Sierra Club * Bold Nebraska * Center for Biological Diversity * For Love of Water * Friends of the Earth * Institute for Agriculture and Trade Policy * Labor Network for Sustainability * Michigan Environmental Council * Minnesota Environmental Partnership * Minnesota Public Interest Research Group * Michigan Land Use Institute * National Wildlife Federation * Natural Resources Defense Council * Oil Change International * Rainforest Action Network * 350.org

January 29, 2014

The Honorable John Kerry
Secretary of State
U.S. Department of State
2201 C St, NW
Washington, DC 20520

Dear Mr. Secretary,

On behalf of the Sierra Club, Bold Nebraska, Center for Biological Diversity, For Love of Water, Friends of the Earth, Institute for Agriculture and Trade Policy, Labor Network for Sustainability, Michigan Environmental Council, Michigan Land Use Institute, Minnesota Environmental Partnership, Minnesota Public Interest Research Group, National Wildlife Federation, Natural Resources Defense Council, Oil Change International, Rainforest Action Network, and 350.org**,** we hereby request that the Department of State prepare a supplemental environmental impact statement ("EIS") for the Keystone XL pipeline that analyzes, among other things, the cumulative climate impacts of the multiple tar sands pipeline proposals currently pending before the agency.

The Department of State (or the "Department") is considering at least two Presidential Permit applications for tar sands pipeline projects that are designed to bring tar sands crude oil to U.S. refineries and to world markets. TransCanada's proposed Keystone XL pipeline project would involve the construction of a new pipeline that would transport at least 830,000 barrels per day (bpd)[1] of tar sands crude oil from Alberta to Gulf Coast refineries. Enbridge's proposed Alberta Clipper pipeline (Line 67) expansion would increase the capacity of an existing pipeline from 450,000 bpd to 880,000 bpd, a capacity increase of 430,000 bpd.

The Department's Draft Supplemental Environmental Impact Statements ("DSEIS") for Keystone XL downplayed the project's connection to increased tar sands development in Alberta and associated climate change impacts. It did so by asserting that if Keystone XL were not built, other tar sands infrastructure projects would come online that would also increase export capacity and allow for uninhibited tar sands growth in coming decades. In other words, the

[1] As set forth in Sierra Club*, et. al.'s* comment letter of April 22, 2013 at page 190, the capacity of Keystone XL could be expanded to 900,000 bpd in the future upon approval by PHMSA.

Department reasoned that a dramatic increase in tar sands development and associated climate emissions is inevitable because the industry will find other avenues to get their product to market in absence of Keystone XL.

However, the announcement of the Alberta Clipper expansion further undercuts this reasoning. The Department now has approval/disapproval authority over not one but two major pipeline projects that would cumulatively facilitate an even greater increase in tar sands development. If both projects were approved, it would represent a total capacity increase of 1.3 million bpd. The Department cannot plausibly argue that other infrastructure projects are inevitable, and that it is powerless to affect the rate of tar sands development in Alberta, when it is simultaneously deciding whether to approve the second-largest cross-border tar sands pipeline proposal.

For the reasons set forth herein, the Department must prepare a Supplemental Environmental Impact Statement (SEIS) for Keystone XL that considers the cumulative impacts of Alberta Clipper and other reasonably foreseeable pipeline. In addition, a supplemental EIS should consider the significant new information, such as information that shows that the Keystone XL pipeline would lead to increased tar sands development and increased greenhouse gas (GHG) emissions.

Keystone XL Must be Evaluated with Alberta Clipper and Other Reasonably Foreseeable Projects

A. The National Environmental Policy Act Requires an Analysis of the Cumulative Effects of Reasonably Foreseeable Projects

The National Environmental Policy Act (NEPA) requires that an EIS consider the cumulative impacts of the proposed federal agency action. Cumulative impacts are defined as: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The Keystone XL DSEIS acknowledges that requirement at page 1.4-2.

NEPA also requires agencies to evaluate, in a single environmental impact statement, all cumulative actions. 40 C.F.R. § 1508.25. Cumulative actions are defined as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.*[2]

[2] Agencies may also choose to analyze similar actions in a single EIS, which are actions "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement." *Id.*

The Supreme Court has recognized that "when several proposals ... that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together."[3]

In *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, the court held that the U.S. Forest Service violated NEPA by failing to analyze the cumulative impacts of depleting existing old-growth habitat on four separate logging projects.[4] Similarly, in *W. Land Exch. Project v. U.S. Bureau of Land Mgmt.*, the court held that BLM failed to consider the cumulative impacts of opening a 6,478-acre parcel of land to development where there were other concurrent proposals before that agency that would result in the total development of 36,747 acres into a population center of over 200,000 residents.[5] The court rejected BLM's argument that it need not analyze cumulative impacts of all of these proposals because rapid growth of the region was already occurring and was expected to continue. Instead, the court held that "[i]f several actions taken together have a cumulatively significant effect, this must be analyzed in an EIS."[6]

B. Enbridge's Alberta Clipper Expansion Proposal

In January 2013, during the Keystone XL review process, the Department of State announced that Enbridge submitted an application to amend its existing Presidential Permit for the Alberta Clipper Pipeline (also known as "Line 67"). 78 Fed. Reg. 144. The amendment would allow Enbridge to increase Alberta Clipper's operating capacity from 450,000 bpd to 880,000 bpd of heavy crude oil. The expansion would involve an initial capacity increase of 120,000 bpd (to 570,000 bpd) by adding horsepower to existing pump stations, and a second capacity increase to 880,000 bpd by adding additional pumping units.

On March 15, 2013, the Department announced that it would prepare a supplemental EIS, which would supplement the final EIS prepared for the project in June 2009, in order to "evaluate the impacts associated with operating Line 67 at its full design capacity of 880,000 bpd." 78 Fed. Reg. 16565, 16566. A coalition of environmental organizations submitted scoping comments to the Department on May 13, 2013, which urged a broad analysis of the Alberta Clipper expansion's impact on tar sands development when combined with Keystone XL and other pipeline proposals.[7] For example, commenters stated the following:

> Enbridge's proposal to almost double the operational capacity of the Line 67 Pipeline, from 450,000 bpd to 880,000 bpd, would enable further expansion of tar

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[3] *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976); *City of Tenakee Springs v. Clough,* 915 F.2d 1308, 1312 (9th Cir. 1990) (where "several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS."); *Earth Island Institute v. U.S. Forest Service,* 351 F.3d 1291, 1306 (9th Cir.2003) (NEPA may require a comprehensive EIS when "several concurrent proposals have a cumulative or synergistic impact."); *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1152 (9th Cir.1998).

[4] 137 F.3d 1372, 1378-80 (9th Cir. 1998).

[5] 315 F. Supp. 2d 1068, 1094-95 (D. Nev. 2004).

[6] *Id. at* 95 (citing *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1214 (9th Cir.1998)).

[7] Attached as Exhibit A.

> sands development in the Western Canada Sedimentary Basin (WCSD) in the province of Alberta. The SEIS should specifically address the cumulative climate change impacts of increased tar sands development and calculate greenhouse gas (GHG) emissions released in the extraction process as part of its GHG accounting.
>
> …
>
> Additionally, the SEIS cumulative analysis should include impacts from TransCanada's Keystone XL Pipeline—both its proposed northern segment and Gulf Coast segment (currently under construction). The Keystone XL and Line 67 pipelines, as proposed, would carry a total of 1.7 million barrels per day of tar sands crude oil from the WCSD in Canada to various refineries in the U.S. The upstream and downstream impacts of these two large-scale projects should be considered together in the Expansion Project SEIS. Their cumulative impacts on the environment and joint roles in perpetuating U.S. reliance on carbon-intensive fossil fuels must be addressed.

These scoping comments for the Alberta Clipper expansion were submitted to the Department after the close of the comment period for the Keystone XL DSEIS, which ended on April 22, 2013.

C. The Keystone XL Draft Supplemental Environmental Impact Statement Fails to Consider the Alberta Clipper Expansion

The Keystone XL DSEIS fails to address the cumulative effects of Keystone XL and Alberta Clipper, especially the growth-inducing effects that the combined 1.3 million bpd of additional pipeline capacity would have on the rate of tar sands extraction in Canada.

The DSEIS cumulative effects assessment purports to consider the "impacts of the proposed Project in combination with …other 'past, present, and reasonably foreseeable future' projects," which includes other "existing, under construction, and planned linear energy transportation systems, including … crude oil pipelines." DSEIS, at 4.15-1. The DSEIS states that "[f]uture projects and activities considered in the [cumulative effects assessment] are those that are reasonably likely to be constructed or take place in the foreseeable future (based on permit applications or similar indication of significant intent). DSEIS at 4.15-18.

However, inexplicably, the impacts of the Alberta Clipper expansion are never mentioned in the DSEIS' cumulative effects assessment. Tables 4.15-1, 4.15-2, and 4.15-3 list the past, present, and future projects considered in the cumulative effects assessment. Neither the original Alberta Clipper project nor the proposed Alberta Clipper expansion is listed or discussed anywhere in the cumulative impacts assessment.

This is particularly surprising given that the DSEIS acknowledges that the Department had already received the Alberta Clipper application and that the project is under review when the DSEIS was written:

> Enbridge has made regulatory filings to expand one of its heavy crude pipelines, Line 67 (also known as Alberta Clipper), from Hardisty Alberta, to Superior, Wisconsin, by 120,000 bpd to 570,000 bpd, with potential to go to 800,000 bpd…This includes an application for a new Presidential Permit currently under review by the Department.

DSEIS at 1.4-31.

Instead, the DSEIS narrowly focusses on the Keystone XL proposal and wrongly asserts that tar sands development will increase at the same rate irrespective of whether Keystone XL alone is approved or not. For example, the DSEIS concludes that the "[a]pproval or denial of *any one* crude oil transport project, including the proposed Project, remains unlikely to significantly impact the rate of extraction in the oil sands…" DSEIS, at 1.4-1 (emphasis added); *see also* DSEIS, at 1.4-6, 1.4-1 ("[T]he proposed Project is unlikely to significantly affect the rate of extraction in the oil sands or in U.S. refining activities"); DSEIS, at 1.4-14 ("It is likely that increasing amounts of WCSB crudes will reach Gulf Coast refiners whether or not the proposed Project goes forward."); DSEIS at 4.15-79 ("it is unlikely that the proposed Project construction would have a substantial impact on the rate of WCSB oil sands development.").

The DSEIS assumed that if Keystone XL is not built, some other infrastructure alternative would be built (either pipeline or rail or some combination) that would also have the effect of increasing tar sands development at the same rate as Keystone XL. Based on this faulty conclusion, the DSEIS downplays the Keystone XL's significant climate impacts. However, nowhere does the DSEIS discuss whether the proposed Keystone XL pipeline, combined with the proposed Alberta Clipper expansion, would have a substantial impact on the rate of tar sands development.

D. The Department of State Must Evaluate the Cumulative Impacts of Alberta Clipper and Other Proposals in the Keystone XL EIS

The Department has pending before it two Presidential Permit applications for major tar sands pipeline projects. The Department is engaged in two separate NEPA processes, preparing EISs for each pipeline. NEPA requires the Department to analyze the cumulative impacts of the two pipelines together in the Keystone XL EIS before it is finalized.

This need to analyze the two projects together is especially important and appropriate given the Department's assertion that Keystone XL will not have significant climate impacts because, in its absence, some other pipeline proposal (such as Alberta Clipper) would inevitably be approved that would also facilitate increased tar sands production. This widely-criticized position is even less credible now that the Department itself is also tasked with deciding the fate of the Alberta Clipper pipeline proposal.

This is precisely the reason that NEPA requires a consideration of cumulative actions and cumulative effects in a single EIS. If not for this requirement, an agency could simply cite other environmentally destructive projects and claim that there is nothing its decision could possibly do to affect the environment. In this case, the Department is concurrently weighing two major pipeline proposals, and a decision to approve each would have cumulatively significant environmental impacts.

In addition to Alberta Clipper, the Department must analyze other reasonably foreseeable pipeline proposals in the Northeast and Northwest that would cumulatively facilitate increased tar sands development in Alberta. For example, in 2008, the Portland Pipe Line Corporation ("PPCL") sought to reverse the flow of an existing 18-inch pipeline between Portland, Maine, and Montreal, Canada, in order to transport approximately 200,000 bpd of tar sands crude oil south to be loaded onto oil tankers in South Portland, Maine. The State Department initially informed PPCL that it would not need to amend its Presidential Permit issued in 1999 for this change in operation. However, in an August 13, 2013 letter to Enbridge, the State Department changed its position and suggested that a new Presidential Permit may be required for a reversal of the PPCL pipeline.[8] Thus, this is a reasonable foreseeable project that must also be analyzed as part of the cumulative effects of the Keystone XL pipeline.

Finally, the DSEIS asserts that even if no additional pipeline capacity were added, rail shipments of crude oil could increase at a rate that would have the same growth-inducing effects on tar sands development.[9] In other words, the DSEIS claims that crude-by-rail shipments could replace the 880,000 bpd capacity of Keystone XL if the latter is not built. Now that the Department is also evaluating the Alberta Clipper expansion, the proper inquiry should be whether rail shipments of tar sands oil could economically and logistically replace the 1.3 million bpd of capacity that the two pipelines would cumulatively represent. As set forth in our comment letters of April 22, 2013 and June 24, 2013, and as demonstrated by the significant new information highlighted below, it is becoming increasingly clear that rail cannot serve as a replacement for these massive pipeline projects.

<u>Significant New Information and Changed Circumstances Requires a Supplemental EIS</u>

NEPA requires an agency to prepare a supplement to an EIS when significant new information or changes in a project implicate significant changes in the environmental analysis. The NEPA regulations require that:

> (1) Agencies…[s]hall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[10] (2) [Agencies] may also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.[11]

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[8] Attached as Exhibit B.

[9] *See, e.g.*, DSEIS at 1.4-1 (Rail and supporting non-pipeline modes should be capable, as was projected in 2011, of providing the capacity needed to transport all incremental Western Canadian and Bakken crude oil production to markets if there were no additional pipeline projects approved).

[10] 40 C.F.R. § 1502.9 (1978).

[11] 40 C.F.R. § 1502.9 (1978).

Courts have recognized that the use of the word "shall" indicates that supplemental EISs are mandatory.[12] If the new information demonstrates that the agency action will "affect the quality of the human environment in a significant manner or to a significant extent not already considered"; *i.e.*, that it "provides a seriously different picture of the environmental landscape" and the agency action has not yet occurred, then the agency must prepare a supplemental environmental impact statement.[13] Information is considered new when it is "intervening information that became available after the preparation of the initial EIS," which does not merely "confirm information already in the record."[14]

An agency must take a "hard look" at the new information and evaluate whether or not the initial EIS and its findings should be revisited.[15] A court reviews an agency's decision as to whether a supplemental EIS is required under the Administrative Procedure Act's ("APA") arbitrary and capricious standard.[16]

When determining if new circumstances or new information require an agency to issue a supplemental EIS, a court should consider the following factors: (a) the environmental significance of the new information; (b) its probable accuracy; (c) the degree to which the agency considered the new information and considered its impact; and (d) the degree to which the agency supported its decision not to supplement its impact statement with explanation or additional data.[17]

On June 24, 2013, the Sierra Club, NRDC, National Wildlife Federation, Oil Change International, Bold Nebraska, and the Center for Biological Diversity requested that the State Department prepare a supplemental environmental impact statement based on significant new evidence of inaccuracy in the Draft Environmental Impact Review (DEIS) from the scientific community, industry analysts, and other federal agencies. That letter details errors in DEIS's analysis, in particular its assertions that increased shipments of crude oil by rail would replace the capacity of Keystone XL if the pipeline were rejected, and that rapidly increasing domestic production of oil will not affect the demand for heavy Canadian crude oil in Gulf Coast refineries.

Since then, the following significant new circumstances and/or information relevant to environmental concerns and bearing on the proposed action or its impacts has arisen that must be considered in a supplemental EIS.

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[12] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989) (recognizing the duty where there are significant new circumstances or information); *see also Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996) ("The use of the word 'shall' is mandatory, not precatory.").
[13] *State of Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *see also Natural Res. Def. Council v. Lujan*, 768 F. Supp. 870, 886 (D.D.C. 1991) (a new report that contained a substantially different estimate of the amount of oil expected to be found in Alaska required the preparation of an SEIS).
[14] *Greer Coalition, Inc. v. U.S. Forest Service*, 470 Fed. Appx. 630, 633–34 (9th Cir. 2012).
[15] *Marsh,* 490 U.S. at 373-74 (1989).
[16] *Id*. at 375-76.
[17] *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025 (9th Cir. 1980); *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983).

A. The Alberta Clipper Proposal

As set forth above, the announcement of the Alberta Clipper expansion constitutes new information that must be analyzed in a supplemental EIS. The Department published the Keystone XL DSEIS on March 8, 2013.[18] While the DSEIS acknowledges its receipt of the amended Alberta Clipper Presidential Permit application in January of 2013, the DSEIS fails to discuss the cumulative effects of Alberta Clipper and Keystone XL. Furthermore, the Department did not announce that it would prepare a supplemental EIS for the Alberta Clipper expansion until after the publication of the Keystone DSEIS, on March 15, 2013. The undersigned environmental organizations alerted the Department of its obligation to consider the cumulative effects of the two projects in their Alberta Clipper scoping comments of May 13, 2013. As such, the Department's concurrent NEPA process for the Alberta Clipper expansion constitutes new information that must be considered in a supplemental EIS.

B. New Information Showing That Keystone XL Will Directly Contribute to Tar Sands Expansion and Increased Global Carbon Pollution

Keystone is a linchpin for tar sands development, a point that has been reiterated by multiple economic analysts. The International Energy Agency's 2013 World Energy Outlook,[19] released on November 13, states that the oil industry's plan for tar sands expansion "is contingent on the construction of major new pipelines to enable the crude to be exported to Asia and the United States" and specifically cites the Keystone XL proposal as critical to allowing these expansion efforts. The International Energy Agency ("IEA") is a science-based, independent international body founded by the members of the Organization for Economic Cooperation and Development, including the U.S. and Canada, to ensure global energy security and environmental protection. The Department must evaluate the analysis and conclusions of the IEA's 2013 World Energy Outlook, which directly contradicts the DEIS's position that tar sands development will increase at the same rate with or without new pipelines.

In addition, a recent working paper by the Stockholm Environmental Institute analyzed a number of scenarios to answer the question of "how Keystone XL might affect the global oil market by increasing supply, decreasing prices, and thus increasing global oil consumption."[20] The study concludes that the "approval of the Keystone XL pipeline could lead (depending on assumptions about how much of the oil would otherwise make it to market) to an increase in global GHG emissions four times as big as prior analyses have concluded and potentially counteract some of the flagship emission *reduction* policies of the U.S. government."[21]

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[18] 78 Fed. Reg. 15012 (March 8, 2013).
[19] Stockman, Lorne. "IEA confirms tar sands pipelines are key to production growth." *Oil Change International. November 12, 2013.*
http://priceofoil.org/2013/11/12/iea-confirms-tar-sands-pipelines-key-production-growth/
[20] Peter Erickson and Michael Lazarus, Greenhouse gas emissions implications of the Keystone XL pipeline (Stockholm Environmental Institute, December 2013), attached as Exhibit D.
[21] *Id*. at 17 (emphasis in original).

In December 2013, Barclays Bank released their "Global 2014 E&P Spending Outlook" for their projections and recommendations for the new year. In the report, they claim that, "Approval of the northern leg of the Keystone XL pipeline, which will transport oil from Alberta to Cushing, remains the most significant catalyst for improving takeaway bottlenecks, in our view."[22] This sentiment has also been echoed by top executives in the oil industry.[23] TransCanada President and CEO Russ Girling recently told a business audience that developing tar sands is an opportunity that's going to be lost for decades to come" if new pipelines do not immediately come online.[24] Brian Ferguson, the chief executive of Cenovus Energy Inc., a large Canadian oil company that plans to nearly triple its tar sands production to reach 1 million bpd by 2023, told the Globe & Mail: "if there were no more pipeline expansions, I would have to slow down."[25]

Additionally, a briefing memo for Canada's Natural Resources Minister, Joe Oliver, stated that Keystone XL would lead to increased crude oil production.[26] Oliver's memo stated that "in order for crude oil production to grow, the North American pipeline network must be expanded through initiatives, such as the Keystone XL Pipeline project."[27] This information came to light in late August, after the documents were released to the Pembina Institute under Canada's Access to Information Act.

In addition to these oil industry executives, investors are increasingly questioning the reliability of tar sands development in Alberta. Statoil ASA, a Norwegian company, is currently contemplating whether to expand their production in the tar sands or develop an entirely new crude oil production center on Canada's east coast. Steve Tungesvik, President and CEO of Statoil, said that he and other companies are "reluctant" in invest in tar sands in Alberta due to the current uncertainty about export pipelines. He says that activity has decreased "because people want to have some answers."[28] Statoil is not alone; Suncor Energy Inc. and Cenovus Energy Inc. also recently created more conservative financial strategies to develop the tar sands.[29]

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[22] "Global 2014 E&P Spending Outlook". *Barclays*. December 9 2013. http://www.pennenergy.com/content/dam/Pennenergy/onlinearticles/2013/December/Global%202014%20EP%20Spending%20Outlook.pdf

[23] Mccarthy, Shawn and Blackwell, Richard. "Oil industry rebuts 'trash-talking' celebrity critics". *The Globe and Mail.* January 15 2014. http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/oil-industry-rebuts-trash-talking-celebrity-critics/article16357980/

[24] Spears, John. "Oilsands development is now or never, industry executives say". *The Star*. January 15 2014. http://www.thestar.com/business/economy/2014/01/15/now_or_never_for_oilsands_executives_say.html

[25] Mccarthy, Shawn and Blackwell, Richard. "Oil industry rebuts 'trash-talking' celebrity critics". *The Globe and Mail.* January 15 2014. http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/oil-industry-rebuts-trash-talking-celebrity-critics/article16357980/

[26] "Canadian officials admit pipeline would increase oil sands production". *Greenwire.* August 26 2013. http://www.eenews.net/greenwire/stories/1059986427/search?keyword=keystone+xl

[27] *Id*.

[28] Lewis, Jeff. "Statoil may pick East Coast over Alberta for new expansions". Financial Post. December 16 2013. http://business.financialpost.com/2013/12/16/statoil-may-pick-east-coast-over-alberta-for-new-expansions/?__lsa=f5e9-1f5e

[29] *Id*.

C. New Information Showing That Rail Cannot Replace Keystone XL and Other Tar Sands Pipelines

The Department's position that crude-by-rail is a viable alternative to pipelines has been recently challenged by the oil industry itself. A Reuters article in October found that multiple oil executives agree that rail is a supplement to pipelines, not a replacement. Gary Kubera, the owner of crude-by-rail shipper Canexus, stated: "We can move large volumes, but it will always be a niche service."[30] Stew Hanlon, the president of Gibson Energy Inc., a company that is proposing a rail terminal in Alberta, stated that, "we remain very, very confident that rail is here to stay as not a replacement for pipelines, but as a supplement to pipelines."[31]

Aside from cost and lack of capacity, the dangers of transporting oil by rail have recently become a growing and urgent concern. There have been horrific rails accidents within the last year in North Dakota, Alabama, New Brunswick, and Quebec. The train derailment in Lac Megantic, Quebec, killed 47 people and incinerated a large portion of the town. [32]Additionally, U.S. trains that shipped crude oil spilled 1.15 million gallons in 2013—more than the spills from the last four decades combined.[33]

This issue has become urgent enough that on September 6, 2013, the Pipeline and Hazardous Materials Safety Administration (PHMSA) announced that they were considering revisions to the Hazardous Materials Regulations (HMR) "to improve the regulations applicable to the transportation of hazardous materials by rail."[34] The rules are expected to be finalized early next year. During the public comment period, the Association of American Railroads argued that the PHMSA process should require retrofits for 72,000 older tanker cars and minor upgrades for 14,000 additional cars. The Association also wants to phase out any cars that did not meet the safety requirements.[35] A large portion of these upgrades would include the DOT-111 model, which represents approximately 85 percent of the nation's 92,000 tank cars. The

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[30] Rucker, Patrick. "Final Keystone review assesses potential of oil-by-rail". *Reuters*. October 29 2013. http://in.reuters.com/article/2013/10/29/usa-keystone-rail-idINL1N0I72G720131029

[31] *Id*.

[32] Associated Press. "US officials call for more safety for oil by rail." *The Washington Post.* January 16 2014.http://www.washingtonpost.com/business/us-officials-call-for-more-safety-for-oil-by-rail/2014/01/16/0d41780a-7ee4-11e3-97d3-b9925ce2c57b_story.html

[33] "Trains spilled more oil last year than in previous 4 decades--data". *Greenwire.* January 21 2014. http://www.eenews.net/greenwire/stories/1059993216/search?keyword=crude+by+rail

[34] http://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=41e8c4a1c0cf0410VgnVCM100000d2c97898RCRD&vgnextchannel=c7c1d95c4d037110VgnVCM1000009ed07898RCRD&vgnextfmt=print

[35] Sobczak, Blake. "Rail industry group says tougher rules needed for tank cars hauling oil". *E&E Publishing, LLC*. November 15 2013. http://www.eenews.net/stories/1059990536

DOT-111 car has come under scrutiny because it tends to puncture when trains crash.[36] The cost estimates for these retrofits exceed $1 billion dollars.[37]

On January 22, 2014, three more federal agencies weighed in on the matter. The National Transportation Safety Board, in a rare joint recommendation with the Transportation Safety Board of Canada, warned that accidents involving increasing amounts of crude oil shipped by rail could result in "major loss of life."[38] The agencies urged their governments to impose new safety rules, such as better route planning, oversight, and emergency response planning for trains carrying hazardous materials such as crude oil.[39] In addition, Transportation Secretary Anthony Foxx announced that the oil and rail industry had agreed to start implementing voluntary changes aimed at accident prevention within the next 30 days following recent meetings.[40] Changes may include altering routes through major metropolitan areas and reducing the speed of trains.

These developments suggest that much-needed safety improvements to the crude-by-rail industry are inevitable, which will undoubtedly increase the costs of shipping tar sands crude oil from Alberta to U.S. Gulf Coast refiners. These added costs would make crude-by-rail an even less viable alternative to pipelines as PHMSA phases in new regulations.

D. Tar Sands Pipelines are Inadequately Regulated and Unsafe, and TransCanada Has Demonstrated a Dismal Safety Record

In November, Public Citizen released evidence that 125 segments of TransCanada's tar sands pipeline through Texas (which was originally proposed as part of Keystone XL) had to be excavated and replaced by TransCanada because of dents, failed welds, and other failures.[41] Independent experts contend that these problems are a result of quality control problems. These construction problems should be considered, along with TransCanada's record of spills and leaks on the Keystone I pipeline, in the environmental review.

In addition, the Department must consider the higher environmental threat posed by tar sands pipelines and the record of operators to adequately address these risks. PHMSA's November 6 "Notice of Probable Violation" cites Exxon for multiple failures to adequately detect, correct, and report problems with the Pegasus tar sands pipeline, and levied a $2.7 million fine.[42] The Department of Interior announced on the same week a $3.4 million fine for Exxon's 2011 crude oil pipeline spill in Montana.[43] The difficulty detecting tar sands pipeline failures and the irresponsibility of tar sands operators is again demonstrated by a North Dakota tar sands

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[36] Johnston, Rory. "The tank car that's stirring up rail safety debate". *CNBC News*. January 16 2014. http://www.cnbc.com/id/101341864

[37] Sobczak, Blake. "Rail industry group says tougher rules needed for tank cars hauling oil". *E&E Publishing, LLC*. November 15 2013. http://www.eenews.net/stories/1059990536

[38] http://www.startribune.com/politics/national/241666491.html

[39] *Id*.

[40]http://www.washingtonpost.com/business/us-officials-call-for-more-safety-for-oil-by-rail/2014/01/16/0d41780a-7ee4-11e3-97d3-b9925ce2c57b_story.html

[41] Attached as Exhibit E.

[42] Attached as Exhibit F.

[43] Attached as Exhibit G.

pipeline spill in September that was not detected by Tesoro Logistics, which subsequently failed to report the spill to authorities for 11 days after it was identified by a farmer.[44]

The Department of State failed to account for the higher likelihood and increased danger to human health, drinking water, and air quality from tar sands pipeline spills. In addition, the failure of leak detection sensors and the subsequent mishandling of spill response points to systematic safety problems with TransCanada and other tar sands pipeline operators, and inadequate oversight by PHMSA that must be considered in a review of the environmental risks of the proposed pipeline.

E. Contractor Conflicts of Interest and Failure by the State Department to Ensure a Thorough and Unbiased Analysis Invalidate Findings of the DEIS

State Department documents released to the Sierra Club and Friends of the Earth in late 2013 demonstrate that the agency failed to evaluate possible conflicts of interest that should have prevented the hiring of Environmental Resources Management (ERM) to perform the environmental review of the Keystone XL pipeline. ERM employees have worked on TransCanada projects and ERM clients potentially stand to gain financially from construction of the controversial pipeline. In addition, ERM is a dues-paying member of the American Petroleum Institute (API), which so far has spent over $20 million lobbying in favor of Keystone XL on behalf of ERM and its other oil industry members.

The State Department Office of Inspector General, which found fault with the agency's hiring of Cardo-Entrix for an earlier review of the project, is again investigating possible conflicts of interest and whether the Department failed to independently verify the statements of contractors and TransCanada.[45]

In March of 2013, the Sierra Club requested all documents showing the process the Department followed in screening ERM for potential conflicts of interest pursuant to the Freedom of Information Act. After the Department failed to provide the documents in a timely manner, the Sierra Club filed a lawsuit in U.S. District Court for the Northern District of California. The lawsuit was settled in November of 2013 after the Department agreed to produce the documents on an expedited basis.

The documents that the Sierra Club has received demonstrate that the Department again failed to conduct any independent inquiry into potential conflicts of interest between ERM and oil industry companies that might stand to benefit from Keystone XL, including TransCanada. This new information demonstrates the need for the Department to wait until the Inspector General completes its investigation, and then prepare an independent SEIS that is free of potential bias.

Conclusion

[44] Attached as Exhibit H.
[45] Attached as Exhibit I.

We respectfully request that the Department of State prepare a supplemental EIS for the Keystone XL pipeline that analyzes this significant new information described herein, including the cumulative impacts associated with the Alberta Clipper expansion proposal, as required by NEPA. *See, e.g.*, 40 C.F.R. §§ 1502.9, 1508.25, 1508.7.

Respectfully submitted,

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