

States file lawsuit against Biden administration seeking to revive Keystone XL from the dead

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The big question: Why is TC Energy, which has invested billions into the project, not involved in the litigation?

Texas Attorney General Ken Paxton and the top lawyers from 17 states filed a lawsuit on Thursday challenging U.S. President Joe Biden's administration's decision to revoke the Keystone XL pipeline permit, setting the stage for yet another protracted legal battle over the proposed Alberta-to-Texas heavy oil conduit.

The lawsuit argues that only the U.S. Congress can grant or reject permits for oil pipelines that cross an international border, not a presidential administration.

One immediate question is whether the pipeline's owner, Calgary-based TC Energy Corp., where Francois Poirer took over as chief executive in January, still has an appetite to invest in the project, which was first proposed in 2008. Although the company expressed disappointment in January about the permit revocation, it was silent about the Texas lawsuit as of Thursday afternoon.

In February, the TC Energy executive team said it was already studying how to wind down the project, adding that its tolerance for exposure to permitting risks — specifically around projects like Keystone XL which has been a political flashpoint for nearly a decade — has shifted.

“You've seen us change our approach here, particularly in the large-scale projects on the KXL, the Coastal GasLinks and the like,” Donald Marchand, TC Energy's executive vice president, strategy and corporate development and chief financial officer said during an earnings call last month, according to a transcript.

A the time, Marchand said capital allocation strategy has evolved, and the company is more careful about limiting “how much capital we have exposed” in such projects, and increasingly looking for partners to who can share the risks.

While Poirer, who had been working his way up the company since 2015 and had a previous career in banking, did not say TC Energy had abandoned all hope in Keystone XL, he emphasized that natural gas, power and storage and renewable power represent growth areas.

The company did not respond to requests seeking comment.

The pipeline, which would carry up to 830,000 barrels of oil a day from Alberta to refineries in Texas and Oklahoma, had been blocked by the Obama Administration twice; and in 2016, TC

Energy filed multiple legal challenges to try and keep the pipeline alive. The pipeline requires a permit from the U.S. president as it crosses an international border.

Ultimately, the Trump administration reinstated the permit in 2019, making the legal challenges unnecessary. This year, Biden revoked the pipeline's permit in one of his first acts as president.

Now, the latest legal challenge, filed by the attorneys general in Texas and Montana and joined by fifteen other states, focuses on a 1.2-mile stretch of the pipeline that crosses the Canadian border into Montana, which the Trump administration approved for a permit in 2019.

Earlier this year, the Biden administration revoked the permit, "within hours of taking office," according to the lawsuit, which argues that construction on the 1.2 mile stretch was "effectively complete" by that time.

The lawsuit also argues that Biden revoked the permit, citing his "ambitious plan" to reduce carbon emissions under "a permit provision that purports to allow such revocation by agreement from the Company holding the permit."

"The president lacks the power to enact his 'ambitious plan' to reshape the economy in defiance of Congress's unwillingness to do so," the lawsuit states.

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LAWSUIT

Scott Lincicome, a Raleigh, N.C.-based U.S. trade lawyer and senior fellow in economics at the Libertarian-focused Cato Institute, said that Keystone was conceived before the U.S. was energy independent, and was justified as an issue of national security. But today, as a result of the fracking boom and increased U.S. oil and gas production, the argument for Keystone in the U.S. has changed to one about sunk costs and job losses.

I kind of shrug at Keystone, in that it has become a political football," said Lincicome.

Mark Warner, an international trade lawyer and principal at MAAW Law in Toronto, said the lawsuit raises "legitimate legal arguments that you could fight over for years."

But he asked why TC Energy, which has invested billions of dollars into the project, isn't involved in the litigation.

"The question is what's going on here?" said Warner. "It looks to me like TC Energy just wants out."

Before the 2020 U.S. presidential election, Patrick Kenny, an analyst with National Bank Financial, estimated that 50 per cent of Keystone XL had been de-risked, which added \$3 per share. Put another way, Kenny set a \$70 price target for the company, and calculated that Keystone accounted for around 4 per cent of that.

The stock closed down nearly 2 per cent to just under \$57 per share in a broadly negative market.

He said that as the oil pipeline permitting and construction processes have transformed from a little-watched process into political flashpoints, companies such as TC Energy have had to become more careful.

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MARK WARNER, INTERNATIONAL TRADE LAWYER

The province of Alberta, for example, invested \$1.1 billion into the Keystone XL Pipeline, and after the Biden administration cancelled the permit, Premier Jason Kenney threatened to sue the U.S., and even demanded that Prime Minister Justin Trudeau enact sanctions on the country.

The Alberta premier's office directed all inquiries to the province's energy ministry, which did not return calls seeking comment.

"It's a little tough (for TC Energy) to just walk away," National Bank's Kenny said. "They have to be mindful of the political ramifications associated with just fully killing the project."

He wrote in a note in January, after Biden had cancelled Keystone XL, that pipeline investors in general need to beware of the "toxic legal battles" that lead to negative headlines and ultimately create "unwelcomed stock price volatility."

Indeed, in his fourth quarter earnings call in February, Poirer said that the politics of energy increasingly guide where the company is looking to develop future projects, and for the moment it is firmly focused on North America, where it already understands the political and regulatory landscape.

"Our experience has been that where you have commercial relationships, you have political relationships with state governors or with members of parliament or members of provincial parliament," Poirer said, adding, "So any time you think about going further afield, you're flying a bit blind in terms of your ability to assess how well you can manage some of those stakeholders."