

II. The Canadian Oil Sands

The future energy policy of the United States is of vital interest and importance not only to the United States government and its citizens but also to the countries from which the United States imports vast quantities of resources. Despite comprising only 4.5% of the world's population[3], the United States consumes one-quarter of the world's oil.[4] Despite evidence that energy consumption in the U.S. is expected to slow by 2035, there is little evidence fossil fuels will not remain the number one source of energy powering the economic engine of the United States.[5] Furthermore, the United States only derives 49 % of its oil from domestic sources, which means the majority is imported from foreign sources in countries such as Canada, Mexico,

[3] Matt Rosenberg: *Current U.S. Population* (May 2, 2011); available at http://geography.about.com/od/obtainpopulationdata/a/uspopulation.htm.
[4] Richard Buckminster, The Solution to the United States' Energy Troubles is Blowing in the Wind, 39 Hofstra L. Rev. 201, 204 (2011) (discussing the true cost of oil and the need for alternative sources of energy).
[5] U.S. Energy Information Administration, International Energy Outlook 2010: World Energy Demand Economic Outlook (July 27, 2010); available at http://www.eia.doe.gov/oiaf/ieo/index.html.

and Saudi Arabia.[6] In 2009, while the United States only produced 11% of the world's petroleum products, it consumed 22%.[7] Also, contrary to public perception, the top supplier of crude oil and petroleum products to the United States is not Saudi Arabia, Iraq, or Mexico, but Canada.[8]

In fact some argue that "Canada and the United States share an energy relationship that is unsurpassed by any other two countries in the world."[9] Today "the U.S. imports more oil from Canada than from any other nation, about 19 percent of its total foreign supply, and around half of that now comes from the oil sands."[10] The Canadian Oil Sands, represent a deposit of oil the size of North Carolina and "some estimates predict that by 2035, thirty-seven percent of America's foreign oil supply could be provided by the Canadian Oil Sands."[11]

For the time being, the size of the oil sands far exceeds the technological ability of companies to extract it. "The Alberta government estimates that the province's three main oil sands deposits, of which the Athabasca one is the largest, contain 173 billion barrels of oil that are economically recoverable today."[12] However, "the Alberta Energy Resources and Conservation Board estimates that more than 300 billion barrels may one day be recoverable

[6] U.S. Energy Information Administration, Petroleum Supply Annual 2009 (November 29, 2010); available at http://www.eia.doe.gov/energy_in_brief/foreign_oil_dependence.cfm#footnotes
[7] *Id.*
[8] Wendy Koch, Proposed U.S.-Canada Pipeline Fuels Debate, USA Today (May 22, 2011); available at http://content.usatoday.com/communities/greenhouse/post/2011/03/us-canada-tar-sands-pipeline-fuels-debate/1
[9] J. Scott Childs, Continental Cap and Trade: Canada, the United States, and Climate Change Partnership in North America, 32 Hous. J. Int'l L. 393, 395 (2010).
[10] Andrew C. Mergen, The Mining of the North: A Review of Andrew Nikiforuk's Tar Sands: Dirty Oil and the Future of a Continent, 21 Vill. Envtl. L.J. 219, 220 (2010).
[11] Buckminster, 39 Hofstra L. Rev. 201, 211; *See also* Robert Kunzig, The Canadian Oil Boom: Scraping Bottom, National Geographic (Mar. 2009); available at http://ngm.nationalgeographic.com/2009/03/canadian-oil-sands/kunzig-text/1
[12] *See Id.* Kunzig.

from the oil sands."[13] Furthermore, it estimates the total size of the deposit at a staggering 1.7 trillion barrels.[14]

However, as noted, despite the vast expanse of the oil sands deposits, only a fraction is readily extractable due to technological deficiencies and the high cost of production. The primary reason for the high cost of oil sands production is the fact that the oil is trapped with the sand in which it lies. This substance is known as bitumen, "a thick gooey substance that looks and smells like tar."[15] Therefore, in order to recover the oil, it must it literally must be "processed and separated from the sand in which it sits."[16] While nearly twenty percent of the oil sands are shallow enough to be mined near the surface, a process known as strip mining, "most of the tar sands lie in deep formations."[17] In order to access the remaining eighty percent "drilling and in situ methods are used to extract the oil" from rock and sand formations.[18] Indeed, Professor Hannah of the University of Texas Law School opined, "as conventional sources of oil and gas become less productive and energy prices rise, production companies are developing creative extractive methods to tap resources like oil shales and tar sands that were previously not worth drilling."[19] Several methods exist for this purpose but the most common is known as steam assisted gravity drainage (SAGD).[20] In this process, steam is pumped deep into

[13] *Id.*
[14] *Id.*
[15] See Mergen, supra note 8, at 221.
[16] See Childs, supra note 7, at 408.
[17] See Mergen, supra note 8, at 221.
[18] Marin Katusa, The Promise and Pitfalls of Canada's Oil Sands, Forbes (Mar. 22, 2011); available at http://blogs.forbes.com/energysource/2011/03/22/the-promise-and-pitfalls-of-canadas-oil-sands/
[19] Hannah Wiseman, Untested Waters: The Rise of Hyrdraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation, 20 Fordham Envtl. L. Rev. 115, 115 (2009).
[20] See Mergen, supra note 8, at 221.

the bitumen formation where the heat separates the oil from the sand so it may be lifted to the surface.[21]

In addition to the specialized production methods required to successfully extract the oil sands, a vast network of substantial infrastructure projects has been created to transport and refine this petroleum.[22] The Canadian provinces in which the bitumen is extracted do not have the capacity or infrastructure to upgrade the entire supply of raw material. Therefore, "a percentage of the raw material is exported by pipeline to the Unites States for processing."[23] In the past decade the oil sands industry has invested $50 billion on infrastructure construction, including $20 billion in 2008 alone.[24] In 2009, the industry spent another $10 billion and "almost $170 billion worth of oil sands projects are currently underway or proposed in the Alberta province.[25] Moreover, the industry hopes to double production by 2015, "with most of the oil flowing through new pipelines to the United States."[26] Perhaps the largest and most ambitious infrastructure project ever proposed to transport the expected increase in oil sands production to Canada's largest energy consumer, the United States, is the Keystone XL Pipeline.

III. The Keystone XL Pipeline

How can these massive supplies of crude oil safely find their way to the hungry refineries of the United States? The answer according to TransCanada, one of North America's largest energy infrastructure companies, is the Keystone Pipeline System.[27] The Keystone XL pipeline is only the third phase of the four phase $13 billion Keystone Pipeline System developed and

[21] *Id.*
[22] Committee Report, Report of the International Energy Transactions Committee, 30 Energy L.J. 207, 208 (2009).
[23] *Id.* at 408.
[24] See Kunzig, supra note 11.
[25] See Katusa, supra note 16.
[26] See Kunzig, supra note 11.
[27] TransCanada: Keystone Pipeline Project; available at http://www.transcanada.com/keystone.html.

built by TransCanada.[28] TransCanada's commercial operation of the first phase of the Keystone system already commenced in June 2010 and was "highlighted by the conversion of natural gas pipeline to crude oil pipeline and construction of an innovative bullet line that brings the crude oil non-stop from Canada to market hubs in the U.S. Midwest."[29] This section of the Keystone system travels across Saskatchewan and Manitoba before heading south through North Dakota, South Dakota, Nebraska and Kansas, ultimately arriving in Illinois.[30] Phase I provides an initial capacity of 435,000 barrels per day.[31] In 2010 Phase II of the pipeline will extend Keystone 291 miles south to Oklahoma, increasing capacity to 591,000 barrels per day.[32]

The third phase of the Keystone system, known as the XL pipeline, will begin at Hardisty Canada, the central hub for oil sands delivery in Canada and extend south through the central part of the Unites States to the Gulf of Mexico.[33] According to the U.S. State department website, the agency charged with reviewing and approving the XL pipeline,

> "TransCanada Keystone Pipeline, L.P. (Keystone) proposes to construct and operate a crude oil pipeline and related facilities to transport Western Canadian Sedimentary Basin (WCSB) crude oil from an oil supply hub near Hardisty, Alberta, Canada to destinations in the south central United States, including a new tank farm in Cushing, Oklahoma and delivery points in Nederland (near Port Arthur) and Moore Junction (in Harris County), Texas. In total, the proposed Keystone XL Project would consist of approximately 1,711 miles of new, 36-inch-diameter pipeline, with approximately 327 miles of pipeline in Canada and approximately 1,384 miles in the United States. The proposed Project would cross the international border between Saskatchewan, Canada, and the United States near Morgan, Montana. The proposed Project initially would have a nominal transport capacity of 700,000 barrels per day (bpd) of crude oil."[34]

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] U.S. Department of State: Keystone XL Pipeline Project; available at http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open

The Keystone system is one of the largest and most ambitious infrastructure projects every undertaken in the United States or Canada. It is four times longer than the more famous trans-Alaskan pipeline.[35] TransCanada proclaims it is a project on the same scope as the Pyramids of Giza.[36] Moreover, according to TransCanada, the Keystone System represents the connection between the oil sands in Alberta Canada to the largest market for petroleum in the world.[37] By its conclusion, TransCanada estimates the pipeline system will transport over 1 million barrels of Canadian crude daily to U.S refiners and replace roughly 20% of what U.S. imports from Venezuela and the Middle East.[38]

IV. The Environmental Risks of Oil Sands and the Keystone XL Pipeline

However, the Keystone XL pipeline is not without controversy and it certainly is not the first battle between energy companies and environmental groups. Rather, this battle merely represents one in a string of many over the years in which the two sides have thrown punch and counter-punch, as the war over energy production and environmental conservation rages on. Indeed,

> "the war pits America's largest environmental groups against some of the world's wealthiest corporations and their 'allies' in the Canadian and Albertan governments. The battle line divides two viscerally opposed camps: Those arguing that North America's deepening dependence on Alberta's oil sands industry represents a pragmatic solution to looming energy crises, and those who say relying on oil sands crude marks an irreversible step closer to climate change catastrophe."[39]

[35] TransCanada, supra note 25.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Geoff Dembicki, In American's Capital a Fierce Fight Over Oil Sands, The Tyee (Mar. 14, 2011); available at http://thetyee.ca/News/2011/03/14/OilSandsFight/

While it is easy to identify that environmental groups and various stakeholders are opposed to oil sands development and the Keystone XL Pipeline, an analysis of why this vociferous opposition exists is vital before an understanding of the advocacy strategies employed to carry out the opposition can be reached. At the forefront of oil sands development and the pipeline system are the environmental and health risks, which are substantial. Opponents believe these risks include: increased greenhouse gas emissions, major landscape disruption from surface mining, massive toxic tailings ponds, major water consumption and contamination of the Athabasca River including health effects on downstream residents, and reduced air quality. In addition, given a recent increase in oil sands pipeline spills, opponents to the Keystone XL pipeline fear a disaster with irreparable health and environmental effects is likely.

A. Oil Sands

One of the major criticisms of the oil sands is the level of greenhouse gas emissions compared with the emission levels associated with conventional oil production. Some estimates place oil sands production at 15% more intensive with greenhouse gas on a lifecycle basis than conventional oil.[40] However, proponents of the sands counter by citing that Canada only produces 2% of the world's greenhouse gases and oil sands represent 8% of that 2%.[41] Also, the oil sands account for less than a tenth of one percent of global Carbon Dioxide emissions. But to many environmentalists the production of oil sands represents a "decision point for North American and the world."[42] They question whether a focus is going to be placed on alternative energy development or

[40] John Vidal, Canadians Ponder Rush for Dirty Oil, The Guardian (July 11, 2008); available at http://www.guardian.co.uk/environment/2008/jul/11/fossilfuels.pollution.
[41] *Id.*
[42] See Kunzig, supra note 11.

environmentally hazardous oil like the oil sands.[43] Moreover, opponents point out that based on current technology, increasing greenhouse gas emissions from oil sands production will make it nearly impossible for Canada to meet its international commitments to greenhouse gas reductions.[44]

Opponents also point to the massive land disruption and disturbance of the boreal forest which is cleared to pave the way for surface mining.[45] In addition, reclamation of these sites are not keeping pace with the rate of disturbance and even if they did, critics lament that the reclamation produces open fields rather than a return of the boreal forests.[46]

Tailings ponds, the repository for water and toxic bi-products of oil sands production pose a substantial risk to wildlife.[47] In April 2010, 1,600 ducks died in a tailings pond in northern Alberta. Furthermore, the reclamation of these tailings ponds has been slow and to this date no tailings pond has been completely reclaimed.[48]

One of the hotly contested issues is the health effects of oil sands production on downstream residents. Claims have been made that a cancer cluster exists in a town downstream of the Athabasca River.[49] However, health authorities and a study performed by the Royal Society of Canada concluded that, "Environmental contaminants at current levels of exposure are unlikely to cause major health impacts for the general population. In particular, there is no credible evidence to support the commonly repeated

[43] *Id.*
[44] Dr. Pierre Gosselin et al., The Royal Society of Canada Expert Panel: Environmental and Health Impact of Canada's Oil Sands Industry (Dec. 2010); available at http://www.rsc-src.ca/documents/expert/RSC_ExP_ExecutiveSummary_ENG_Dec14_10_FINAL_v5.pdf.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] See Kunzig, supra note 11.

media accounts of excess cancer in Fort Chipweyan being caused by contaminants released from oil sands operations."[50] On the other hand, a study performed by the University of Alberta concluded that the oil sands industry contributes elements toxic at low concentrations to the Athabasca River and its tributaries.[51]

B. The Keystone XL Pipeline

In addition to the concerns addressed above, opponents to the Keystone XL Pipeline question the safety of transporting oil sands in pipelines across the heart of the United States and fear the environmental and health impacts of a major spill. Opposition to the XL Pipeline in this regard is not misplaced, hypothetical or conjectural. According to TransCanada's official risk assessments a leak of 50 barrels or more on the Keystone system was predicted to occur only once every seven years.[52] However, the first phase of the Keystone project has already seen eleven spills in its first year of operation.[53] While these spills may be categorized as minor, the worst spill released 500 barrels of oil into the environment.[54] Moreover, a crude oil pipeline in Northern Alberta released[55] nearly 4.5 million liters of crude into the environment. This was in addition to a spill in Michigan last year which released nearly a million gallons of tar sands crude oil into the

[50] See Gosselin, supra note 44.
[51] Erin N. Kelly et al., Oil Sands Development Contributes Elements Toxic at Low Concentrations to the Athabasca River and its Tributaries, Proceedings of the National Academy of Sciences, vol. 107, no. 37 (Sept. 14, 2010); available at http://www.pnas.org/content/107/37/16178.full.pdf+html?sid=9eaaf665-b484-45d2-b5d4-b122e232f7e4.
[52] Stacy Feldman, Latest Pair of Oil Accidents Fuel Opposition to Keystone Pipeline Extension, Reuters (May 12, 2011); available at http://www.reuters.com/article/2011/05/12/idUS418509825620110512.
[53] Kevin Woster, Pipeline Foe Calls Pipeline Spill Sign of Things to Come, Rapid City Journal (May 13, 2011); available at http://www.rapidcityjournal.com/news/article_4f2ad790-7d19-11e0-a536-001cc4c03286.html.
[54] *Id.*
[55] Lauren Krugel, Oil Spills Raise Concern About Crude Pipeline, The Canadian Press (May 14, 2011); available at http://thechronicleherald.ca/Canada/1243198.html.

Kalamazoo River.[56] Opponents argue that the benefits of the Keystone XL project do not outweigh the potential costs associated with these pipeline spills. Nor do they consider a BP Deep-water Horizon type disaster which occurred in the Gulf of Mexico out of the realm of possibility. Rather, based on the number of recent pipeline spills, opponents believe the risk and the threat to the environment to be very real.

Thus, the two sides continue to debate the potential ramifications of the Keystone XL Pipeline for the environment, the economy, and the communities through which it travels, using every advocacy strategy at their disposal including public and media relations, lobbying efforts in legislative and agency settings, litigation, and community outreach. Meanwhile, the fight over the specific impacts of the Keystone XL Pipeline is set against the backdrop of major policy debates centered on energy policy as a whole, where the question of whether the United States will continue to invest in non-renewable fossil fuels or transition investment to alternative sources of energy remains unanswered.

V. Advocacy Efforts of Opponents to the Keystone XL Pipeline

The advocacy efforts of groups, both national and local, to prevent the construction of the Keystone XL Pipeline have been varied, complex and wide reaching. Environmental interest groups such as the National Research Defense Council, Sierra Club, Greenpeace, and the Northern Plains Research Council have engaged in administrative notice and comment concerning the environmental impact of the pipeline, published accessible informational brochures detailing their position against the pipeline, lobbied legislators, and held informational meetings in communities that lay in the pipeline's proposed path. In addition to these

[56] Ed Brayton, Alberta Hit by Another Massive Pipeline Leak, The Michigan Messenger (May 5, 2011); available at http://michiganmessenger.com/48775/alberta-hit-by-another-massive-pipeline-leak.

environmental interest groups, local municipalities in the Midwest, who fear the potential environmental ramifications associated with the development and transportation of oil sands have actively voiced their opposition with the State Department. Moreover, often lost in the macro level debate over the proposed pipeline are the individual stories of those affected through whose lands and communities the pipeline will be built. For these people, who do not belong to national interest groups or have the resources to have their voice heard over multi-national energy companies, the battle is often a tale of David v. Goliath.[57]

While opponents to the Keystone Pipeline System as a whole have failed to prevent the construction of Phase I or II their efforts have substantially increased the level of the project's environmental safeguards. And while the goal of preventing construction remains the same in the context of the XL expansion, it is far from certain whether opponents of the pipeline have the power to conquer the overwhelming perception that the oil sands represent an immeasurable and irreplaceable source of wealth and prosperity. However, it is certain that to this point their various advocacy efforts have done a great deal to mitigate potential environmental costs, generate a more thorough discussion and review of environmental impacts and created a growing opposition to the XL pipeline project in its current form.

A. Administrative Advocacy at the United States State Department and the Environmental Protection Agency

On September 19, 2008 TransCanada Keystone Pipeline L.P. filed an application with the U.S. State Department requesting a Presidential Permit authorizing the construction operation and maintenance of border pipeline facilities in connection with "Keystone's proposed international pipeline project (the Keystone XL Project) which is designed to transport crude oil

[57] See Koch, supra note 6.

production from the Western Canadian Sedimentary Basin to existing markets in the Texas Gulf Coast area."[58] The application further stated that the proposed pipeline would serve the "national interests of the United States by providing a secure and reliable source of Canadian Crude Oil to meet the growing demand by refineries and markets in the United States."[59]

Initially it appeared that the State Department was prepared to fast track the pipeline project without engaging in a serious and rigorous debate over the benefits of economic productivity and environmental harm. Speaking to an audience in San Francisco in October of 2010 Secretary of State Hillary Clinton stated that she was "inclined" to grant a permit for the proposed pipeline.[60] Since that comment however, despite remaining "generally supportive" of importing oil sands, Secretary Clinton has backed off from her inclination to grant the permit. Instead, testifying before the Senate appropriations committee, she stated that, "since my department bears the ultimate responsibility for making a recommendation on the pipeline, I am not able to express an opinion."[61] Secretary Clinton's re-positioning on this issue can be attributed in part to the advocacy efforts engaged in by opponents to the project at the state department and Environmental Protection Agency.

On July 2, 2010, a coalition of environmental groups led by the Sierra Club, submitted Public Comments to the State Department on the TransCanada Keystone XL Pipeline Draft Environmental Impact Statement (hereafter "DEIS").[62] The comments totaling one hundred and

[58] TransCanada: Application for Presidential Permit (Sept. 19, 2008); available at http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/presidentialpermitapplication.pdf?OpenFileResource.
[59] *Id.*
[60] Sheldon Alberts, Hillary Clinton Supportive of Alberta Oil Imports, Wavers on Keystone XL Pipeline, The Montreal Gazette (Mar. 2, 2011); available at http://www.montrealgazette.com/business/Hillary+Clinton+supportive+Alberta+imports+wavers+Keystone+pipeline/4374207/story.html
[61] *Id.*
[62] Sierra Club, Public Comments on Draft Environmental Impact Statement for the Proposed TransCanada Keystone XL Pipeline Project (July 2, 2010); online at http://docs.nrdc.org/energy/files/ene_10070201a.pdf. As noted in the Sierra Club's comments, "the DEIS's must comply with the National Environmental Policy Act

fifty one pages criticized the DEIS on multiple bases including, *inter alia*, the stated "rationale" of the pipeline and the inadequate assessment of "the potential environmental impacts of the project including the impacts on the global climate, wetlands, and wildlife."[63] Thus, according to the comments, because the DEIS did not address all the "direct, indirect and cumulative impacts of the project" the State Department should deny the application for a Presidential Permit or in the alternative "reissue the DEIS for further public comment."[64]

In issuing its review of the Environmental Impact Statement (EIS) conducted by the State Department, the EPA echoed many of the same concerns raised by the Sierra Club in its Public Comments on the DEIS.[65] In fact, the EPA recommended that "additional information and analysis" be provided because the DEIS did not "provide the scope or detail of analysis necessary to fully inform decision makers and the public."[66] The EPA identified the areas inadequately addressed by the DEIS including the "purpose and need of the project, the potential greenhouse gas emissions of the project, air pollutant emissions at the receiving refineries, pipeline safety/spill response, potential impacts to environmental justice communities, wetlands, and migratory birds."[67]

(NEPA) which stands as the United States 'basic national charter for the protection of the environment.' 40 C.F.R. § 1500.1. Therefore, "NEPA requires all agencies of the federal government to prepare a 'detailed statement' that discusses the environmental impacts of, and reasonable alternatives to, all 'major Federal actions significantly affecting the quality of the human environment.'42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (EIS)." *See* 40 C.F.R. Part 1502.

[63] *Id.* at 9; in the interest of brevity and the mere fact that a discussion of all the criticisms leveled at the DEIS would become an infinite exercise, this section attempts to highlight only the most significant areas of concern raised by the comments.

[64] *Id.* at 13.

[65] U.S. Environmental Protection Agency: Comments on the Draft Environmental Impact Statement on the Keystone XL Pipeline Project (July 16, 2010); available at http://yosemite.epa.gov/oeca/webeis.nsf/%28PDFView%29/20100126/$file/20100126.PDF?OpenElement; See also Susan Casey, Lowest Rating from EPA for Tar Sands Oil Pipeline Assessment, Switchboard, National Resource Defense Council Blog (July 22, 2010); available at http://switchboard.nrdc.org/blogs/sclefkowitz/lowest_rating_from_epa_for_ tar.html

[66] *Id.*

[67] *Id.*

The advocacy efforts of the opponents in the administrative arena significantly changed the debate surrounding the pipeline proposal causing the State Department to develop and issue a Supplemental Environmental Impact Statement. Moreover, in a press release on March 15, 2011, the State Department indicated that it expects to request public comments in April 2011 on the Supplemental EIS, "in order to provide interested parties and the public the maximum opportunity to comment on this important project."[68]

B. The Supplemental Environmental Impact Statement

On April 15, 2011 the U.S. Department of State posted the Supplemental Draft Environmental Impact Statement (EIS) for the proposed Keystone XL pipeline.[69] The Federal Register Notice was issued on April 22 and marked the beginning of a 45-day public comment period, ending on June 6.[70] After the 45-day public comment period the State Department will issue a final environmental impact statement at which time interested federal agencies such as the Environmental Protection Agency will have 90 days to provide an opinion on whether issuing the Presidential Permit for the pipeline would be in the national interest.[71]

The U.S. State Department issued the Supplemental Draft Environmental Impact Statement as part of its continuing evaluation of the adequacy of the DEIS.[72] In doing so, it analyzed new and additional information which became available after the DEIS.[73] While noting that it received thousands of comments on the DEIS, the State Department also declared that "no

[68] Press Release, U.S. State Department, State Department Announces Next Steps in Keystone XL Pipeline Permit Process (Mar. 15, 2011); available at http://www.state.gov/r/pa/prs/ps/2011/03/158402.htm.
[69] Press Release, U.S. State Department, State Department Releases Keystone XL Pipeline Supplemental Environmental Impact Statement (Apr. 15, 2011); available at http://www.state.gov/r/pa/prs/ps/2011/04/161015.htm
[70] *Id.*
[71] *Id.*
[72] Executive Summary: Keystone XL Pipeline Supplemental Draft EIS, U.S. State Department; available at http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/03_KXL_SDEIS_Executive%20Summary.pdf?OpenFileResource.
[73] *Id.*

new issues of substance emerged from the comments received."[74] Still, the State Department issued the Supplemental Impact Statement to address new and additional information as well as to further the purposes of NEPA.[75] However, despite the thousands of public comments, new information and further analysis, the State Department's ultimate conclusion regarding the need and environmental impacts of the pipeline were not altered in the Supplemental Impact Statement.

Subsequent to its release opponents to the pipeline project continued their advocacy efforts in the administrative arena, levying criticism at numerous aspects of the new statement. Many local and national environmental groups agree that the 45 day comment period is an inadequate length of time to fully review and draft substantial comments on the supplemental statement.[76] In addition, opponents in local communities along the proposed path of the pipeline are criticizing the State Department for choosing not to hold public hearings and meetings in those communities[77]. To that end, local environmental groups such as STOP, which originated in Texas, have begun to hold public hearings along the proposed pipeline route and intend to forward public comments gathered at those meetings to the State Department.[78] Moreover, opponents feel that the supplemental statement provided inadequate analysis and explanation in regards to pipeline safety, alternative routes around the Ogallala Aquifer, climate change impacts, and environmental justice concerns near oil sands refineries.[79]

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[74] *Id.*
[75] *Id.*
[76] Terrie Gonzalez, Keystone XL Pipeline Comment Period Underway Through June 6, Cherokeean Herald (Apr. 27, 2011); available at http://www.thecherokeean.com/news/2011-04-27/News/Keystone_pipeline_XL_comment_period_underway_throu.html.
[77] *Id.*
[78] *Id.*
[79] Susan Casey-Lefkowitz, Keystone XL Tar Sands Pipeline Environmental Review-Strike Two! Switchboard (Apr. 19, 2011); available at http://switchboard.nrdc.org/blogs/sclefkowitz/keystone_xl_tar_sands_pipeline.html.

As noted above, the comment period for the Supplement Environmental Impact Statements runs through June 6th.[80] After this date, the Department of State "will begin a 90-day period for consultations with other federal agencies to determine if issuing a Presidential Permit for the proposed Project is in the National Interest."[81] Furthermore, during the first 30 days after the final Environmental Impact Statement is released, the public will have the opportunity to comment on the National Interest Determination. [82] The Department of state also indicated that it expects to grant or deny the permit by the end of 2011.[83]

C. Public Relations Strategy

The battlefield of the Keystone XL Pipeline proposal and the exploitation of the Athabasca Canadian oil sands has not been limited to the confines of high level scientific, legal or policy debates. Rather an acute awareness exists that a loss on these battlefields is not dispositive on the outcome of the war. Far from courtrooms, agencies, or the halls of Congress, a battle is being waged for the hearts and minds of the American public. At the forefront of this fight is perhaps the most rigorously debated point of the entire issue, what is this black substance called?

According to Canadian author and journalist Andrew Nikiforuk, this resource should be referred to as "Tar Sands" and intentionally titled his book "Tar Sands: Dirty Oil and the Future of a Continent" in order to "emphasize the point that the substance mined does not start as oil."[84] He has argued that "referring to this resource as "oil sands" creates the misimpression of a ready

[80] See Executive Summary, supra note 72.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] See Mergen, supra note 8, at 222.

energy seeping from the sands and soil when the truth is that extracting this resource is extremely difficult.[85]

Virtually mirroring this sentiment is the title of the National Resource Defense Council's Fun Facts brochure titled "Say No to Tar Sands Pipeline: Proposed Keystone XL Project Would Deliver Dirty Fuel at a High Cost."[86] The publication states that "instead of carrying common crude oil, the Keystone Pipeline would carry thick, toxic bitumen for refining in the Gulf States effectively transporting pollution from Canada to the United States."[87] Even residents in the proposed path of the pipeline have referred to the sands as "tar sands" stating the "mines are destroying our environment and "we cannot let the fossil fuel industry do this to us."[88]

The use of words like "tar sands," "dirty oil," "toxic bitumen," and "fossil fuels" by opponents to the pipeline is certainly not a mistake. It is part of a well-coordinated public relations strategy aimed at steering the conversation and debate away from the benefits of oil as a cheap resource towards the harmful effects "tar sands" will have on the environment. Indeed it is undeniable that the images generated in our minds from words like "tar" and "toxic" are far different from those generated by use of the word oil.

D. Advocacy Efforts of Landowners in Keystone's Path: Litigation and Social Media

Similarly, far from Washington the battle for the future of the pipeline is playing out between landowners and TransCanada. This is because even if the presidential permit is granted, TransCanada is still "responsible for gathering the appropriate permits required by different state

[85] *Id.*
[86] Fun Facts: Say No to Tar Sands Pipeline, Natural Resources Defense Council (Mar. 2011); available at http://www.nrdc.org/land/files/TarSandsPipeline4pgr.pdf
[87] *Id.*
[88] *Id.*

agencies" as well as acquiring the land on which the pipeline will ultimately be built.[89] To that end, TransCanada "is seeking right-of-way from thousands of landowners in six states along a 1,375 mile U.S. route stretching from the Montana/Saskatchewan border all the way to Texas."[90] In many states including Nebraska and Oklahoma, TransCanada sent letters to property owners encouraging them to enter into voluntary contracts granting the company easements on their property.[91] At first blush this seemed innocuous, that is until property owners realized the consequence of failing to sign the voluntary agreements. In those very same letters TransCanada stated that if the agreements were not signed within 30 days it would initiate eminent domain proceedings against the property owners.[92]

Thus far this strategy employed by TransCanada has been extremely successfully. According to figures released by TransCanada, nearly "ninety percent of the 5,354 U.S. landowners along the route have completed negotiations on easements."[93] Some of the remaining landowners are in the process of negotiating easements with TransCanada.[94] However, others are challenging whether TransCanada has the right to use eminent domain to compel the acquisition of easements, threatening to bring the entire pipeline to a standstill. A group of one hundred property owners in Montana, South Dakota, Nebraska, Oklahoma and Texas, all in the right of way of the proposed pipeline, composed a letter to President Obama and Secretary of State Clinton detailing their objections not only to the project itself but also, what

[89] Elizabeth McGowan, Some Landowners Mount Legal Bid to Deny Right-Of-Way to Keystone Pipeline (Feb. 28, 2011); available at http://solveclimatenews.com/news/20110228/landowners-lawsuit-oil-sands-keystone-pipeline-transcanada-Oklahoma
[90] *Id.*
[91] Elizabeth McGowan, Some Nebraska Landowners Won't Make Way for Oil Sands Pipeline (Oct. 12, 2010); available at http://solveclimatenews.com/blog/20101012/some-nebraska-landowners-wont-make-way-oil-sands-pipeline
[92] *Id.*
[93] See McGowan, supra note 55.
[94] *Id.*

many feel are deceptive business practices of TransCanada.[95] The letter highlights the environmental risks a spill would pose to communities, landowners and drinking water as well as TransCanada's threats to end negotiations for easement in favor of condemnation proceedings through eminent domain.[96]

One such holdout is Doris Lynn, who resides on her farm with her husband in Bryan County, Oklahoma, near the Texas border.[97] Rather than negotiate an easement, Lynn hired attorney Harlan Hentges to oppose TransCanada's "attempt to deploy eminent domain to condemn about an acre at one corner of the family farm."[98] The proposed pipeline would cut through their land only a half mile from their house a "proximity that makes both of them nervous when it comes to the possibility of a leak or other emergency."[99] Attorney Harlan Hentges, representing the Lynn's, believes that the "prospect of a foreign company using the U.S. law to take land from U.S. citizens" is problematic.[100]

In the six states along the pipeline's path TransCanada has been designated as a "common carrier" granting it the right to exercise eminent domain. While most people assume the right of eminent domain is only employed by governmental entities, the power may be delegated to a private entity through an act of the state legislature.[101] For example, the Texas Natural Resource Code provides that "in the exercise of the power of eminent domain ... a common carrier may enter on and condemn the land, rights-of-way, easements, and property of

[95] Ed Brayton, Landowners Express Concerns Over Keystone Pipeline (Apr. 4, 2011); available at http://michiganmessenger.com/47862/landowners-express-concerns-over-keystone-pipeline.
[96] *Id.*
[97] See McGowan, supra note 55.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] John Allen Chalk Sr. & Sadie Harrison Fletcher, Eminent Domain Power Granted to Private Pipeline Companies Meets With Greater Resistance From Property Owners in Urban Rather Than Rural Areas, 16 Tex. Wesleyan L. Rev. 17 (2009).

any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline."[102] Achieving this designation is monumental because,

> "Once a company has "been declared one of these entities, the rest of the game is relatively simple--the company knocks on the landowner's door and tells him that a pipeline will be laid on his property. At that point, the landowner has relatively few choices. The landowner can attempt to challenge the company's status as a "common carrier,"….using the court system, but the likelihood of the courts overturning the company's designation is very slim. And, as mentioned earlier, the courts have almost no say if they disagree with the Legislature's designation as to whom has the power of eminent domain. In the end, once the Legislature designates the oil and gas company as one of the entities, it is a losing battle for the landowner."[103]

However, Hentges thinks a distinction can be made based on the international and private status of the pipeline. He stated that "a common carrier hauls anybody anywhere for a flat rate and is built to serve the public of the United States" and that public use is defined by the states and the U.S. Constitution. He added that there could be no debate that "the purpose of the pipeline is to carry Canadian bitumen to the Gulf Coast. That is not a common carrier. Keystone XL is like a private car going from Canada to the Gulf Coast, not a bus that goes from Wichita to Dallas."[104] When asked how far the Lynn's were willing to proceed with litigation, Hentges responded they would take the case all the way to the Oklahoma Supreme Court in order to get a definitive ruling and answer on TransCanada's designation as a "common carrier."[105]

With the same goals in mind, property owners in other states are employing a variety of methods to impede TransCanada's efforts. In Nebraska, residents have sought assistance from their state and federal representatives. Although it died in the Nebraska Natural Resources

[102] Amanda Buffington Niles, Eminent Domain and Pipelines in Texas, 16 Tex. Wesleyan L. Rev. 271 (2010); citing Tex. Nat. Res. Code Ann. § 111.019(a), (b) (Vernon 2001).
[103] *Id.*
[104] Elizabeth McGowan, Special Status May Make Keystone Pipeline Impervious to Lawsuits (Mar. 2, 2011); available at http://solveclimatenews.com/news/20110302/landowners-lawsuit-oil-sands-keystone-pipeline-transcanada-part3-common-carrier.
[105] Telephone Interview with Harlan Hentges, Esq., Harlan Hentges Attorney & Counselor at Law (Apr. 15, 2011).

Committee, State Senator, Merton Dierks, introduced a bill in the Nebraska Legislature "that would have required TransCanada to set aside money in a specially designated fund to cover expenses such as pipeline leaks, repairs, and abandonment costs."[106] U.S. Senator Mike Johanns wrote a "harsh letter" to TransCanada's chief executive Russell Girling denouncing the use of eminent domain to threaten landowners in the pipeline's path.[107] In addition, a group called Bold Nebraska, a coalition of anti-pipeline organizations, "launched a toll free tip line, radio ads, and a website that allows citizens and TransCanada employee to confidentially report abusive and questionable acts."[108]

In Texas advocacy organizations such as Public Citizen Texas and Stop Tar Sands Oil Pieplines (STOP) have sprouted up across the State to confront TransCanada's use of eminent domain and have used a variety of social media to spread their message. STOP's website states that members are a "diverse group made up of concerned people and affected landowners….who have come together to make our community safe through awareness and education" of the project.[109] The website also includes a video, posted on YouTube, which tells the story of landowners in the path of the pipeline.[110] The video includes interviews of landowners, pictures of the land, creeks, rivers, ponds, and forests that the pipeline would disturb, providing a visual representation of the impact the pipeline could have.[111] In the video, founder of STOP, David Daniels, stated that "the way the company is treating us we don't have any peace of mind."[112] He added "the company really needs to prove to me and many other people that this line is

[106] McGowan, supra note 57.
[107] *Id.*
[108] *Id.*
[109] Stop Tarsands Oil Pipeline (STOP); available at http://stoptarsands.org/about.
[110] *Id.*
[111] *Id.*
[112] *Id.*

necessary and that hasn't been done."[113] In addition to their website and the YouTube video, STOP also has a Facebook Page and it isn't alone in that regard.[114] Another group called Texans Against Tar Sands also has a Facebook page with similar content.[115]

Property owners and concerned citizens have also been extremely active in Montana as well. In fact, the Major Facility Siting Act passed by the state legislature has done more to protect property owners in Montana than any other state.[116] The legislature declared the purpose of the Act was to

> (a) ensure protection of the state's environmental resources, including but not limited to air, water, animals, plants, and soils;
> (b) ensure consideration of socioeconomic impacts;
> (c) provide citizens with the opportunity to participate in facility siting decisions; and
> (d) establish a coordinated and efficient method for the processing of all authorizations required for regulated facilities under this chapter.[117]

While it does not prevent a taking through eminent domain per se, it does provide "more opportunities for landowner and citizen input before condemnation becomes an issue."[118]

In addition, to activity pursuant to the Major Facility Siting Act, a group of 45 property owners along the Keystone XL route was formed by the Northern Plains Resource Council in order to compile a four-page document to guide homeowners during right-of-way negotiations with TransCanada.[119] Subsequently, the group requested that

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[113] *Id.*
[114] Stop Tarsands Oil Pipeline; online at http://www.facebook.com/?ref=logo#!/pages/Stop-Tarsands-Oil-Pipelines/157160017661362
[115] Texans Against Tar Sands; online at http://www.facebook.com/?ref=logo#!/pages/Texans-Against-Tar-Sands/107142982663895
[116] Elizabeth McGowan, In Keystone XL Pipeline Negotiations, Charges of Bad Faith Tactics (Mar. 1, 2011); available at http://solveclimatenews.com/news/20110301/landowners-lawsuit-oil-sands-keystone-pipeline-transcanada-montana-south-dakota-eminent%20domain; compare with South Dakota; where an attempt to advance similar legislation was unsuccessful after the lead sponsor dropped his commitment to champion the bill.
[117] Major Facility Siting Act, Mont. Code Ann. § 72-20-102.
[118] See McGowan, supra note 84.
[119] *Id.*

the Montana Department of Environmental Quality include the conditions[120] outlined in the document as part of the permitting process for the pipeline.[121]

VI. Conclusion

The ultimate question of whether the advocacy efforts of opponents to the Oil Sands and the Keystone XL Pipeline have been successful is yet to be determined. To that point, it is important to recognize that the measure of success is different for the various stakeholders opposed to the pipeline. While some only see success as a complete ban on the construction of the pipeline, others are fighting for fairness in the negotiation process, transparency throughout construction, increased safety measures and the development of an emergency response plan in the event of a small scale or catastrophic spill.

Moreover, the fight over the oil sands and the construction of pipelines to transport them is still in its infancy. While Canada has been mining oil sands for decades, in the United States where the deposits are significantly smaller than those in Canada, development is just beginning. There is already controversy surrounding the opening of the first oil sands mine in Utah by a Canadian company, Earth Energy Resource Inc.[122] As the world's non-renewable energy resources continue to decrease while demand is increasing, how will civilization power itself? In the wake of the Deepwater Horizon blowout in the Gulf of Mexico and the dangers of Nuclear energy

[120] The conditions including "responsibilities and liabilities with regard to eminent domain; pipeline design, safety and construction; mitigation and spill cleanup." More specifically, one specific proposal sought to require that TransCanada "obtain all of its state and federal permits before resorting to eminent domain in Montana."
[121] *Id.*
[122] Mark Whittington, Utah Tar Sands Mining Proposal Stirs Controversy from Environmentalists (Apr. 12, 2011); available at http://news.yahoo.com/s/ac/20110412/pl_ac/8279893_utah_tar_sands_mining_proposal_stirs_controversy_from_environmentalists.

demonstrated after the Tsunami in Japan the question has only become more difficult and complex.[123]

As development of energy sources and the production of corresponding energy projects continue throughout the United States the same issues and concerns of environmental groups and residents along the Keystone XL Pipeline route will be shared by citizens across the country. In order to ensure a fair determination of the benefits of energy production and likewise, a weighing of the potential health and environmental costs, it is vital that citizens understand the many forms advocacy can take, as well as the necessity of a complex advocacy strategy to ensure and achieve the success they desire.

[123] David Dittman, Japan, US Nuclear Options and the Canadian Oil Sands, Investing Daily (Mar. 25, 2011); available at http://www.investingdaily.com/ce/18485/japan-us-nuclear-options-and-the-canadian-oil-sands.html.