KEYSTONE XL: THE PIPELINE TO ENERGY SECURITY

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I. INTRODUCTION

The Keystone XL Pipeline ("Keystone XL") represents one of the most promising economic opportunities currently available. When government officials talk about an economic opportunity for the country, often they should be talking about an opportunity for the federal government to get out of the way. Keystone XL is one such opportunity. Nonetheless, critics hope the government will block Keystone XL's construction based on several concerns: that Keystone XL would carry a type of oil that is especially corrosive, that greenhouse gas emissions would be especially high with the type of product it will transport, that oil and gas prices could actually increase as a result of increased petroleum supply, or that the use of carbon based fuels could continue for some time.

However, these concerns are only superficial attempts to express a deeper ideological fixation—the fear that Keystone XL would further an entrenchment in oil dependence. The problem with this view, of course, is that it ignores the tremendous economic benefits the pipeline can provide as well as its critical importance to our energy supply. We simply do not have the luxury of letting long-term environmental concerns deaden our senses to the immediate threats to our nation's energy security. Moreover, our recovering economy cannot afford to pass up a private investment of twenty billion dollars and the addition of tens of thousands of jobs. Developing alternative energy sources is always a high priority, but we cannot ignore the need to protect our energy supply. We face a number of challenges in securing these vital sources, and Keystone XL represents a key element of a more secure future on this front.

Given the amount of oil we import every day into this country—about 11.4 million barrels per day,¹ representing nearly half the oil we consume²—it seems obvious that if we could choose our suppliers, we

† Special thanks to Graham Dufault, AT Johnston, Mark Anderson, Chuck Isom, and Christine Cimino of my staff for their hard work on this piece.


2. See id. at 19 n.63 (noting the U.S. consumed about 18.8 million barrels per day in 2011).
would select the most stable and trustworthy trading partners. Like it or not, we depend heavily on petroleum products; oil fulfilled about thirty-six percent of all of our energy needs in 2011.\(^3\) Moreover, oil is a global commodity. Demand for oil is rising worldwide while production has stagnated.\(^4\) Swelling populations in India and China, as well as increasing car ownership in these countries and other developing nations, have caused worldwide demand for oil to soar.\(^5\) Oil production, however, has not kept pace with this increase in demand, which threatens to drive prices of oil-based products even higher.\(^6\)

Meanwhile, oil production in Canada is rapidly expanding. The Energy Policy Research Foundation estimates that Canada has about 170 billion barrels of recoverable oil resources in the form of bitumen.\(^7\) With production of this resource ramping up, Canada needs a trading partner for its product and we are the first choice. It is imperative that we take advantage of this opportunity before the window closes because it will not last forever. Going forward, we must ensure the political winds that have blown Keystone XL's construction off track no longer play a role in the decision-making process for such an economically important investment.

I have consistently supported efforts to establish infrastructure and policies that enable greater diversity of energy sources and supplies.\(^8\) The foregoing are a few of the major reasons why Keystone XL represents a critical component of this broader strategy. By creating a dedicated line to Canadian production, Keystone XL will allow us to

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increase our reliance on dependable energy sources while reducing our dependence on sources that expose our entire economy to serious risk.

II. BACKGROUND

A. FEDERAL REGULATION OF OIL TRANSPORTATION

The federal government treats petroleum pipelines traveling across international borders differently from pipelines beginning and ending inside the United States. Cross-border pipelines must obtain a federal permit, but domestic oil pipelines generally need not seek federal permission in order to begin construction. In fact, the Federal Energy Regulatory Commission’s ("FERC") regulatory authority over oil pipelines is narrow compared to natural gas pipelines.\textsuperscript{9}

Nonetheless, oil pipeline operators must file tariffs with FERC, which has jurisdiction over pipelines' terms of service and rates.\textsuperscript{10} Although pipeline companies propose rates and terms of service, FERC has the exclusive jurisdiction to determine whether they are just, reasonable, and not unduly discriminatory.\textsuperscript{11} If pipeline proposals fail to reach this threshold, FERC has the authority to prescribe the rates or terms of service if need be.\textsuperscript{12} FERC has set its policy through a series of adjudications under this authority, which inevitably affects pipeline construction and expansion decisions.\textsuperscript{13} In addition, oil pipelines operate under obligations to file reports with FERC, including annual and quarterly reports.\textsuperscript{14} These activities have given FERC institutional knowledge of the oil pipeline business both in modern times and dating back to the nineteenth century in the agency's previous incarnations.

Even though FERC manages only a narrow set of oil pipeline issues, it is responsible for a broad set of natural gas pipeline activities.\textsuperscript{15} This responsibility has required FERC to develop expertise in the wide range of issues that generally arise with pipelines. For example, natural gas pipeline companies must obtain a certificate from FERC prior to beginning construction.\textsuperscript{16} Under its authority to per-


\textsuperscript{10} See 18 C.F.R. § 342.2 (2012) (requiring carriers to file rate information with FERC).

\textsuperscript{11} Id. §§ 342.3, 342.4.

\textsuperscript{12} Barr, supra note 9, at 565-66.

\textsuperscript{13} Id. at 566.

\textsuperscript{14} 18 C.F.R. §§ 357.1, 357.4.

\textsuperscript{15} Barr, supra note 9, at 565.

\textsuperscript{16} PAUL W. PARFOMAK, CONG. RESEARCH SERV., R41536, KEEPING AMERICA'S PIPELINES SAFE AND SECURE: KEY ISSUES FOR CONGRESS 12 (2012), available at http://www.fas.org/sgp/crs/homesec/R41536.pdf. Siting decisions by FERC are mostly based on public convenience and necessity and can also have safety requirements attached.
mit, FERC must determine whether the pipeline would serve “public convenience and necessity.”17 FERC also has authority to deny applications by pipeline companies that seek to abandon existing facilities in operation.18 These regulatory activities have established the agency as the key policymaker on natural gas pipeline issues in addition to regulating oil pipelines.

Pipelines originating across national borders may not operate inside the United States without a Presidential Permit.19 The Department of State (“DOS”) oversees the vetting process for permit applicants and the President has the authority to approve or block the application.20 This authority comes from a series of executive orders granting the executive branch authority to issue permits for pipelines that export and import oil.21

Although DOS is not bound by the procedures set forth in the National Environmental Policy Act22 (“NEPA”),23 DOS has opted to conform to them for the purpose of the Presidential Permit. Under this process, when a company submits an application for a permit, DOS must collect comments from interested stakeholders before issuing a determination.24 At its discretion, DOS can also conduct environmen-

But generally, safety regulation of pipelines (both safety from terrorist threats and public safety connected to pipeline dangers) is the province of the Departments of Transportation and Homeland Security. See generally id. at 1-12 (describing the departments’ roles).

17. 15 U.S.C. § 717(f)(c) (2006); see also Independence Pipeline Co., 91 FERC 61,102, 61,347 (2000) (noting that FERC is empowered to issue certificates when a proposed pipeline is or will be necessary or convenient to the public).


19. U.S. Dep’t of State, Executive Summary: Final Environmental Impact Study for the Proposed Keystone XL Project ES-1 (2011), available at http://keystonepipeline-xl.state.gov/documents/organization/182010.pdf; see also Exec. Order No. 13,337, 3 C.F.R. 165 (2005) (designating the Secretary of State to receive applications for permits); Exec. Order No. 11,423, 3 C.F.R. 445 (1969) (giving the Executive Branch the authority to issue permits over pipelines, conveyor belts, and “similar facilities for the exportation or importation of petroleum, petroleum products”). Although the Constitution does not directly provide authority for the President to grant these permits, and Congress has not specifically delegated that authority, the courts have recognized the President’s authority to do so. See, e.g., Sisseton-Wahpeton Oyate v. U.S. Dep’t of State, 659 F. Supp. 2d 1071, 1075 (D.S.D. 2009) (acknowledging the President’s delegation of authority to the Department of State in the opinion’s recitation of facts).

20. See U.S. Dep’t of State, supra note 19, at ES-1 (describing the presidential permitting procedure).

21. See id. (listing relevant executive orders).


tal impact statements as part of its permit application review. At the end of its review, if DOS finds that the pipeline would "serve the national interest," it recommends that the President issue a permit. Although the language "national interest" is used in Executive Order 13,337, it has no content. That is, factors demonstrating what serves the "national interest" are nowhere to be found.

Interestingly, although permit applications are subject to DOS review, courts have considered final permitting decisions to be presidential actions not subject to the Administrative Procedure Act ("APA"). As a result, final determinations are essentially immune to judicial review. However, when DOS finds it necessary to perform an Environmental Impact Study ("EIS"), as it did with Keystone XL, courts are split on whether the EIS is reviewable as an agency action under the APA. In any case, the immunity to judicial review enjoyed by final decisions to issue a permit is concerning.

B. Keystone XL and the Permitting Process

Keystone XL would carry heavy crude oil through a three-foot-diameter pipe produced from the oil sands region of Alberta, Canada to production sites in North Dakota and Montana, and then to refineries in Oklahoma and on the Texas Gulf Coast. The pipe would be manufactured subject to a number of Pipeline and Hazardous Materials Safety Administration ("PHMSA") specifications aimed at ensuring the strength and durability of the material. As planned, the U.S. portion of the Keystone pipeline would stretch 1,380 miles and would carry approximately 830,000 barrels of oil per day ("bpd").

In 2010, the first phase of the Keystone project was completed, connecting crude producers in Alberta to refineries in Illinois. The

27. See id. (lacking a definition of "national interest").
29. Sisseton-Wahpeton Oyate, 659 F. Supp. 2d at 1081-82.
30. Id.
32. Parfomak et al., supra note 1, at 3.
33. U.S. Dep't of State, supra note 19, at ES-6, -7 (describing conditions one through nine that outline some requirements on pipeline materials and fabrication).
34. Parfomak et al., supra note 1, at 3.
second phase’s original route runs from Alberta to the Gulf Coast. The southern portion of the second phase has been approved; however, the northern portion, crossing the U.S.-Canada border, is the controversial section. This upper portion would connect producers in Hardisty, Alberta to Steele City, Nebraska, and would increase heavy crude transport capacity by 509,000 bpd.

Keystone XL would originate in Canada, so TransCanada must obtain a Presidential Permit from DOS. To this end, the company filed a permit application in September 2008. DOS issued a Draft Environmental Impact Statement (“DEIS”) regarding the project on April 16, 2010. DOS then issued an amendment to the DEIS, The Supplemental Draft Environmental Impact Statement (the “SDEIS”), in April 2011 and a final draft (“FEIS”) in August 2011. Despite having performed these EIS reports, DOS deferred making a final national interest determination until it could obtain additional information on potential alternate routes for the pipeline. DOS cited the portion of the proposed route in the original application through Nebraska’s Sand Hills region as a major reason for its concern.

Congress responded to DOS’s delay with several measures. On July 26, 2011, I introduced the North American-Made Energy Security Act, which would have required the President to make a final deci-

36. Id.
37. See Parfomak et al., supra note 1, at 4 fig.1 (illustrating the proposed route).
45. Id.
46. H.R. 1938, 112th Cong. (as passed by House, July 26, 2011).
sion by November 1, 2011.\textsuperscript{47} It passed the full House with a vote of 279 to 147. Prior to this provision’s passage, I introduced the North American Energy Access Act\textsuperscript{48} on December 12, 2011, which would move the authority to permit cross-border oil pipelines from the State Department to the Federal Energy Regulatory Commission.\textsuperscript{49} Senator John Hoeven also responded with a bill on January 30, 2012 that would legislatively approve Keystone XL and deem DOS’s environmental review as having met NEPA standards.\textsuperscript{50} Representative Connie Mack subsequently introduced the House companion bill to Senator Hoeven’s legislation on February 9, 2012.\textsuperscript{51}

An altered version of my legislation, requiring the President to make a decision on the permit, passed the Senate and House as part of the Temporary Payroll Tax Cut Continuation Act of 2011\textsuperscript{52} on December 23, 2011.\textsuperscript{53} The provision required the President to approve the pipeline within sixty days unless he determined that it was not in the national interest.\textsuperscript{54} It also provided that if the President fails to approve an alternate route submitted by the Governor of Nebraska within ten days of submission, the alternate route will be deemed granted by operation of law.\textsuperscript{55} DOS subsequently advised the President on January 18, 2012 not to approve the permit because it did not have sufficient time to obtain the necessary information on alternate routes.\textsuperscript{56} The President issued a memorandum that day indicating that the process would be stalled again pursuant to DOS’s recommendation, but cited no specific national interest analysis.\textsuperscript{57} Shortly after

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\item North American-Made Energy Security Act, H.R. 1938, 112th Cong. § 3(c) (as passed by House, July 26, 2011).
\item H.R. 3548, 112th Cong. (2011).
\item A Bill to Approve the Keystone XL Pipeline Project and Provide for Environmental Protection and Government Oversight, S. 2041, 112th Cong. § 1 (2012).
\item Energizing America Through Employment Act, H.R. 4000, 112th Cong. § 3 (2012).
\item Pub. L. No. 112-78, 125 Stat. 1280 (2011).
\item Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501(a), (b), 125 Stat. 1280, 1289-90.
\item § 501(a), 125 Stat. at 1289.
\item § 501(e), 125 Stat. at 1291. "If the President does not approve the route within the State of Nebraska submitted by the Governor of Nebraska … not later than 10 days after the date of submission, the route submitted by the Governor of Nebraska under subsection (d)(3)(B) shall be considered approved … ." Id.
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the President’s decision, I and several of my colleagues authored a letter requesting the President to articulate his reasons for determining that the issuance of the permit would be against the national interest. I received a response from DOS on April 11, 2012, which stated, “the decision to deny a permit for the pipeline was not based on the merits of the project, but rather on the fact that the deadline in the Temporary Payroll Tax Cut legislation left us insufficient time to assess the application with a revised route through Nebraska.”

TransCanada re-submitted its application to DOS on May 4, 2012, this time only with respect to the northern portion traveling cross-border. Meanwhile, Nebraska’s Department of Environmental Quality ("NDEQ") is reviewing the corridor and route TransCanada has proposed that will avoid the Sand Hills region. According to the NDEQ, its review would last about six months with a final determination about sixty to ninety days after TransCanada submits its final proposal. The DOS also entered into a Memorandum of Understanding with NDEQ to facilitate coordination between the state and federal processes. Subsequently, DOS issued a Notice of Intent ("NOI") stating that it plans to conduct yet another Supplemental Environmental Impact Statement with respect to the northern portion of the pipeline. The NOI also indicates DOS plans to consult with State Historic Preservation Officers, Indian tribes, and the Advisory Council on Historic Preservation, among others, on this next environmental study. All told, the review process has lasted nearly four years and DOS is on its fourth environmental study.

61. Id.
63. Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) and to Conduct Scoping and to Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed TransCanada Keystone XL Pipeline Proposed to Extend From Phillips, MT (the Border Crossing) to Steele City, NE, 77 Fed. Reg. 36,032, 36,032-33 (June 15, 2012).
III. ANALYSIS

A. The Federal Energy Regulatory Commission Should Have Authority over Cross-Border Pipeline Permits

The Presidential Permit process for cross-border pipelines has serious flaws that could be remedied by moving permitting authority to the Federal Energy Regulatory Commission ("FERC"). First, the Department of State ("DOS") is ill-equipped to make decisions that are insulated from political considerations. Political pressures have caused DOS to delay TransCanada’s application for so long that it appears dead in the water. Second, removing permitting authority to FERC would subject permitting decisions to judicial review under the Administrative Procedure Act65 ("APA"). This would require the agency to articulate a rational nexus between its final decision and the facts and analysis it marshals in the decision-making process, something that DOS is not required to do under the "national interest" standard. Third, FERC has developed a considerable body of relevant expertise in issuing interstate natural gas pipeline certificates.

The Natural Gas Act of 193866 ("NGA") provides the authority for FERC.67 The National Power Act68 ("NPA") created its predecessor agency, the Federal Power Commission, in 1920.69 In 1977, Congress reorganized the Federal Power Commission into FERC, further expanding the agency’s power.70 The NPA and the NGA, as amended by subsequent legislation, provide the essential statutory basis for FERC’s structure and activities. The President has the power under statute to appoint up to five commissioners with the advice and consent of the Senate, including a chairman, to head FERC.71 The parties of the commissioners must be split so that at most three commissioners are from the same political party.72 Each commissioner has an equal vote on matters before FERC, and the mission they carry out is to ensure reasonable, nondiscriminatory rates for energy and oversee the development of energy infrastructure.73 Moreo-

ver, FERC has the authority to promulgate rules and issue orders,\textsuperscript{74} which are quasi-legislative and quasi-judicial functions respectively.\textsuperscript{75} Thus, its functions and purposes are in many ways a delegation of the Congressional power over interstate commerce, as well as the judicial power to issue orders.\textsuperscript{76} As such, case law suggests that FERC is an independent, rather than an executive, agency.\textsuperscript{77} Thus, FERC decisions are more insulated from the President's politically motivated preferences.\textsuperscript{78}

DOS, on the other hand, operates under the management of a presidentially appointed Secretary of State and without bipartisan leadership. The Secretary serves at the pleasure of the President; the President can fire an executive officer such as the Secretary unilaterally,\textsuperscript{79} whereas heads of more independent agencies may be removed only through certain procedures.\textsuperscript{80} It is an established observation in administrative law that agencies like DOS are less inclined to depart from presidential preference than independent agencies.\textsuperscript{81}

In this case, it appears that politics have caused DOS to drag its feet on the Keystone XL decision. Each of the cross-border Presidential Permit applications filed prior to TransCanada's was approved

\textsuperscript{74} See 15 U.S.C. § 717o (specifying that FERC has the power to “prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary to or appropriate to carry out the provisions [of the Act]”).

\textsuperscript{75} See Humphrey’s Ex’r v. United States, 295 U.S. 602, 624 (1935) (concluding that the Federal Trade Commission’s functions were quasi-legislative and quasi-judicial in part because commission members are “called upon to exercise the trained judgment of a body of experts ‘appointed by law and informed by experience’”) (citing Standard Oil Co. v. United States, 283 U.S. 235, 238-39 (1931); Ill. Cent. R.R. Co. v. Interstate Commerce Comm’n, 206 U.S. 441, 454 (1907)).

\textsuperscript{76} See Humphrey’s Ex’r, 295 U.S. at 628 (“Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control.”).

\textsuperscript{77} See Wiener v. United States, 357 U.S. 349, 353 (1958) (“[T]he most reliable factor for drawing an inference regarding the President’s power of removal in our case is the nature of the function that Congress vested in the [agency at issue.]”); see also Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law: Cases and Materials 197 (2010) (noting that under Wiener, even where there is Congressional silence as to the removal of agency officials, the functions of the agency can support an inference that Congress intended to limit the President’s removal power).

\textsuperscript{78} See Wiener, 357 U.S. at 353 (noting that there are some tasks that Congress wants to be free from Executive interference).

\textsuperscript{79} Humphrey’s Ex’r, 295 U.S. at 631 (distinguishing Myers v. United States, 272 U.S. 52 (1926), on the grounds that executive officials performing solely executive functions may still be removable without cause, whereas officials heading independent agencies perform quasi-judicial and quasi-legislative functions and therefore cannot be removed unilaterally by the chief executive).

\textsuperscript{80} See Wiener, 357 U.S. at 353-54; Humphrey’s Ex’r, 295 U.S. at 629.

\textsuperscript{81} See Humphrey’s Ex’r, 295 U.S. at 629 (“For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”).
within eighteen to twenty-four months. In this case, however, DOS review dragged on for over three years before my legislation passed, forcing the President to make a decision. Moreover, investment expectations during the review process show that the initial determinations DOS made in its Draft Environmental Impact Statement ("DEIS") and the Supplemental Draft Environmental Impact Statement ("SDEIS") apparently indicated that DOS was likely to grant the application. These expectations could not be far off if the head of DOS herself publicly stated her inclination to approve the pipeline. The question is, what happened to change DOS’s mind? One possible answer is that the political realities for a Democratic administration up for reelection are dimmer with a pipeline approval on its track record.

With these concerns in mind, one wonders what mechanism provides assurance that this is not the case. Precedent suggests that courts lack the authority to review a decision to approve or deny a Presidential Permit. Although DOS’s Environmental Impact Statement ("EIS") drafts might be subject to judicial review, it appears the ultimate decision is not. This attribute sets Presidential Permit decisions apart from most other determinations that go through the administrative decision-making process. Administrative decisions are typically subject to requirements set forth in the APA, which provides for judicial review of most agency actions.

82. See Waiting for the Keystone XL Pipeline, HOUSE ENERGY & COM. COMMITTEE, http://energycommerce.house.gov/keystonexl.shtml (last visited June 22, 2012) ("Historically, the NEPA process for cross-border pipeline takes 18 to 24 months.").
84. See Memorandum from Baird Equity Research to Lee Terry, Congressman, U.S. House of Representatives 4 (June 15, 2011) (on file with author) ("While ‘politics’ are clearly influencing the pace of the permit’s consideration, at this time we do not expect the approval to be fully derailed by any concessions to environmental advocates.").
85. Art Hovey, Hillary Clinton’s Comments Did Refer to Keystone XL Pipeline, LINCOLN J. STAR (Oct. 21, 2010), http://journalstar.com/news/local/article_cda4324a-dd70-11df-80f4-001cc4c03286.html.
86. See Sisseton-Wahpeton Oyate v. U.S. Dep’t of State, 659 F. Supp. 2d 1071, 1081-82 (D.S.D. 2009) (reasoning that the President has inherent constitutional authority over international oil pipeline border crossings).
87. See Kleppe v. Sierra Club, 427 U.S. 390 (1976) (noting that an EIS is a reviewable agency action); see also VANN ET AL., supra note 23, at 24-28. DOS issued a rule declaring that it would perform an EIS, but it was under no obligation to do so under NEPA. See id. at 24 (noting that necessity of DOS review under NEPA was uncertain). Thus, the EIS is not technically part of the mandatory decision-making process for a Presidential Permit. See id. at 26.
88. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (determining that where an action is taken by the President, it is not reviewable as an agency activity).
the APA in 1946 in response to dissatisfaction with the inappropriate political decision-making of the National Labor Relations Board ("NLRB") prior to World War II. In the words of two respected law professors, the APA "create[s] greater uniformity with respect to the procedures agencies use to make decisions and the standards courts apply in reviewing those decisions." Perhaps more to the point, the APA is often considered a "constitution" of administrative law.

The APA lays out Congress's intent with respect to how agencies should conduct rulemakings and adjudications. Section 706 provides the statutory basis for judicial review of both rulemakings and adjudications. Although the provision does not distinguish between these two agency activities, doctrine suggests that courts look at three separate, overlapping aspects of agency actions: conclusions of law, findings of fact, and the reasoning process. Cross-border permit determinations are currently free of the judicial scrutiny Congress intended administrative decisions to have.

Here, DOS conducted a procedure the APA might designate an adjudication, because it deals with case-sensitive facts specific to the matter before the agency. The APA requires and the courts, reviewing adjudications pursuant to the APA, define their function as determining whether there was "substantial evidence" to support the agency's finding. The United States Supreme Court has characterized the "substantial evidence" test as requiring the agency to provide more than a "scintilla" of evidence or a "suspicion of the existence of the fact to be established." Summing up early APA decisions, Professor Frank Cooper outlined a number of factors that subsequent court decisions have relied on to decide whether or not an agency decision was based on "substantial evidence." Among them is whether "evidence that is slight in relation to much stronger contrary evidence is not substantial evidence." This prong is the most likely to be implicated in the case of Keystone XL. The most suspect part of the decision not to issue the permit was the reasoning used in DOS's con-

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91. Universal Camera Corp. v. NLRB, 340 U.S. 474, 478-79 (1951) (discussing Congress' reaction to NLRB decisions and legislative response in the form of the APA).
92. Hickman & Pierce, supra note 77, at 106.
93. Id. at 20.
95. Hickman & Pierce, supra note 77, at 324.
96. See id. at 231-34 (discussing the difference between adjudicative and rulemaking determinations).
100. Id.
clusion, which relied upon findings in the environmental impact statements.

Alternatively, if the permitting decision were subject to the APA and determined to be an agency rulemaking, a court could review the decision to adjudicate whether it was "arbitrary and capricious." Although a decision to issue a permit would appear to be an adjudicatory matter, FERC's pipeline permitting decisions have been reviewed as rulemakings. Under this standard, a court determines whether an agency has fulfilled its obligation to "examine the relevant data and articulate a satisfactory explanation for its action." Essentially, the final agency determination must be permissible under the organic statute and the court must be able to understand the agency's reasoning. Whether DOS would be unable to explain its reasoning based on the DEIS, SDEIS, Final Environmental Impact Statement ("FEIS"), and regulatory comments is hard to predict. What we do know is that DOS does not need to explain its reasoning with respect to the final decision with an eye toward passing judicial muster.

To be sure, the bar that the courts have set for agencies to make legally sound adjudication and rulemaking decisions under the APA is low. And the remedies that courts have handed down in finding agency reasoning to be substandard have typically been limited to remanding the matter back to the agency to take a more reasoned approach. But in this case, DOS is not even held to this low standard. As a result, we are left with the types of agency decision-making processes Congress feared before World War II and finally addressed in 1946 with the APA. Make no mistake, without the proper safeguards, politics can and will dictate agency decisions rather than expertise. Moving jurisdiction over cross-border pipeline permit approval to FERC would ensure that experts held to an enforceable legal standard, and that is a consideration that must guide the fate of our energy security instead of the political caprices of an administration angling for re-election.

In addition to the pressure courts could exert to ensure reasonable permitting, decades of expertise in pipeline issues would also benefit the process. Whereas DOS only has experience with cross-border Presidential Permits, FERC and its predecessor agency have been in

104. See Handley v. Chapman, 587 F.3d 273, 281-82 (5th Cir. 2009); Huvis Corp. v. United States, 570 F.3d 1347, 1353 (Fed. Cir. 2009).
the business of approving pipelines since the early 1900s. Issuing these permits of public convenience and necessity is one of FERC’s major natural gas obligations. In making the determination, FERC examines a number of factors, including: (1) the existence of a market for the applicant’s service; (2) the effect of the proposed pipeline on competition; (3) the effect of the proposed project on the existing service of the applicant; and (4) the proposed “end use” of the gas being transported. The agency has some leeway in applying these factors, but they have been developed throughout the decades and have survived court challenges.

In a relatively recent court case in which a certificate was challenged, the United States Court of Appeals for the District of Columbia Circuit reviewed FERC’s decision under the arbitrary and capricious standard. In the permitting process, FERC found that even though the Environmental Impact Statement it conducted favored permitting one company, a number of countervailing factors supported granting the permit to a different company. After an analysis of the facts, the court ultimately upheld FERC’s decision and stated, “The Commission concluded that other values outweighed what the FEIS described as the project’s limited but nonetheless acceptable environmental costs of specified mitigation measures were taken. It then conditioned the certificate on . . . compliance with those measures. This strikes us as responsible agency decision making.” Moreover, the court noted FERC’s well-established history of considering market competition and an applicant’s service-readiness. Issuing natural gas certificates is clearly a fact-intensive process that FERC has spent decades establishing under the persistent shadow of judicial review.

The DOS standard for determining whether to issue a Presidential Permit, on the other hand, is an empty “national interest” standard. The standard comes from Executive Order 13,337, delegating

107. 64 AM. JUR. 2d Public Utilities § 223 (2011).
108. See Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 21-23 (1961) (discussing FERC’s ability to regulate “end use” and “price” factors); Midcoast Interstate, 198 F.3d at 964 (noting FERC’s flexible balancing process); Lynchburg Gas Co. v. Fed. Power Comm’n, 275 F.2d 847, 850 (3d Cir. 1960) (affirming FERC’s decision based on merely one of the factors); Panhandle E. Pipe Line Co. v. Fed. Power Comm’n, 232 F.2d 467, 471-72 (3d Cir. 1956) (discussing FERC’s goal of maintaining service to existing customers when new facilities are being constructed).
109. Midcoast Interstate, 198 F.3d at 967.
110. Id. at 967-68.
111. Id. at 968.
112. Id.
presidential authority to approve permits to DOS. The Order contains no details as to what entails "national interest," leaving interpretation entirely up to DOS. Agency activity reviewable under the APA is generally in reference to an organic statute, representing delegated authority from Congress, not the executive branch. Typically, these standards must contain an "intelligible principle" to guide the agency in translating them into regulations. Even if the "national interest" standard could be considered an intelligible principle, DOS's interpretation of the standard is effectively non-reviewable by the courts because the President's ultimate decision remains shielded. Thus, the national interest standard lacks definition in statute and in accumulated years of agency decision-making. FERC, on the other hand, does have the institutional capability to define an intelligible standard that has passed judicial muster.

B. ENVIRONMENTAL CONCERNS SURROUNDING KEYSTONE XL

A handful of attacks have been leveled at Keystone XL due to environmental concerns. The major arguments are that: (1) the substance Keystone XL would transport is more corrosive to steel pipes and is more likely to result in spills; (2) the process used to extract oil in Alberta emits more greenhouse gases than production of other types of petroleum; and (3) that the pipeline could contaminate the Ogallala Aquifer. Keystone XL's benefits overwhelm these concerns for a number of reasons.

The Natural Resources Defense Council ("NRDC") argues that Keystone XL poses overwhelming environmental concerns beyond the threats other pipelines present. Petroleum produced from oil sands is a highly viscous, tar-like substance called bitumen. In order to ease transport, bitumen must be made lighter. Therefore, the bulk of bitumen exported from Canada in the near future will be cut with light hydrocarbons, creating a mixture known as dilbit. The rest is converted to synthetic crude, commonly known as syncrude, which lightens the substance for transport but involves a more expensive
The dilbit mixture that is expected to comprise the bulk of Canadian exports is one of NRDC’s concerns because it claims the substance is more corrosive than other types of oil transported through pipelines. As a result, NRDC argues for additional environmental reviews on top of the several that have been done.

As an initial matter, NRDC’s findings are based on a flawed analysis. Its report compared incidents in Alberta, Canada pipelines carrying a high proportion of dilbit to incidents in U.S. pipelines. Based on this comparison, it concluded that Alberta had a higher rate of reportable pipeline incidents than U.S. pipelines. But the report’s comparison is inapt on two dimensions. First, according to Canada’s pipeline regulator, the Energy Resources Conservation Board (“ERCB”), the set of U.S. pipelines NRDC gathered data from is much more limited than the set of Alberta pipelines it included. The U.S. reports only include transport pipes for hazardous liquids, which ERCB defines as “petroleum, petroleum products, or anhydrous ammonia.” The Alberta oil sands report, on the other hand, includes water and multiphase pipelines in addition to petroleum product pipelines, which account for 25.9% and 36.8% of pipeline incidents respectively. Second, ERCB reports every pipeline incident, not just incidents involving a spill where more than five barrels of oil is released, as the United States does. A comparison between these figures is analytically meaningless, and it cannot support a conclusion that the corrosive nature of dilbit causes more spills. Moreover, ERCB notes that it was only able to identify three spills resulting from internal corrosion between 1990 and 2005, the period NRDC examined. Thus, the average failure frequency for crude oil pipelines in this pe-

121. Swift & Shope, supra note 117, at 1-2.
122. Id. at 8; see also Danielle Droitsch, Here We Go Again: TransCanada Applies Again for Keystone XL Tar Sands Pipeline, Switchboard: Natural Res. Def. Council Staff Blog (June 18, 2012), http://switchboard.nrdc.org/blogs/ddroitsch/state_department_announces_pro.html. The NRDC Public Safety Backgrounder called for environmental review in 2010, before the SDEIS or FEIS were performed, and in the staff blog post from June 2012, NRDC asks for yet another. Id.
129. Id.
period is 0.03 per 1000 km per year, which is significantly lower than 0.08 per 1000 km per year, the U.S. failure frequency NRDC quotes.\textsuperscript{130}

The evidence supporting the claim that dilbit is corrosive to steel is weak. DOS itself determined that below four hundred and fifty degrees Fahrenheit, dilbit is not corrosive to steel.\textsuperscript{131} The maximum operating temperature at any point on the pipeline is expected to be below one hundred and fifty degrees Fahrenheit.\textsuperscript{132} Thus, dilbit is transported at temperatures well below the point at which it could become especially corrosive. Second, TransCanada has agreed to comply with Pipeline and Hazardous Material Safety Administration ("PHMSA’s") fifty-seven special conditions, many of which address the potential for internal corrosion.\textsuperscript{133} For example, Condition 34 requires TransCanada to limit corrosion-causing sediment to "0.5% by volume and [to] report . . . testing results to PHMSA in the annual report."\textsuperscript{134} Conditions 33, 42, and 53 further mandate the use of specific cleaning tools and internal inspections with increased frequency, as well as a crude oil monitoring and sampling program to ensure the product meets specifications.\textsuperscript{135} Additionally, the tariff approved by FERC that covers the Keystone XL system’s imported oil also prevents TransCanada from shipping dangerously corrosive oil.\textsuperscript{136} Thus, the evidence shows that dilbit does not create any heightened risk for internal corrosion.\textsuperscript{137}

\textsuperscript{130} Id.

\textsuperscript{131} U.S. Dep’t of State, Supplemental Draft Environmental Impact Survey 3-112 (2011), available at http://keystonepipeline-xl.state.gov/documents/organization/182272.pdf ("Additionally, while the total acid number (TAN) for WCSB dilbit is in the midrange of heavy crude oils, the TAN characteristics of crude oils are not significant to the corrosion potential of steel piping at temperatures below approximately 450 degrees Fahrenheit (PHMSA 2011).”).

\textsuperscript{132} Id.


\textsuperscript{134} See Final PHMSA Recommended Conditions for Keystone XL State Dept. Presidential Permit, supra note 133, at 19-20.

\textsuperscript{135} Id. at 19, 22, 26.

\textsuperscript{136} U.S. Dep’t of State, supra note 131, at 3-116.

\textsuperscript{137} See Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 16, 125 Stat. 1904, 1915 (2012). Although there is little compelling evidence to suggest accelerated internal corrosion in dilbit pipelines, Congress has nonetheless directed experts to examine the issue. The uncontroversial Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 passed both houses and the President signed it into law last year. The law requires PHMSA to review current regulations to determine whether or not they are sufficient to ensure the safety of pipelines
The fear of spills along Keystone XL is largely what fuels environmentalist worries over internal corrosion. So it would also be appropriate to address other measures TransCanada has agreed to take in order to prevent spills from any potential cause. Pursuant to the PHMSA special conditions, TransCanada agreed to implement a number of state-of-the-art methods to prevent spills. First, a handful of conditions require TransCanada to use specific materials for the pipeline itself and its coating materials. These include requirements on the manufacturing process for the steel used for the pipeline. Second, TransCanada must adhere to specific welding guidelines and must give notice on the welding procedures it uses. Third, the conditions mandate sophisticated computer systems to remotely control pipeline functions and detect potential leaks and pipeline weakness. Fourth, pipe valves must be installed in twenty-mile intervals along with auxiliary power and communications facilities to remotely close the valves in inclement weather. Finally, the conditions require regular testing, reviewing, and reporting on test results to the National Transportation Security Board or the PHMSA.

Looking past the dispute over whether Keystone XL is especially vulnerable to corrosion or releases into the environment, the notion that spilled oil will significantly harm the Ogallala Aquifer in Nebraska is also suspect. As DOS points out, although bitumen is a particularly thick substance, it has a lower specific gravity than water, and will “tend to float on water.” Moreover, oil spilled in groundwater is not likely to spread far. Groundwater has natural characteristics that limit the spread of petroleum contaminants. Contaminants spread more slowly than groundwater moves, and the

carrying diluted bitumen, and to determine whether or not they present a heightened risk of spills.

138. Final PHMSA Recommended Conditions for Keystone XL State Dept. Presidential Permit, supra note 133, at 1-7 (establishing conditions 1, 2, 4, 7, 9, 11).

139. See id. at 1-2 (establishing conditions 1, 2).

140. See id. at 4-7 (establishing conditions 5, 6, 12).

141. See id. at 10 (establishing condition 18).

142. See id. at 14-18 (establishing conditions 24 and 25, and requiring the installation of a Supervisory Control and Data Acquisition (SCADA) system).

143. Id. at 16; see also White Paper: PHMSA 57 Special Conditions, supra note 133, at 6 (noting that this is a more stringent requirement than standard valve placement requirements).

144. See Final PHMSA Recommended Conditions for Keystone XL State Dept. Presidential Permit, supra note 133, at 8-26 (establishing conditions 14, 16, 27, 36-41, 44-48, 52).

145. See U.S. Dep’t of State, supra note 131, at 3-104.

Ogallala Aquifer flows at an average of 150 feet per year, or less than a foot per day.\textsuperscript{147} These properties result in a much lower likelihood that an aquifer would be significantly contaminated in the first place, as well as better opportunities for cleanup crews to reclaim spilled oil.

The Environmental Protection Agency ("EPA") has voiced concerns regarding Keystone XL based on fears that greenhouse gas ("GHG") emissions are greater for bitumen than other forms of petroleum.\textsuperscript{148} However, the GHG concerns arise mainly from the actual extraction of oil sands rather than its consumption as an end product. In order to extract bitumen, Canadian production companies primarily use a method called \textit{in situ} production.\textsuperscript{149} Production from oil sands is about eighty percent \textit{in situ} and the other twenty percent is obtainable through mining operations.\textsuperscript{150} \textit{In situ} is a process that uses steam generated from natural gas to heat the substance so that it can be extracted more easily.\textsuperscript{151} There are a number of different methods of \textit{in situ} extractions, but there are two different methods generally used in Alberta: cyclic steam stimulation ("CSS") and steam assisted gravity drainage ("SAGD").\textsuperscript{152} The SAGD method uses two pipes inserted to an oil sands formation, where one pipe is inserted above, carrying the heated gas into the area where the oil is located.\textsuperscript{153} The other pipe is situated below the area and catches the liquefied bitumen as it flows from its location in the formation.\textsuperscript{154} In CSS, steam is injected into the oil reservoir, which heats up the bitumen and allows it to be brought to the surface.\textsuperscript{155}

According to the EPA, bitumen extraction causes four times the GHG emissions associated with production of other forms of petroleum.\textsuperscript{156} Although this figure may at first seem alarming, it must be

\begin{itemize}
\item \textsuperscript{147} The Ogallala Aquifer, HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT No. 1, http://www.hpwd.com/the_ogallala.asp (last visited June 6, 2012).
\item \textsuperscript{149} \textbf{Energy Policy Research Found.}, supra note 35, at 1.
\item \textsuperscript{150} \textit{Id}.
\item \textsuperscript{151} \textit{Id}.
\item \textsuperscript{153} \textit{Id}.
\item \textsuperscript{154} \textit{Id}.
\item \textsuperscript{155} \textit{Id}.
\item \textsuperscript{156} Letter from Cynthia Giles to Jose W. Fernandez and Kerri-Ann Jones, \textit{supra} note 148; see also U.S. DEP’T OF ENERGY, AN EVALUATION OF THE EXTRACTION, TRANSPORT AND REFINING OF IMPORTED CRUDE OILS AND THE IMPACT ON LIFE CYCLE GREENHOUSE GAS EMISSIONS 5 (2009), available at http://www.netl.doe.gov/energy-analyses/
put in perspective. Emissions from extraction only account for about twenty percent of emissions resulting from the production of petroleum products from extraction to retail.\textsuperscript{157} Taking into account the downstream steps in the process from “well to wheel,” bitumen production creates only about a five to fifteen percent increase in emissions over emissions from production of other types of petroleum.\textsuperscript{158} Moreover, because the dilbit mixture transported from Canadian extraction sites is only about seventy percent bitumen, its GHG emissions are lower than they otherwise would be for any given quantity of dilbit.\textsuperscript{159} As Canada continues to extract bitumen from oil sands, \textit{in situ} technology continues to improve.\textsuperscript{160} The process already uses fifteen percent less steam than when it was initially used less than ten years ago.\textsuperscript{161}

Viewing the emissions from Canadian oil sands production from a global perspective is even more illuminating. Canada’s total contribution to global GHG emissions is two percent.\textsuperscript{162} Canada’s oil sands contribute about five percent of this two percent.\textsuperscript{163} Thus, oil sands extraction in Canada contributes about 0.1\% of global GHG emissions.\textsuperscript{164} Canada also sits on one of the world’s largest supplies of petroleum, second only to Saudi Arabia.\textsuperscript{165} The sheer volume of Canadian oil certainly adds to its GHG emissions. Weighing these factors against the potential investment from TransCanada and the dramatic increase in jobs, the GHG emissions from Canadian bitumen extraction is a manageable environmental cost.

Moreover, even if we take these claims at face value, a decision not to permit Keystone XL is not likely to have any effect on the pollution that results. Reducing those upstream emissions means leaving the oil in the ground, which Canada is not likely to do in any scenario. Canadian producers will find a trading partner whether or not the pipeline is approved. For example, Canadian producers are likely to resort to exporting to pacific rim countries, especially China.\textsuperscript{166} If China were able to secure long-term contracts with TransCanada, the

\textsuperscript{157} See \textsc{Energy Policy Research Found.}, supra note 35, at 6.

\textsuperscript{158} Id.

\textsuperscript{159} IHS CERA, \textsc{Oil Sands, Greenhouse Gases, and US Oil Supply: Getting the Numbers Right} 8 (2010), available at \url{http://www.api.org/aboutoilgas/oilsands/upload/cera_oil_sands_GHGs_US_oil_supply.pdf}.

\textsuperscript{160} Id. at 10.

\textsuperscript{161} Id.

\textsuperscript{162} \textsc{Energy Policy Research Found.}, supra note 35, at 6.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} IHS CERA, supra note 159, at 2.

\textsuperscript{166} \textsc{Energy Policy Research Found.}, supra note 35, at 5.
pipeline would instead be directed west of production areas, to be carried in supertankers through the Strait of Juan de Fuca.\textsuperscript{167} Moreover, because the United States has an obligation with its trading partners to maintain a high level of crude oil imports, lost Canadian imports would be replaced by imports from other sources.\textsuperscript{168}

C. The Economic Impact of Keystone XL

There are two major results from Keystone XL construction that will impact the U.S. economy. First, TransCanada's expenditures on the project would create thousands of jobs and increase U.S. Gross Domestic Product (GDP) over the next few decades. The Perryman Group predicts that throughout the lifetime of the project the spending will total about $20.931 billion and 118,935 person-years of employment.\textsuperscript{169} Second, the project will decrease the cost of energy by increasing supply and strengthening the reliability of supply, which will have ripple effects in the domestic energy industry and the economy as a whole.

Keystone XL will bolster the refining business in the Gulf States. A number of the fifty-six refineries in the Gulf States are specially equipped to handle heavier crude inputs.\textsuperscript{170} The main sources of these heavier crudes are Venezuela and Mexico, which have faltered as heavy crude suppliers to the Gulf States in recent decades.\textsuperscript{171} The significant amount of vacant heavy crude refining capacity among these refineries is a result of the shortfalls in Venezuelan and Mexican supply and an economic risk for the industry.\textsuperscript{172} Keystone XL would connect these refineries with capacity for heavier crudes with Canadian supply to help fill vacant capacity.\textsuperscript{173} The viability of these processing centers is important, not only for the economic health of the region, but for the rest of the nation as well. Strong domestic production of petroleum end products is a key element of a stable energy supply.

\begin{itemize}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{The Perryman Grp., The Impact of Developing the Keystone XL Pipeline Project on Business Activity in the U.S. 4 (2010), available at http://www.perrymangroup.com/reports/TransCanada.pdf.}
\item \textsuperscript{170} \textit{Energy Policy Research Found., supra note 35, at 13. Oil refining inputs are often known as feedstock.}
\item \textsuperscript{171} \textit{Parpomak et al., supra note 1, at 20.}
\item \textsuperscript{172} \textit{See Energy Policy Research Found., supra note 35, at 13 (noting that offsetting Mexican and Venezuelan imports would support the fundamentals of the American refining complex).}
\item \textsuperscript{173} \textit{Id. at 12.}
\end{itemize}
In addition to the thousands of jobs the pipeline would bring to the United States initially, it would also decrease energy prices by reducing the risk of price fluctuations inherent in other sources and increasing energy supply.\(^{174}\) As a result, energy production would contribute more to the domestic economy. Combining the downward pressure on prices from increased stability and increased supply, it is estimated that private sector investment would increase by $100.144 billion.\(^{175}\) Further, the Perryman Group estimates an increase in output of about $29.048 billion and about 250,348 permanent jobs.\(^{176}\) These phenomenal gains are estimates based on a “normal” price index for oil; predictions for growth in the industry if oil prices increase are even higher.\(^{177}\) At this juncture, with an embattled private sector and on the heels of government encroachment in the form of stimulus, Keystone XL is exactly the kind of investment our economy needs.

Interestingly, NRDC and the State of Nebraska claim that the entry of a new supplier into the Gulf Region market would actually increase prices.\(^{178}\) If Keystone XL were built, they argue crude that would otherwise be converted to gasoline for domestic use in the Midwest would instead divert to the Gulf to be converted to diesel for export. As a result, according to NRDC, U.S. refineries would produce less gas in aggregate and prices would increase.\(^{179}\) This argument should not be taken seriously for several reasons.

First, the lower portion of the Keystone XL pipeline connecting Cushing, Oklahoma to Port Arthur located on the Gulf Coast of Texas—which President Obama already approved—is an apparent endorsement of the possibility that the bitumen would be converted to diesel and exported. Approving only the southern portion would present even more of a threat to gas prices if you accept NRDC’s logic. Unlike the northern portion of Keystone XL that TransCanada hopes to get approved, the southern connector pipeline can only divert crude


\(^{175}\) The Perryman Grp., supra note 169, at 30.

\(^{176}\) Id.

\(^{177}\) See id. at 30-31.


\(^{179}\) Swift, supra note 178, at 5, 7-9.
otherwise headed toward the Midwest to the Gulf. The President’s approval of the southern portion of the pipeline could cause the realization of NRDC’s fear—that crude oil for domestic consumption will be converted to diesel and exported for foreign consumption. NRDC, however, levels no criticism at the President for his approval.

Second, the scenario NRDC contemplates will not present itself if Keystone XL is approved. With the entire length of the proposed Keystone XL in operation, crude will travel from production sites in Alberta to Gulf refineries, and producers in North Dakota and Montana will also be able to link from their production sites through Keystone XL.¹⁸⁰ This will transport oil over and above the amount transported to U.S. refiners from current production sources. The result is an increase in overall crude available to Gulf refiners, not a decrease in input supply to Midwest producers in favor of Gulf refiners. Even if some additional Canadian crude might go to the Midwest instead of the Gulf absent Keystone XL, they will be unable to handle projected dilbit import growth.¹⁸¹ Moreover, bitumen is a fungible input. The fate of the final product is a matter of economics, not government policy.

Finally, NRDC’s basic claims rely on the false premise that Keystone XL’s construction would increase crude prices. In its report, NRDC repeatedly states that crude prices are the most significant factor in determining gas prices but never clarifies exactly how an increase in the overall supply of crude will put upward pressure on crude prices.¹⁸² The NRDC report may confuse the market for gas for the market for crude. It uses the possibility that a higher percentage of refined crude will be exported, thus shrinking the domestic market supply for the final product, as a premise for concluding that the price of crude (the input) will rise.¹⁸³ The bottom line is that in the next decade as oil sands production ramps up in Canada, the Midwest will be unable to handle the additional output. So characterizing Keystone XL as taking supply from Midwest refiners and putting it in the hands of Gulf refiners is misleading. Rather, Keystone XL will allow the impending oil sands to reach the broader U.S. market, and especially the Gulf, which has the capacity to accept it. For a given level of demand, increased supply of a given product is going to create downward pressure on prices. This is a basic economic tenet and there is no reason to

¹⁸². See Swift, supra note 178, at 8-10.
¹⁸³. Id.
think the market for crude in the U.S.—which includes refiners in the Gulf and in the Midwest—is any different.

D. Energy Security

By replacing heavy crude from Mexico and Venezuela and other petroleum inputs from the Middle East and Africa, Keystone XL would bolster energy security. The importance of energy security cannot be understated. Shockwaves from energy supplies have had devastating effects on both markets and our nation in the past, and the risk that they might in the future should be mitigated. Keystone XL would reduce this risk in a number of ways. While Mexico and Venezuela have decreased production, Canada expects a surge in bitumen exports.184 Thus, Canada’s export capacity is more reliable. Additionally, the politics between the United States and Canada are much less volatile than U.S. relations with certain regimes in the Middle East. Further, the instability inherent in the region—beyond tension with the United States alone—also adds uncertainty with respect to energy supply. Moreover, the domestic production Keystone XL would stimulate would further reduce our dependence on unstable suppliers.

History is instructive on the effect our reliance on energy supplies from the Middle East can have on the broader economy. The Organization of the Petroleum Exporting Countries (“OPEC”) oil embargo of 1973 serves as a potent reminder that our dependence on OPEC exposes us to serious economic risk. In retaliation for U.S. military aid to Israel, OPEC cut off oil exports to the United States for six months.185 As a result, consumer goods and food prices exploded and the American economy spiraled out of control.186 For example, the Dow Jones Industrial Average lost over 45% of its value, and inflation jumped from 3.4% to 12.3%.187

Threats from the Middle East to our oil supply are not a thing of the past. We produce around half of the oil we use, but about forty percent of the 11.4 million barrels per day (“Mbpd”) we import—or 4.56 Mbpd—still comes from OPEC.188 In a recent example of why this is problematic, Iran has repeatedly threatened to block oil tanker

186. Id.
187. Id.
passage through the Straits of Hormuz, which would choke off oil exports to both Europe and the United States, however efforts are already underway in surrounding countries to bypass the threatened Straits.\(^{189}\) For example, the United Arab Emirates has constructed a pipeline to carry its oil around the Strait to the Indian Ocean to serve as an alternate route to send exports westward.\(^{190}\) However, the pipeline would only hold capacity for about ten percent of the amount of oil sent through the Strait, so it would not serve as an adequate substitute by itself.\(^{191}\) Moreover, it is doubtful that alternate routes around a contested waterway for oil transport would resolve the central concern, which is that our enemies are in a position to threaten our energy supplies.

Conflict in Libya also threatened energy supplies to the U.S. and the rest of the global market. Libya provides roughly two percent of the world's oil, in the form of easy-to-refine sweet crude.\(^{192}\) During the conflict, Libya shut down its oil production, putting pressure on other suppliers like Nigeria to fill the gap.\(^{193}\) Lower output from Libya frustrated U.S. refining expectations, leading to negative economic results in the United States: the U.S. Energy Information Administration noted that the absence of Libyan oil would interfere with seasonal ramp-ups in refining, apparently putting upward pressure on prices.\(^{194}\) With unrest in Libya igniting independently of U.S. involvement, the conflict represents a different kind of threat than the one Iran poses: the general instability in the Middle East. We would be hard-pressed to find a similar sovereign risk in Canada.

In addition, a significant portion of our imports come from Venezuela and Mexico, both of which directly supply the same Gulf Coast refineries Keystone XL is designed to supply. Venezuela supplied 0.9 Mbdp and Mexico imported 1.2 Mbdp in 2011.\(^{195}\) It is no secret that these sources are problematic for our energy supply. After a strike at Venezuela’s national oil company in 2002-03, production fell by one Mbdp and never recovered.\(^{196}\) Likewise, Mexico is also facing decreased production due to an inability to develop new oil production


\(^{190}\) Id.

\(^{191}\) Id.


\(^{193}\) Id.

\(^{194}\) See id. (discussing the possible effects of a prolonged crisis).

\(^{195}\) PARMOMAK ET AL., supra note 1, at 20.

\(^{196}\) Id.
sites and depletion of its Cantarell field site.\textsuperscript{197} As a result, fewer imports have been available to the U.S. These two countries supply the type of heavy crude that many Gulf refineries are specially equipped to process, so oil from Keystone XL would likely replace or supplement these sources initially.\textsuperscript{198} With supply from these countries dwindling and gas prices putting pressure on pocketbooks across the country, it is more important than ever to establish a dependable lifeline to production sources.

Currently, the U.S. Gulf Region provides over half of U.S. refining capacity.\textsuperscript{199} Oil sands produced in Alberta, however, can only reach U.S. refineries in the Midwest because the Midwest is the only region that cross-border pipelines can currently access.\textsuperscript{200} Meanwhile, Canada's growing oil sands output will find a market. Opening up pipeline capacity to those refineries in the Gulf Coast area would ensure that the United States could handle exports from Canada that might otherwise go to China. A long-term contract between Canada and China or other Asian nations would spell increased U.S. reliance on Middle East and African oil.\textsuperscript{201}

Notwithstanding the importance of securing a stable trading partner for oil, Keystone XL can also bolster domestic production. The Illinois terminal of the pipeline would provide a transport method for producers located in the Bakken area of Montana and North Dakota.\textsuperscript{202} Keystone XL's availability has already encouraged greater production from the Bakken areas of North Dakota and Montana by creating a more efficient method of transport from Bakken. In fact, TransCanada has already contracted with Bakken producers to carry sixty-five thousand barrels per day of oil down to Gulf Coast refineries.

\textsuperscript{197} Neurkurk, supra note 188, at 3 n.4 ("Mexican output fell sharply due to depletion at the giant Cantarell field. Efforts to offset the decline from other sources have been hampered by difficulties at the Mexican national oil company, Pemex, and restrictions on foreign investment.").


\textsuperscript{199} See Number and Capacity of Petroleum Refineries, U.S. Energy Info. Admin. (Jun. 22, 2012), http://www.eia.gov/dnav/pet/pet_pnp_cap1_a_na_800_Count_a.htm (noting that PADD 3, the Gulf Coast region, provides 37 percent of refining capacity currently).

\textsuperscript{200} Parfomak et al., supra note 1, at 20.


The contracts have incentivized the construction of a link from these producers in Baker, Montana to the proposed Keystone XL terminal in Patoka, Illinois. Currently, oil is transported by rail and truck from North Dakota and Montana, but this method is not ideal. With a pipeline at the disposal of producers, the incentive would be greater to produce. In addition to simply offering another transport option to producers in the Bakken area, a pipeline might be more secure and would certainly be less expensive. The link connecting Bakken to Keystone XL is expected to hold a capacity of about one hundred thousand barrels per day, and would amount to about a one hundred forty million dollar investment.

Keystone XL stands to fortify the security of our energy supplies on a number of fronts. By ensuring Canadian production flows to the United States rather than Asia, Keystone XL would help reduce our dependence on oil from the Middle East and Africa. Further, Keystone XL can replace the shortage in supply of heavy crudes from Venezuela and Mexico. Supply from Canada is simply a more reliable proposition given the lack of sovereign risk on the one hand, and the promise of enormous output capacity on the other. Finally, Keystone XL has encouraged an increase in domestic production, which could further reduce U.S. dependence on imports generally.

IV. CONCLUSION

Looking at all aspects of Keystone XL, beyond the criticisms and fears espoused by opponents, a clear picture comes into focus. The pipeline promises an immediate impact on our economy with a seven point six billion dollar investment and twenty thousand additional jobs, accomplished with private sector funds. This stands in contrast to a comparable stimulus investment by the federal government, which would provide no returns to taxpayer-investors and only ephemeral job market improvements. Moreover, the feedstock influx for U.S. refiners would bolster their businesses on the Gulf Coast as well as the Midwest. In turn, the greater feedstock supply would put downward pressure on prices of oil and gas, combating high prices at the pump.

To these direct economic impacts, add the long-term economic benefit of replacing insecure oil supplies with Canadian imports and

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205. PARFOMAK ET AL., supra note 1, at 5.

206. See id. (noting the need to increase transport capacity).

207. Id.
domestically produced oil from the Bakken region. Not only are these sources more reliable from a political stability perspective, but production from Canada is also expected to increase dramatically. Moreover, if the United States does not get in front of this increased production, Asia will; and this would further entrench our reliance on oil from less stable sources in the Middle East and Africa. The need for Keystone XL from an energy security perspective is clear and the window of opportunity is closing quickly.

The economic argument for Keystone XL illustrates clearly why authority to allow cross-border pipeline construction should be with an expert agency. Pipeline approval decisions are fact-intensive and technical undertakings. The economic benefits comprise the overwhelming need for the pipeline, and the potential environmental impacts must be weighed against these significant considerations in an impartial and apolitical manner. In the end, this is not what has happened at the Department of State. Moving permit authority to FERC would ensure the decision is in the hands of energy transportation experts. Further, with authority vested in FERC, the agency’s vulnerability to lawsuits would ensure that the decision-making process is rational as opposed to political.