GOVERNMENT MATTERS

March 26, 2013 Vol. 1, No. 6

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Congressional Bills Seek to Cut Public Scrutiny and Participation Out of Keystone XL Decision

The Keystone XL pipeline is a controversial project that would transport tar sands oil (which is more corrosive than crude oil) from Canada through America's heartland to Texas, creating air, water, and public health risks in its wake. In the past two weeks, lawmakers have introduced bills in both the House and Senate to strip the decision on the Keystone XL pipeline away from the Obama administration. The bills, if passed, would short-circuit the regulatory permitting process and prevent the public from voicing their concerns about the public health and environmental risks of the pipeline.

Background

Traditionally, the process of approving trans-border pipelines (including TransCanada Corp's Keystone XL pipeline) has been handled by the State Department because the projects are international and are regulated by at least two sets of standards and laws. The U.S. regulatory process requires federal agencies to review the environmental impacts of a proposed pipeline project and to publish their assessments for public comment before a decision is made. Environmental organizations

and communities living near the proposed path of the pipeline have raised significant concerns about the potential risks the proposed project presents to the health and safety of communities the pipeline will pass through.

On March 1, the State Department released its draft Supplemental Environmental Impact Statement (SEIS) on the pipeline. The public has until April 22 to comment on the environmental impact statement. President Obama is not expected to make a final decision on whether to approve the pipeline until after the State Department concludes its review process, meaning that a final decision would probably not be reached for several months.

Legislative Shortcut

However, legislators in both the House and Senate seem unwilling to wait for the review and public comment period to play out and have instead proposed bypassing the normal permitting process. On March 14, Sens. John Hoeven (R-ND) and Max Baucus (D-MT) introduced legislation (S. 582) that would enable Congress to approve the Keystone XL without President Obama's signature. The next day, Rep. Lee Terry (R-NE) introduced a similar measure (H.R. 3) in the House.

Hoeven believes the Senate bill has the support of more than 50 senators, though 60 votes would be needed for passage. Rep. Fred Upton (R-MI), chairman of the House Energy and Commerce Committee, said he expects a vote on the bill by the end of May.

This congressional effort to get around the regulatory process is at odds with public opinion. A new national poll found that the majority of Americans oppose congressional intervention to approve the Keystone XL. The study, commissioned by the Center for Biological Diversity, finds that over half of Americans surveyed are concerned about the pipeline's impact on water and wildlife.

"Americans take a pretty dim view of Congress, and most don't want it anywhere near the Keystone project," said Jerry Karnas in the Center for Biological Diversity's press release. "Keystone XL is a dangerous project for wildlife, climate and our environment. It deserves to be carefully considered by those who understand the long-term impacts, not hastily decided by politicians who're easily swayed by the oil industry's army of lobbyists."

Unfortunately, this is not the first time Congress has tried to bypass the permitting process and pressure President Obama to approve Keystone XL. In late 2011, Republicans inserted language into a payroll tax cut bill that gave the president a 60-day deadline to make a decision on whether to approve the pipeline. In January 2012, at the end of the deadline, Obama rejected the Keystone XL, saying political pressure from Congress resulted in a rushed process that did not allow the State Department to gather all the information it needed to consider before approving the permit, including public comments.

In March 2012, Congress tried again when Hoeven introduced an amendment to a transportation bill (S. 1813) designed to renew funding for highway and infrastructure projects. The amendment would have fast-tracked the Keystone project and eliminated the president’s authority. It received 56 of the 60 votes required to pass and was not adopted.

The public health and safety risks associated with the Keystone XL necessitate an open permit process with public engagement and without political meddling.

Public Health and Environmental Concerns

Communities near the proposed path of the pipeline and environmentalists are concerned about the potential risks of spills and water and soil contamination to states in the Midwest and the possible health effects of increased air pollution on communities living near refineries along the Gulf. The overall effects of increased greenhouse gas emissions on climate change are also a significant concern. These stakeholders believe that the Draft SEIS significantly underestimates the environmental risks from the pipeline and are especially concerned about the State Department's conclusion that the pipeline would "not likely result in significant adverse environmental effects."

As proposed, the pipeline would cross five U.S. states (Montana, South Dakota, Nebraska, Oklahoma, and Texas) and several major rivers – including the Missouri, Yellowstone, and Red Rivers – and aquifers that supply millions of Americans with drinking water and irrigated farmland. The construction and operation of the pipeline would bring significant risks to the lives and livelihoods of those living along its route and near the refineries to which the tar sands outflow would be directed.

TransCanada's Keystone I pipeline, which runs from Alberta, Canada, to refineries in Illinois, leaked 14 times during its first year of operation between 2010 and 2011, showing that these concerns are not simply theoretical. One of the largest spills occurred in North Dakota in May, when 21,000 gallons of tar sands oil leaked from the pipeline, temporarily shutting it down. Experts warn that spills would be more likely with the Keystone XL pipeline because of the more corrosive consistency of the tar sands oil that would flow through the pipeline.

Other government and expert studies show that tar sands oil produces three times more greenhouse gas emissions than crude oil, which leaves the State Department's assessment very low relative to other scientific studies. The EPA has estimated that Keystone XL would increase annual carbon emissions by the equivalent of seven coal-fired power plants operating continuously.

Environmentalists are also disputing the State Department's claim that the pipeline would be "unlikely to have a substantial impact on the rate of development of the oil sands." This conclusion directly conflicts with statements made by the oil and gas producers themselves. For instance, the Canadian Association of Petroleum Producers stated that Keystone XL is necessary to increase the expansion of tar sands (i.e., without it, production could not expand). And Standard & Poor's reported that future growth of tar sands will be at risk if new pipelines are not approved.

Weigh In! Make Your Voice Heard!

Members of the public can weigh in by submitting comments, questions, and concerns to the State Department as part of the permitting process. Send your comments to keystonecomments@state.gov by April 22. At the end of the public comment period, State will prepare a Final Supplemental Environmental Impact Statement, which will assess whether the pipeline "serves the national interest." Though the Final EIS will not determine whether the project gets approved, its content will

be a critically important part of the decision. For this reason, it is vital for people to make their voices heard in this critical debate.

One Step Forward, One Step Missed: House Committee Approves Limited FOIA Improvements

On March 20, the House Committee on Oversight and Government Reform approved the FOIA Oversight and Implementation Act (H.R. 1211), sponsored by the committee's chair and ranking member, Reps. Darrell Issa (R-CA) and Elijah Cummings (D-MD). The bill would take steps to improve agency compliance with the Freedom of Information Act (FOIA) and require agencies to post more public information online. However, more reforms will be needed to address fundamental flaws in the current FOIA system.

Enabling the Public's Right to Know

FOIA is a vital tool for government transparency and accountability, as it provides the public with information necessary to understand what government is doing. Under FOIA, citizens have a right to request information from federal agencies, which agencies must promptly provide unless the information describes matters covered by one of the law's specific exemptions, such as classified national security information.

More than half a million FOIA requests are filed each year by companies, journalists, advocates, and citizens seeking answers about every kind of government program and activity – including critical topics such as food safety, compliance with environmental standards, and special interest influence in government decision making. The public can use the information to better understand government actions and participate in debates about public policy.

However – and despite recent reforms by Congress and the Obama administration – citizens continue to encounter serious problems in using FOIA to access public information. Delays in providing records remain common, agencies persistently withhold information that should be available to the public, and agencies too often wait for requests for important information that should instead be routinely disclosed.

House Bill Contains Several Encouraging Reforms

The House bill includes several helpful provisions, which would be a positive step toward comprehensively reforming the FOIA system. The bill's key reforms include:

- Requiring agencies to post more information online in advance of receiving a request, which would increase transparency and could reduce duplicative processing;
- Codifying the key standards from President Obama's FOIA memo and Attorney General Eric Holder's FOIA guidelines: that agencies must implement FOIA with a presumption of openness, may only withhold information when they can foresee actual harm from disclosure, and have an obligation to proactively disclose information rather than simply wait for requests;

- Strengthening the FOIA ombudsman, the Office of Government Information Services (OGIS), which has been a useful voice for improving agencies' FOIA practices and helpfully assisted requesters in working with agencies;
- Encouraging agencies to resolve FOIA disputes rather than force requesters into court, which would help citizens receive information without expensive and lengthy lawsuits;
- Establishing a single website for the public to submit and track requests at any agency, rather than through the more than 100 disparate systems that currently exist, which would simplify the process for requesters;
- Requiring agencies to bring their FOIA regulations up to date, which would encourage consistent implementation and reduce confusion where the statute and regulations conflict; and
- Strengthening several other oversight and compliance mechanisms, which would increase pressure on agencies to fully follow the law.

Bill Does Not Address Fundamental Problems with Current System

There are several key issues to the effective functioning of the FOIA system that are not currently addressed in the House legislation.

The bill does not currently explain how the foreseeable harm standard for withholding should be applied. Without more details, it is not clear how the provision would affect agency procedures or judges' decisions. We believe the burden should fall squarely on the agency to show that harm would result from disclosure and that judges should be able to review these decisions.

In addition, the bill does not currently address the Justice Department's litigation stance on FOIA, which has been widely identified as a key problem in enforcing compliance. The Justice Department seems willing to defend any agency action under FOIA. As a result, there is little pressure for agencies to comply with the law, and more requesters are forced to pursue expensive and lengthy lawsuits in order to enforce their rights. Congress should make clear that this is not acceptable public service and increase transparency around the Justice Department's exercise of its discretion.

Meanwhile, some of the bill's provisions move in the right direction but are too limited. OGIS's authority should be further strengthened, such as by directing other agencies to cooperate with the office's activities. The move toward more proactive disclosure should also be bolder by making the requirements more specific and enforceable.

These and other revisions would make the legislation stronger and more effective at achieving its purposes: to make FOIA work better for the public. In last week's markup, Cummings commented, "I hope that we can work together to make further improvements to the bill as it moves to the House floor." We agree and are looking to both the House and Senate to take the opportunity to craft reforms that will truly deliver the transparency that the American public deserves.

Battle Lines Await an (Unlikely) Budgetary "Grand Bargain"

With Congress and the Obama administration still divided over tax revenues, the possibility of a "grand bargain" on another major deficit reduction package seems increasingly small.

"The odds are very high that it doesn't get done," a senior White House official told the *National Journal*.

"It ain't happening," said a senior GOP aide on Capitol Hill.

In a meeting with House Democrats on March 14, President Obama himself assured Rep. Keith Ellison (D-MN) that the administration's proposed cuts in Social Security benefits were unlikely because a grand bargain on the budget was itself unlikely. "I haven't heard anything from Republicans on revenues," he said. "So Keith, I think you can relax."

But if it did happen, how would it happen? And what would it look like?

How Would It Happen?

According to White House aides, writes Ron Fournier in the *National Journal*, a grand bargain would first come together in the Senate, where Democrats would negotiate with a group of more moderate Republicans concerned about sequestration-related defense cuts, entitlement changes, and tax reform. The deal would also include new revenues derived from tax reform. Once passed in the Senate, said these aides, the deal would put pressure on the House to act and also provide political cover to House Republicans willing to cross party lines and support it.

"I do know that there are Republicans in Congress who privately, at least, say that they would rather close tax loopholes than let these cuts go through," President Obama said about across-the-board sequestration cuts that began in early March. "I know that there are Democrats who'd rather do smart entitlement reform than let these cuts go through. So there is a caucus of common sense up on Capitol Hill. It's just -- it's a silent group right now, and we want to make sure that their voices start getting heard."

"I think Republicans, if they saw true entitlement reform, would be glad to look at tax reform that generates additional revenues," said Sen. Bob Corker (R-TN) on Fox News on March 17, echoing the president's comments. "And that doesn't mean increasing rates, that means closing loopholes. It also means arranging our tax system so that we have economic growth."

Democratic congressional leaders also remain open to a deal. According to a story in *The Washington Post*, both House Minority Leader Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) are ready to back a grand bargain that includes both revenue increases and cuts in entitlements like Social Security.

So what are the chances this would happen? On March 20, Senate Majority Whip Dick Durbin (D-IL) put the odds of a grand bargain happening at less than 50 percent but, he said, if it gets done, it would likely be tied to a vote to extend the debt ceiling sometime later this summer.

If history is any guide, any package that reached the House and Senate floors would probably split both parties, especially in the House. A comprehensive tax package enacted earlier this year (the American Taxpayer Relief Act) passed in the House with 85 Republicans and 172 Democrats voting for it, but 151 Republicans and 16 Democrats voting against it. Similarly, the Budget Control Act enacted in 2011 passed with 174 Republicans and 95 Democrats voting for it and 66 Republicans and 95 Democrats voting against it. A similar split seems likely on any grand bargain agreement.

What Might Be In It?

The final vote, of course, would depend largely on what was in the deal. Since no deal has been struck yet, it is difficult to know what support it would draw, but it is still possible to make some educated guesses.

The starting point would probably be a $1.8 trillion proposal offered by President Obama, which currently includes $680 billion in additional taxes, $880 billion in spending cuts – including cuts in Social Security benefits and Medicare – and $200 billion in interest savings. The proposal would also eliminate sequestration.

This proposal would likely be modified, however, to gain Republican support. Entitlement cuts might be increased, for example. Sequestration-related spending cuts, meanwhile, might not be eliminated, but merely delayed a year or two.

Provisions would probably also be included to smooth the way for individual and corporate tax reform that closes loopholes and lowers rates. Differences between the two parties over net new tax revenue, meanwhile, might be papered over by an agreement that would allow such revenue but leave it unclear whether this revenue would come from loophole closures or economic growth. This would leave resolution of the matter to the House and Senate tax-writing committees.

Many Republicans Would Still Oppose It

Any deal, if it happened, would probably still face an uphill fight on Capitol Hill. According to *Politico* analysts Jim Vandehei and Mike Allen, House Republicans see little reason to sign off on any agreement that both raises taxes and also angers seniors with entitlement cuts.

"Can you imagine Boehner and his troops heading into the 2014 midterm elections dominated by conservative activists having to explain, not one, but two increases?" they wrote.

House Speaker John Boehner (R-OH) has echoed these sentiments. "The president believes that we have to have more taxes from the American people. We're not going to get very far," Boehner told ABC's Martha Raddatz. "The president got his tax hikes on January 1. The talk about raising revenue is over. It's time to deal with the spending problem."

Meanwhile, although the president has made a concerted effort to reach out to Senate Republicans, those same senators have said that they are not prepared to buck their party's leader, Sen. Mitch McConnell (R-KY), who said he will "absolutely not agree to increase taxes." Conservative organizations like the Club for Growth have also been warning GOP legislators to expect a primary challenge if they support a deal that raises taxes.

A Similar Split on the Left

Democrats would probably also be split on any grand bargain. But with Republicans divided, their support would be crucial, even in the House where they are in the minority.

Early signs of such division could be seen in a letter signed by over 100 House Democrats calling on the president and Democratic leaders to avoid any cuts in entitlements, including those achieved through modification of the consumer price index used to calculate cost-of-living increases for Social Security (called the chained CPI).

"If the Republicans are willing to make a major deal on tax revenues – which I doubt – but if they do, we can have a fight over chained CPI," Rep. Jerrold Nadler (D-NY) told *The Washington Post*.

If all of the House Democrats who signed this letter opposed the final deal, it probably would fall short. But some analysts believe that if it came to that, many would choose to support the president and the Democratic leadership. At least one Democratic leader agrees.

"If a president comes up with a reasonable approach which ends up giving years of solvency to Medicare ... I think that many Democrats will come around to that position," Durbin told *The Hill*. He said the president's support would provide them the cover they needed to shield them from grassroots anger.

These sentiments deeply worry some activists, including Damon Silvers, Director of Policy and Special Counsel for the AFL-CIO, who cautions Democrats not to even offer entitlement cuts. "This is an obvious trap," he told activists during a March 20 meeting. "People are forgetting how Republicans used the president's proposed Medicare cuts against him in the last campaign."

Overall, these divisions create both a challenge and an opportunity. If a deal is reached, it will probably move relatively quickly. Activists and policymakers would have little time to react and decide to either support or oppose a final package.

In the meantime, efforts like those by House Democrats to signal that cuts in entitlement benefits are unacceptable will be crucial. Their voices may spell the difference between a grand bargain that cancels sequestration and minimizes adverse impacts on the economy, and a "grand disaster" that could slow the economy, cut important investments like education, transportation, and research, and ask too little of the wealthiest among us.

The Small Business Administration's Office of Advocacy Exaggerates Its Influence

The Office of Advocacy, an independent office within the Small Business Administration (SBA), recently released its annual report to Congress on agency compliance with the Regulatory Flexibility Act (RFA) during fiscal year (FY) 2012. In the report, the office makes dubious claims that its efforts to delay or stop six agency rules saved billions for small businesses in the last fiscal year.

The Center for Effective Government published a report earlier this year demonstrating that the Office of Advocacy often echoes the arguments of big business rather than small businesses, so we were skeptical of the office's claims. Our analysis calls the Office of Advocacy's assertions into question for the following reasons:

- The office's calculations are often unverifiable or exaggerated;
- The sources the office cites do not support the cost savings claimed; and
- The Office of Advocacy often took credit for agency actions over which it had little influence.

Listed below are the six rules that form the basis for the office's claims and our analysis of the flaws in the Office of Advocacy's savings estimates.

Department of Labor's Revisions to Wage Calculations for the Worker Visa Program

In October 2010, the Department of Labor (DOL) proposed a rule that would revise the formula used to calculate wages paid to seasonal, non-agricultural workers under the H-2B visa program. The rule was a response to a court order requiring the agency to correct multiple problems with its 2008 wage rule. In comments, employers and the Office of Advocacy argued that employers needed time to plan for increased labor costs, so DOL allowed for a full year before the rule took effect on Jan. 1, 2012. Labor groups challenged the one-year delay; a court agreed and ordered DOL to make the rule effective sooner. The Office of Advocacy submitted comments urging DOL to disregard the court's order and delay the effective date because small businesses would have to bear added costs if higher wages were required sooner than expected.

In DOL's official notice making the higher wage rates effective on Sept. 30, 2011, the agency rejected the Office of Advocacy's critique, noting that ***only a small percentage of small businesses participate in the H-2B program, few of which would be significantly impacted by the changes to the wage rule.*** DOL further explained that the cost of the new rule was spread over a 10-year period and that regardless of its effective date, the total cost of the rule would remain the same. In fact, DOL calculates that the rule would cost all businesses that participate in the H-2B worker program $847 million per year and small businesses $146 million annually. Neither number corresponds to the Office of Advocacy's apparently exaggerated claims that delay of this rule saved small businesses over a billion dollars in FY 2012 alone.

Separate from the Office of Advocacy's efforts, Congress stepped in and twice delayed the effective date of the higher wage rates. Initially, the Consolidated Appropriations Act for FY 2012 prohibited DOL from using its funds to implement the new rule and delayed the rule's effective date until Oct. 1,

2012. Next, the continuing resolution that funded agencies through Mar. 27, 2013, prevented DOL from enforcing the rule. The Office of Advocacy claims credit for these two delays in implementing this rule and attributes to them half the total "cost savings" that the office says it produced in FY 2012. We could not find any numbers to replicate the Office of Advocacy's figures.

Department of Transportation's 2010-2011 Trucking Rule

A second rule that the Office of Advocacy included in its report was a Department of Transportation (DOT) proposal to reduce the number of hours truck drivers could spend behind the wheel. The purpose of the rule was to reduce risks of fatigue-related crashes and long-term health problems for drivers, such as obesity, high blood pressure, and diabetes. DOT proposed four options for revising the rule and solicited comments from the public. The Office of Advocacy sent a letter to DOT, urging that it not change the number of hours truck drivers could work because doing so would impose significant costs from adjusting schedules and other operational changes. DOT responded by noting that "[t]he claims of serious operational disruptions are unsupported by any data and contradicted by the industry's own statement that the provisions are not used by most drivers."

The Office of Advocacy's comments boosted all transportation-related businesses, not just small businesses, and echoed comments already submitted to DOT.

DOT modified the proposed rule after the comment period and calculated the total annual cost of the final rule for *all businesses* at $470 million. But the Office of Advocacy claims it was responsible for changes to this rule and estimates the resultant savings to small businesses at $815 million – $345 million more than the entire cost DOT estimated for the rule. The office cites an exhibit in DOT's Regulatory Impact Analysis as the basis for its savings estimate, but we could find no numbers in that source to support the Office of Advocacy's claim.

Environmental Protection Agency's 2012 General Permit for Stormwater Discharges from Construction Sites

In April 2011, the U.S. Environmental Protection Agency (EPA) proposed updates to its General Permit for stormwater discharges from construction activities. The Office of Advocacy claims that before the permit was finalized, it worked with EPA to make changes that resulted in a cost savings for small businesses.

EPA finalized the updated permit in February 2012, incorporating technology-based permitting requirements for the construction industry. The updates made two significant additions to the earlier permit. First, it allowed construction operators applying for coverage under the general permit to electronically certify that they have satisfied the permit's requirements. EPA's analysis of this change concludes e-filing will save businesses money.

Second, the permit increased the frequency and specificity of site inspections; EPA estimates this will increase total annual costs for all permitted businesses by $146,000. EPA attributes all other costs associated with the 2012 permit to the original permitting requirements adopted in 2009.

Even though ***EPA's analysis shows only a slight cost increase from the added inspection requirements***, the Office of Advocacy claims its efforts saved small business $150 million. The office cites EPA's *Federal Register* Notice as the source of its estimates, but the notice provides no support for the Office of Advocacy's claims.

Small Business Administration's Small Business Size Standards

In 2011, the Small Business Administration (SBA) proposed to expand the Small Business Size Standards for certain industries. This would allow more businesses to qualify as "small" and receive the benefits of SBA programs. The Office of Advocacy claims to have saved existing small businesses money by convincing SBA to adopt a narrower definition of small business than the agency had originally proposed.

The Office of Advocacy cites "industry analysis" as the source of its $134.5 million savings estimate related to the definition of "small business," so it is impossible to verify, but the figure seems to represent the amount of loans, grants, and contracts that would have been awarded to additional businesses under an expanded definition. SBA, on the other hand, concluded that some current small businesses may accrue costs, but it could not "estimate the potential distributional impacts of these transfers with any degree of precision."

Department of Justice's Americans with Disabilities Act Rules

Under the public accommodation provisions of the Americans with Disabilities Act, the Department of Justice (DOJ) proposed rules requiring that wading pools, swimming pools, and spas be accessible to persons with disabilities by March 15, 2012. The Office of Advocacy objected to the cost of this requirement, urging DOJ to extend the compliance deadline by six months (in the end, DOJ extended the deadline by one year). The office claims its comments resulted in one-time savings to small business of $99.6 million.

The Office of Advocacy cites DOJ's impact analysis to support its calculations, but this 450-page document does not support the office's claims. The delay itself does not change the accessibility requirements, so it is difficult to understand why postponing investment in equipment to provide disabled people access to swimming facilities would result in such large savings. Even former Office of Information and Regulatory Affairs Administrator Cass Sunstein – a proponent of cost-benefit tests for regulations – cites the dignity public accommodation rules provide to disabled citizens as a public value that "should be quantified" and set against the costs of the ADA.

EPA's Emissions Standards for Combustion Engines

In March 2009, EPA proposed to extend limits on hazardous air pollutants emitted from large diesel compression ignition (CI) engines to include emissions from gas-fired spark ignition (SI) engines. EPA spent almost four years working with stakeholders developing the SI engine rules. During this time, the Office of Advocacy urged EPA to delay the rules until it studied the effects of SI engines in urban versus rural environments.

EPA's final rule exempted SI engines in specific rural environments from some provisions. According to EPA's analysis, these changes reduced the annual costs of regulating SI engines by $138 million. Although the Office of Advocacy's comments did not ask for this exemption, the office takes credit for this "savings to small business."

This is the only rule where the Office of Advocacy's claimed savings numbers seem to match the agency's cost estimates. However, EPA's analysis also indicates that 42 percent of the companies affected by the rule are big businesses, and they may have garnered a significant portion of the savings. So once again, the Office of Advocacy claimed savings for small businesses that in fact represented savings to big businesses, too.

Conclusion

The numbers in the Office of Advocacy's annual report for FY 2012 do not add up. The savings the office estimates its efforts generated for small businesses do not match the estimates that it cites for six different agency rules. In five of the six cases, we can find no basis for its numbers. In one case, the office bases its estimated cost savings on an industry analysis that it does not identify.

The Office of Advocacy often complains agencies underestimate the costs of rules, but our findings suggest that the Office of Advocacy exaggerates the potential costs and savings to small businesses of rules that will protect the overall health and welfare of the American public.

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