

THE TRANSCANADA KEYSTONE XL PIPELINE: THE GOOD, THE BAD, AND THE UGLY DEBATE

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“The Keystone XL pipeline is a bad idea for many reasons, but the Obama administration needs to consider only one factor to reach the right decision: Is it in our national interest? The answer is an unequivocal ‘no.’”¹

“Good paying jobs. Economic growth. Energy security. Most Americans wouldn’t question whether these benefits are in the national interest. This is what the Keystone XL pipeline promises for America.”²

“The determination of national interest involves consideration of many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.”³

I. INTRODUCTION

Keystone XL is a proposed pipeline stretching from Alberta, Canada’s tar sand oil reserves to refineries in Oklahoma and Texas,⁴ and would have a carrying capacity of 700,000 barrels per day (bpd) of crude oil.⁵ The Keystone project has evoked heated debate over the environmental prudence, economic viability, and international politics of implementing the plans. Thousands of demonstrators concerned about the environmental impact of the pipeline gathered near the White House in opposition of the pipeline in November of 2011.⁶ While supporters of the

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¹ Amy Harder, *What Factors Should Drive the Keystone Pipeline Decision?*, NAT’L J. (Oct. 14, 2011), <http://energy.nationaljournal.com/2011/10/what-factors-should-drive-keys.php#2094096> (This comment was given by Michael Brune, Executive Director of Sierra Club).

² *Id.* (This comment is from Jack Gerard, President and CEO of American Petroleum Institute).

³ U.S. DEP’T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, EXECUTIVE SUMMARY ES-1, (2011), <http://keystonepipeline-xl.state.gov/documents/organization/182010.pdf>. [hereinafter EIS EXECUTIVE SUMMARY].

⁴ *Id.*

⁵ *Id.*

⁶ Juliet Eliperin & Steven Mufson, *Keystone Pipeline Debate Heats Up*, THE WASHINGTON POST, Nov. 5, 2011, http://www.washingtonpost.com/national/health-science/keystone-pipeline-debate-heats-up/2011/11/04/gIQA824rpM_story.html

pipeline engaged in media blitz to promote their view that the pipeline could provide both thousands of permanent jobs and oil from an allied neighbor.⁷ This Note attempts to balance the positive aspects of the project with the negative ramifications of its implementation. While each side of the debate has merit, and neither side can agree on the prudence or imprudence of the project, this Note attempts to flesh out the good that the Keystone XL could accomplish, the bad effects the pipeline could cause, and reconcile some of the ugly debates surrounding Keystone XL.

II. BACKGROUND, HISTORY, AND PLANS OF KEYSTONE XL

The proposed Keystone XL pipeline would extend from Hardisty, Alberta, Canada to southeastern Texas.⁸ The U.S. Department of State's Executive Summary of the Environmental Impact Statement states the pipeline, as proposed, would be a "[Thirty-six]-inch-diameter pipeline, with approximately 327 miles in Canada and 1,384 miles in the [United States]" It would include about "30 electrically operated pump stations, 112 mainline valves, 50 permanent access roads, and a new oil storage facility in Cushing, Oklahoma."⁹ Additionally, if the market dictates, the capacity could be increased from 700,000 bpd to about 830,000 bpd.¹⁰ Figure ES-8 shows the proposed route:¹¹

⁷ *Id.*

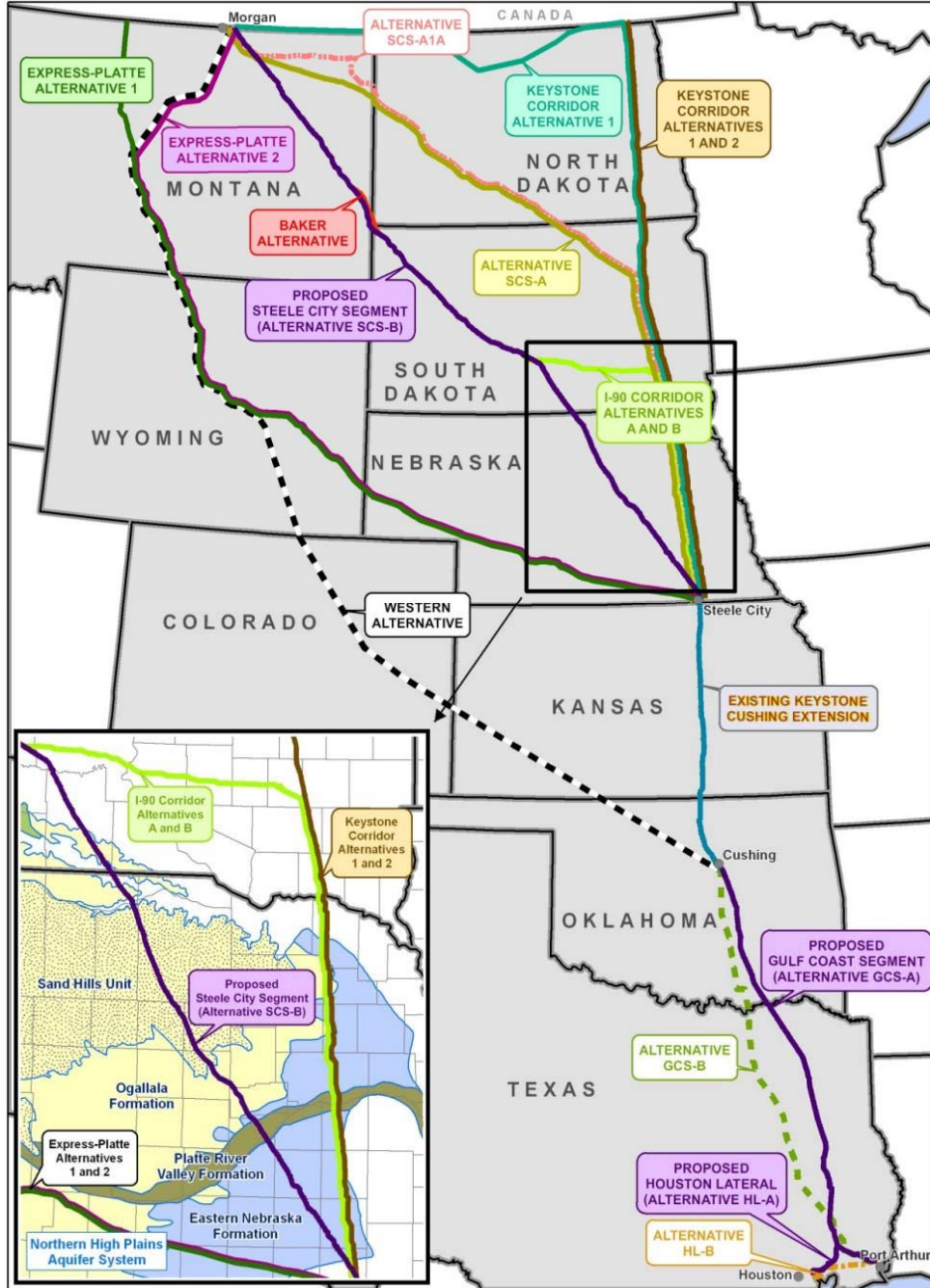
⁸ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1.

⁹ *Id.*

¹⁰ *Id.* at ES-2.

¹¹ *Id.* at ES-13.

Figure ES-8
Major Route Alternatives



As the map illustrates, there are several proposed alternative routes. Furthermore, there are numerous proposed minor route adjustments that seem more likely to come into play if the project is approved. The Executive Summary goes on to state that, “the agency-preferred alternative is the proposed Project route with the various and minor route realignments described in the EIS . . .” where realignments generally, “replace short segments of the proposed Project . . . relatively close to the proposed route, and would be implemented in accordance with applicable regulatory requirements of federal, state, or local permitting agencies.”¹² The estimated cost of this enormous project is about \$7 billion.¹³

However, in November of 2011, President Obama and the Department of State issued a statement that the approval decision, which was projected for the end of 2011, would be postponed, likely until 2013, in order to give greater attention to sensitive areas, such as the Northern Plains aquifer system.¹⁴ This area is one of utmost concern along the route as it includes the Sandhills and Ogallala aquifer systems, which are unique and sensitive areas.¹⁵ “The Northern High Plains Aquifer system supplies 78 percent of the public water supply and 83 percent of the irrigation water in Nebraska and approximately 30 percent of water used in the U.S. for irrigation and agriculture.”¹⁶ These areas are particularly vulnerable, not only because of the volume and importance of the water, but also because “the depth to groundwater is less than 10 feet for about 65 miles of the proposed route in Nebraska.”¹⁷

The pipeline is intended to transport crude oil extracted from tar sands areas in northern Alberta, Canada.¹⁸ Tar sands, or oil sands, are “a combination of clay, sand, water, and bitumen, which is a material similar to soft asphalt. Bitumen is extracted from the ground by mining or by injecting steam underground to heat the bitumen to a point where it liquefies and can be pumped to the surface.”¹⁹ After extraction, the bitumen is treated and converted into synthetic crude or diluted bitumen, which are suitable for pipeline transport.²⁰ Both of these bitumen products, synthetic crude and diluted bitumen, are “similar in composition and quality to the crude oils currently transported in pipelines in the U.S. and being refined in Gulf Coast refineries.”²¹

¹² *Id.* at ES-14.

¹³ *Id.* at ES-2.

¹⁴ *Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information*, U.S. DEP’T OF STATE (Nov. 10, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>. [hereinafter *Keystone Review Process*].

¹⁵ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at ES-2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at ES-3.

In addition to the Canadian crude, the Keystone XL plans include projects to integrate link lines to transport oil from the Bakken and Cushing sources.²² “The Bakken Marketlink would allow transport of up to an additional 100,000 bpd of crude oil from the Bakken formation in the Williston Basin in Montana and North Dakota.”²³ The Cushing Marketlink from the Cushing, Oklahoma area would potentially add another 150,000 bpd to the Project for transportation to the various delivery points in Texas.²⁴

The Keystone XL pipeline is being spearheaded by TransCanada Keystone Pipeline, LP (Keystone). The application process began in September 2008 when Keystone filed its application for a Presidential Permit with the U.S. Department of State (DOS).²⁵ The President and DOS are drawn in according to Executive Order 13337, which states, “the Secretary of State is hereby designated and empowered to receive all applications for Presidential permits . . . for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum . . . or other fuels to or from a foreign country.”²⁶

For a project like Keystone XL, a major part of the permitting process is preparation of an Environmental Impact Statement (EIS) as the National Environmental Policy Act (NEPA) requires.²⁷ Here, DOS is the lead agency for a Presidential Permit, so it took the lead in the environmental review.²⁸ DOS enlisted the aid of Cardno ENTRIX.²⁹ The EIS process took almost three years, “and included consultations with the third-party contractor, cooperating agencies, and scientists and engineers with expertise in key areas of concern related to the proposed Project.”³⁰

The summary of the findings of the EIS states, “[t]he analyses of potential impacts associated with construction and normal operation of the proposed Project suggest that there would be no significant impacts to most resources along the proposed Project corridor . . . ”³¹ This finding is based on the assumptions the pipeline “would comply with all applicable laws and regulations”; that Keystone would adhere to the required special conditions; take appropriate mitigation measures, including measures to reduce impacts; and otherwise operate and

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at ES-1.

²⁶ Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) [hereinafter Executive Order].

²⁷ See EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1 and 42 U.S.C. § 4321 *et seq.*

²⁸ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1.

²⁹ *Id.*

³⁰ *Id.*

³¹ U.S. DEP’T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, VOL. 2, SUMMARY OF FINDINGS 3.15-1 (2011), available at <http://keystonepipeline-xl.state.gov/documents/organization/182070.pdf>.

maintain the project as the EIS directs.³² However, the EIS goes on to state that, “[a]lthough most resources would not experience significant impacts, there would be significant adverse effects to certain cultural resources along the proposed Project corridor and mitigation measures have been developed”³³

Some question the impartiality of Cardno ENTRIX, however. Even though DOS chose Cardno ENTRIX, TransCanada is paying for the study.³⁴ Some argue this relationship, and the fact that previous TransCanada projects have had EISs performed by Cardno ENTRIX, creates a conflict of interest, and therefore the EIS cannot be relied upon.³⁵ However, this type of a relationship is not uncommon, and “while the company seeking the permit pays the bill under federal regulations, the government picks the contractor.”³⁶

In making the final decision on whether or not to grant the permit, DOS considered “many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.”³⁷ Originally, this decision was expected before the end of 2011.³⁸ House Resolution 1938 of the 112th Congress attempted to mandate an expedited approval process, stating, “[t]he President . . . shall coordinate with each Federal Agency responsible for coordinating or considering an aspect of the President’s National Interest Determination . . . [and] the President shall issue a final order granting or denying the Presidential Permit for the Keystone XL pipeline [no] later than November 1, 2011.”³⁹ The Senate never addressed H.R. 1938. And while it appears the House of Representatives supports the project, the State Department and President Obama responded and stated that a final decision would be postponed until after the 2012 election, citing a need to gather additional information about the possible impacts.⁴⁰ Congress ultimately voiced its disapproval of the President’s hesitance to address the permit application, and mandated an expedited decision.⁴¹ President Obama stuck to his guns and denied the permit, stating “the Department does not have sufficient time to obtain the

³² *Id.*

³³ *Id.*

³⁴ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1.

³⁵ Leslie Kaufman, *State Department Defends Contractor Chosen for Pipeline Study*, N.Y. TIMES, Nov. 1, 2011, at A21, available at <http://www.nytimes.com/2011/11/02/us/state-department-defends-keystone-xl-pipeline-contractor.html>.

³⁶ *Id.*

³⁷ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1.

³⁸ *Id.* at ES-3.

³⁹ H.R. 1938, 112th Cong. (2011).

⁴⁰ John M. Broder & Dan Frosch, *U.S. Delays Decision on Pipeline Until After Election*, N.Y. TIMES, Nov. 11, 2011, at A1, available at <http://www.nytimes.com/2011/11/11/us/politics/administration-to-delay-pipeline-decision-past-12-election.html>.

⁴¹ H.R. 3765, 112th Cong. (2011).

information necessary to assess whether the project, in its current state, is in the national interest.”⁴² However, TransCanada seems undaunted, and stated:

This outcome is one of the scenarios we anticipated. While we are disappointed, TransCanada remains fully committed to the construction of Keystone XL. Plans are already underway on a number of fronts to largely maintain the construction schedule of the project . . . We will re-apply for a Presidential Permit and expect a new application would be processed in an expedited manner to allow for an in-service date of late 2014.⁴³

Thus, the debate over the pipeline still rages.

III. THE BAD: ARGUMENTS FROM THOSE OPPOSING THE PIPELINE

In any oil and gas development or pipeline installation, adverse environmental impacts abound. However, in this project, opponents argue that other impacts include detrimental economic consequences and endangerment of national security. For instance, some experts suggest the pipeline will result in higher gas prices, will not provide a significant increase in jobs, and will not improve national security. Additionally, oil tar sands is regarded as “dirty oil,” and some believe the risks of aquifer contamination are simply too high. This section will outline some of these arguments.

A. *The Keystone XL Will Result in Higher Gas Prices*

During the June 15, 2011 markup debate of H.R. 1938, California Representative Henry Waxman argued, *inter alia*, the pipeline would not reduce, but would actually raise, gasoline prices.⁴⁴ This argument is based on language in TransCanada’s Canadian Permit Application from 2008. That application cites an independent study that concluded there currently exists an oversupply of heavy crude in the U.S. Midwest, which has resulted in a pricing discount on Canadian

⁴² Brian Montopoli, *Obama Denies Keystone XL Pipeline Permit*, CBS News (Jan. 18, 2012), http://www.cbsnews.com/8301-503544_162-57361324-503544/obama-denies-key-stone-xl-pipeline-permit.

⁴³ Luiza Ch. Savage, *TransCanada Will Re-Apply for Keystone XL Permit*, MCCLEANS.CA (Jan. 18, 2012) <http://www2.macleans.ca/2012/01/18/transcanada-will-try-again-hope-for-pipeline-in-2014>.

⁴⁴ Transcript of Markup on H.R. 1938 Before the Energy & Power Subcomm. of the H. Comm. on Energy & Commerce, 112th Cong., June 15, 2011, at line 257, http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/061511%20EP%20Markup%20of%20HR%201938%2C%20The%20North%20American-Made%20Energy%20Security%20Act.pdf [hereinafter Markup Transcript].

heavy crude.⁴⁵ Access to the USGC (US Gulf Coast) via the Keystone XL Pipeline is expected to raise Canadian crude oil pricing in PADD II [U.S. Midwest] by removing this oversupply.⁴⁶ While this notion may be hard for Midwesterners to understand,⁴⁷ TransCanada has research demonstrating that Canadian heavy crude oil prices in the Midwest are historically priced lower than comparable heavy crude.⁴⁸ Their permit application goes on to say:

Access to the USGC via the Keystone XL Pipeline is expected to strengthen Canadian crude oil pricing in PADD II by removing this oversupply. This is expected to increase the price of heavy crude to the equivalent cost of imported crude. Similarly, if a surplus of light synthetic crude develops in PADD II, the Keystone XL Pipeline would provide an alternate market and therefore help to mitigate a price discount.⁴⁹

According to TransCanada's application, the Midwest has been receiving Canadian oil at a discounted price, and Keystone XL will remove the surplus supply in the Midwest and increase prices to match current market rates for comparable Mexican heavy crude.⁵⁰

The Keystone XL Pipeline would change the destination market of the tar sands crude, and therefore help mitigate a price discount for Canadian heavy crude.⁵¹ "The resultant increase in the price of heavy crude is estimated to provide an increase in annual revenue to the Canadian producing industry in 2013 of US \$2 billion to US \$3.9 billion."⁵²

Phillip Verleger, president of a consulting firm specializing in research on oil market economics, agreed the result of the pipeline would be an increase in gas

⁴⁵ Canadian National Energy Board, Hearing OH-1-2009, TransCanada Keystone Pipeline GP Ltd., Keystone XL Pipeline Project, Section 3 Supply and Markets, p.7, Appendix 3-1, and Figure 13, available at [https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/418396/550305/556487/549220/B-1f_-_Supply_and_Markets_\(Tab_3\)_incl._Appendix_3.1_-_A1I9R7?nodeid=549324&vernum=0](https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/418396/550305/556487/549220/B-1f_-_Supply_and_Markets_(Tab_3)_incl._Appendix_3.1_-_A1I9R7?nodeid=549324&vernum=0).

⁴⁶ *Id.*

⁴⁷ In the Markup Transcript, Representative Waxman quipped, "Tell a consumer in the Midwest that they are receiving discounted prices on their gasoline and you might get an earful." See Markup Transcript, *supra* note 44, at line 639.

⁴⁸ *Id.*

⁴⁹ Canadian National Energy Board, Hearing OH-1-2009, TransCanada Keystone Pipeline GP Ltd., Keystone XL Pipeline Project, Section 3 Supply and Markets, p.7, line 9-16.

⁵⁰ *Id.* at Appendix 3-1.

⁵¹ KENNY BRUNO ET AL., DIRTY BUSINESS, 15 (Friends of the Earth, Apr. 2001), http://stopbigoilriproffs.com/documents/dirty-business-how-transcanada-pipelines-bullies-farmers-manipulates-oil-markets-threatens-fresh-water-and-skimps-on-safety-in-the-united-states/at_download/file.

⁵² Canadian National Energy Board, Hearing OH-1-2009, TransCanada Keystone Pipeline GP Ltd., Keystone XL Pipeline Project, Transcript Volume 3 (Sept. 17, 2009).

prices, not a decrease.⁵³ Verleger stated Midwestern refiners traditionally paid more for oil because it had to be shipped from the Gulf Coast states.⁵⁴ Verleger goes on to observe that more recently, “Canadian output has increased. Oil now flows south, not north. Midwestern refiners can save significant sums, savings that ultimately get passed on to consumers.”⁵⁵ Verleger argues Canadian oil companies are dissatisfied with this alleged discount, and the Keystone XL would alleviate the discount because the oil will bypass the Midwest and go directly to the Gulf Coast.⁵⁶ “However, hidden in their presentations to Canadian National Energy Board officials is their declared intent to use the pipeline to raise prices to Americans.”⁵⁷

By bypassing the Midwestern refineries, those same refineries will have two options: pay the higher price demanded by the Canadian oil companies to continue to have the oil sent directly to the Midwest; or, let the Canadian oil bypass the Midwest and go to the Gulf Coast, and then bring oil back from the Gulf Coast. Verleger estimates the impact of Keystone XL as follows: “U.S. farmers, who spent \$12.4 billion on fuel in 2009, according to the U.S. Department of Agriculture, could see expenses rise to \$15 billion or higher in 2012 or 2013 if the pipeline goes through. At least \$500 million of the added expense would come from the Canadian market manipulation.”⁵⁸ Those increases in costs, Verleger argues, would then be passed on to American consumers through increased food costs, as well as more expensive gasoline and diesel fuel, a simple “tribute to our ‘friendly’ neighbors to the north.”⁵⁹

Another argument regarding increased gas prices stems from pipeline tolls and the fact that the Keystone XL is simply not necessary. Lorne Stockman, with Corporate Ethics International, wrote that the Keystone and Clipper pipelines, both of which were recently built, have excess capacity.⁶⁰ Stockman also writes, “[t]hese two pipelines alone have the potential to be expanded to 1.39 million [bpd], more than total tar sands production in 2009. The excess capacity has already led to a 33% hike in shipping tolls between Alberta and the Midwest.”⁶¹ Further, “[c]urrent estimates suggest that with XL added to the system, spare capacity in pipelines from Alberta to the U.S. will be at 41%. This could result in a

⁵³ Philip K. Verleger, *Philip Verleger: If Gas Prices Go Up Further, Blame Canada*, STAR TRIBUNE, Mar. 13, 2011, available at <http://www.startribune.com/opinion/otherviews/117832183.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ LORNE STOCKMAN, TAR SANDS OIL MEANS HIGH GAS PRICES, 1 (Corporate Ethics Int’l, May 6, 2010), available at <http://dirtyoilsands.org/files/CEI-TarSandsMeansHigherOilPrices.pdf>.

⁶¹ *Id.* at 2.

tripling of tolls for moving crude oil from Canada to the U.S.”⁶² These increased costs and tolls, Stockman argues, would be passed on to the consumers at the pump.⁶³

And finally, some argue the current methods of extracting oil from the tar sands are cost prohibitive unless oil prices remain high. Stockman’s study also quotes Mr. Marvin Odum, Shell’s head of tar sands, citing his statement from April 2010, where he “announced that the company would not go ahead with any new tar sands projects in the next five years and perhaps longer because of the expense of doing so.”⁶⁴ Odum is quoted as saying, “the oil sands have become one of the most costly places on earth to pursue oil projects.”⁶⁵ He went on to say, “the 100,000 barrel a day (b/d) project will require minimum oil prices of \$70-75 to turn a profit.”⁶⁶ If success of the pipeline and tar sands in general is dependent upon higher prices, one could argue that despite increased supply derived from the Canadian tar sands oil, the U.S. would continue to pay higher prices per barrel simply to maintain stability.

*B. Keystone XL Will Be Detrimental to National Security
and Dependence on Foreign Oil*

Opponents to Keystone XL argue the pipeline would threaten national security. Frances Beinecke, president of the Natural Resources Defense Council, stated that by building the pipeline, “We will . . . be compromising American security interests. The Pentagon, the CIA, and the National Intelligence Council have identified climate change as a threat multiplier. And even if tar sands oil comes from a friendlier nation, our dependence on fossil fuel remains an Achilles heel.”⁶⁷ She also quotes data, stating that, “for every 50 convoys of fuel brought into Afghanistan, one Marine is wounded or killed. And for every one-dollar rise in the cost of oil, another \$30 million gets added to the Navy’s energy costs.”⁶⁸ This dependence on oil, as Ms. Beinecke sees it, is dangerous, and is the wrong solution for the Department of Defense: “[t]hat’s why the DOD has pledged to get 25 percent of its energy from renewable sources by 2025. The Navy and the Marine Corps plan to reduce fossil energy use by 50 percent by 2020 and cut the petroleum used in their non-tactical fleet by 50 percent by 2015.”⁶⁹ Ms. Beinecke

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Frances Beinecke, *A National Security and Climate Threat*, NAT’L J. (Oct. 11, 2011), <http://energy.nationaljournal.com/2011/10/what-factors-should-drive-keys.php#2089672>.

⁶⁸ *Id.*

⁶⁹ *Id.*

is blunt, and clearly states her position that, “[t]he Keystone pipeline would take America in the opposite direction.”⁷⁰

Others argue further that, “[t]he pipeline would divert investment from the alternative-energy technologies that will power the clean economy, which has already generated 2.7 million jobs in the U.S. and has the potential to generate many more.”⁷¹ Pipeline opponents argue that without further advances and investment in alternative energy, dependence on foreign oil from hostile areas of the world will remain.⁷²

C. *Keystone XL Will Not Provide a Significant Increase in Jobs*

Opponents of Keystone XL do not argue the project would not create jobs. However, they are firm in their argument that the projected (or advertised) jobs are grossly exaggerated. TransCanada and others estimate as many as 20,000 jobs will be created due to the pipeline.⁷³ However, DOS estimates a much lower number, stating, “[t]he construction work force would consist of approximately 5,000 to 6,000 workers, including Keystone employees, contractor employees, and construction and environmental inspection staff.”⁷⁴

Further, data provided by the Perryman Group, which was commissioned by TransCanada, states that Keystone XL would create 118,935 “person years” of employment.⁷⁵ But, this method of measuring job growth has been criticized as misleading.⁷⁶ Evidence of misinterpretation surfaced when House Energy Committee Chair Rep. Fred Upton said that the pipeline would create more than 100,000 jobs while pushing for approval of the pipeline.⁷⁷ For example, TransCanada is reported to have projected “‘a peak workforce of approximately 3,500 to 4,200 construction personnel’ to build the pipeline.”⁷⁸ However, “[a]ccording to TransCanada’s own data, just 11% of the construction jobs on the Keystone I pipeline in South Dakota were filled by South Dakotans—most of them for temporary, low-paying manual labor.”⁷⁹

⁷⁰ *Id.*

⁷¹ Michael Burne, *Keystone XL Is Wrong for the U.S.*, NAT’L J., (Oct. 14, 2011), <http://energy.nationaljournal.com/2011/10/what-factors-should-drive-keys.php#2094096>.

⁷² *Id.*

⁷³ Eartha Jane Melzer, *Keystone XL Jobs Claims Are Inflated, Critics Say*, MICHIGAN MESSENGER, (Sept. 26, 2011), <http://michiganmessenger.com/52705/keystone-xl-jobs-claims-are-inflated-critics-say>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Markup Transcript, *supra* note 44, at line 193.

⁷⁸ *Key Facts on Keystone XL*, TAR SANDS ACTION.ORG, <http://www.tarsandsaction.org/spread-the-word/key-facts-keystone-xl/> (last visited May 9, 2012).

⁷⁹ *Id.*

Therefore, while opponents admit some jobs will be created, they claim the projected number of jobs is grossly exaggerated in an effort to seize upon citizens' emotions during a time where jobs and economic stimuli are hot button issues.

D. Tar Sands Oil Is "Dirty Oil"

Opponents also attack the wisdom of the Keystone XL because of the type of crude it would be transporting and the intensity of its extraction. First, the extraction process itself produces a far greater amount of Green House Gases (GHGs) than conventional oil. "Pollution from tar sands oil greatly eclipses that of conventional oil. During tar sands oil production alone, levels of carbon dioxide emissions are three times higher than those of conventional oil, due to more energy-intensive extraction and refining processes."⁸⁰

Extraction of crude or bitumen from tar sands is done by "mining or by injecting steam underground to heat the bitumen to a point where it liquefies and can be pumped to the surface." Either method used, opponents argue, is detrimental to the environment.⁸¹ "Each stage of tar sand and oil shale processing and upgrading requires the use of significant quantities of energy—mainly from burning fossil fuels—and significant harm to the environment."⁸² The mining process described as "stripping thousands of acres of fertile ground and using massive amounts of water. In fact, it has been estimated that once the tar sands project in Alberta, Canada is completed, it will have devastated an area the size of Florida and consumed millions of gallons of fresh water."⁸³

If the mining method is not used, in situ extraction will be implemented, which "involves injecting substances to heat up the sands, making the bitumen fluid enough to be pumped out of the ground."⁸⁴ This heating is largely accomplished by burning fossil fuels.⁸⁵ Therefore, opponents argue, "[o]il derived from tar sands can have serious impacts on climate even before it is burned—estimates show that extraction and processing of tar sands generates between 5 to 10 times more carbon dioxide emissions than conventional oil . . . and could mean the battle to limit global warming will be lost before it ever really begins."⁸⁶

⁸⁰ *Keystone XL Pipeline*, FRIENDS OF THE EARTH, <http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline> (last visited Dec. 2, 2011) [hereinafter FRIENDS OF THE EARTH"].

⁸¹ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-2.

⁸² LISA SUMI, OIL AND GAS AT YOUR DOOR? A LANDOWNERS GUIDE TO OIL AND GAS DEVELOPMENT, I-40 (Oil and Gas Accountability Project, 2nd ed. 2005), *available at* <http://www.earthworksaction.org/files/publications/LOguideCh1.pdf?pubs/LOguideCh1.pdf>.

⁸³ *Id.*

⁸⁴ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-2.

⁸⁵ SUMI, *supra* note 82, at I-40.

⁸⁶ *Id.*

In addition to the GHG's from the energy intensive extraction, vast amounts of water are used in the extraction process.⁸⁷ The Friends of the Earth organization describe the water usage as requiring, "three barrels of water to extract each single barrel of oil. At this rate, tar sands operations use roughly 400 million gallons of water a day."⁸⁸ And after that water is used, "[n]inety percent of this polluted water is dumped into large human-made pools, known as tailing ponds These ponds are home to toxic sludge, full of harmful substances like cyanide and ammonia, which has worked its way into neighboring clean water supplies."⁸⁹

Beside these devastating impacts from extraction, opponents argue that when the products are burned as fuel, they are much dirtier than other similar oil products.⁹⁰ In the EIS, the DOS commissioned "a detailed study of greenhouse gas life-cycle emissions that compared Canadian oil sands crude with other selected reference crudes."⁹¹ While the study revealed that "oil sands crude is, on average, more greenhouse gas intensive than the crude oil it would replace . . . ," the results varied greatly depending on the reference crudes used in the analysis.⁹² The Executive Summary states, "greenhouse gas emissions of gasoline produced from Canadian oil sands crude are approximately 17 percent higher than gasoline from the 2005 average mix of crude oil consumed in the U.S."⁹³ Another study referenced in the EIS, however, states the "Canadian oil sands crude are only 2 percent higher when compared with Venezuelan heavy crude, a type of crude oil that is similar to the crude oil that would be transported by the proposed project"⁹⁴

Whether it turns out to be closer to the low 2 percent, or to the much higher 17 percent, the change is significant. To put this into perspective, "[t]his overall range . . . is equivalent to annual GHG emissions from the combustion of fuels in approximately 588,000 to 4,061,000 passenger vehicles or the CO₂ emissions from combusting fuels used to provide the energy consumed by approximately 255,000 to 1,796,000 homes for one year."⁹⁵

E. Precious Water Supplies Will Be Unreasonably Endangered

Another aspect of Keystone XL that causes opponents to shudder is the pipeline will cross over delicate water sources such as the Ogallala and Sandhills

⁸⁷ *Id.*

⁸⁸ FRIENDS OF THE EARTH, *supra* note 80.

⁸⁹ *Id.*

⁹⁰ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-15.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ U.S. DEP'T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, VOL. 2, CUMULATIVE IMPACTS 3.14-55, (2011), available at <http://keystonepipeline-xl.state.gov/documents/organization/182069.pdf>.

aquifers. The below map shows these aquifers, overlaid with the proposed pipeline route:

Figure 1⁹⁶



⁹⁶ Liz Barratt-Brown & Anthony Swift, *The Keystone XL Tar Sands Pipeline Supplemental Environmental Impact Statement Must Consider Alternative Routings*, SWITCHBOARD NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (Apr. 11, 2011), http://switchboard.nrdc.org/blogs/lizbb/the_keystone_xl_tar_sands_pipe.html.

Opponents of the pipeline fear that spills from the pipeline will irreversibly damage the water supplies.⁹⁷ Perhaps the area of most concern is Nebraska. “The NHPAQ [the Northern High Plains Aquifer, which includes the Sandhills and Ogallala] and system supplies 78 percent of the public water supply and 83 percent of irrigation water in Nebraska.”⁹⁸ Local Nebraskan residents worry their way of life and livelihood will be permanently compromised if Keystone XL is constructed.⁹⁹ For example, at a State Department hearing in Atkinson, Nebraska on September 29, 2011, local residents conceded that some jobs might be created, but noted Nebraskans would bear a brunt of the costs if a spill were to occur.¹⁰⁰ Another woman, a fifth generation rancher, argued, “an oil spill would jeopardize her land and her children’s future. The current route is ‘just wrong,’ she said.”¹⁰¹

Another Nebraska rancher, Ben Gotschall, describes his concerns quite eloquently in an article and interview by Ted Genoways of Onearth. Mr. Gotschall stated that, “[e]very ranch has multiple wells. If you have a pipeline leak underground and the plume hits where your well is, you’ve got chemicals coming up . . . groundwater can quickly become surface water . . .” as it flows from the well to the creek to the river, and eventually to the Missouri River.¹⁰² Mr. Gotschall goes on to point out that the monitoring system is wholly inadequate.¹⁰³ “The worry is compounded by TransCanada’s own admission that their leak detection system only identifies leaks of more than 1 percent of the flow.”¹⁰⁴ Such a small percentage of disrupted flow could mean 8,000 or 9,000 barrels per day could leak and go undetected, and could last for quite a while.¹⁰⁵

Mr. Gotschall is merely one of many local ranchers with concerns, but has become a spokesman of sorts on behalf of the local ranchers. In a public hearing hosted by the State Department in Atkinson, Nebraska, Mr. Gotschall spoke his mind to the State Department representatives.¹⁰⁶ He spoke of his deep roots in the community, and his family’s legacy in the Sandhills region.¹⁰⁷ He stated that, “I believe that this proposed pipeline route poses a serious risk to the Sandhills and

⁹⁷ U.S. DEP’T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT, VOL. 1, WATER RESOURCES 3.3-9, (2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182017.pdf>.

⁹⁸ *Id.*

⁹⁹ Ted Genoways, *Tar Sands Showdown in the Nebraska Sandhills*, ONEARTH (Sept. 30, 2011), <http://www.onearth.org/article/keystone-xl-tar-sands-hearing-nebraska>.

¹⁰⁰ Lisa Song, *Keystone Hearing in Nebraska Sandhills Draws Mostly Critics, and Passions Flare*, INSIDECLIMATE NEWS (Sept. 30, 2011), <http://insideclimatenews.org/news/20110930/state-department-keystone-xl-hearing-atkinson-nebraska-sandhills-critics-passions-flare>.

¹⁰¹ Genoways, *supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

the Ogallala Aquifer. This pipeline is not in our national interest.”¹⁰⁸ He went on to describe his experience with oil spills in other regions, and fears the same consequences in the Sandhills: “I have been to Marshall, Michigan, and have seen the damage done by the Enbridge tar sands oil spill in July 2010 that has contaminated 40 miles of the Kalamazoo watershed . . . I saw it. I smelled it. I got it on my boots, and it doesn’t wash off.”¹⁰⁹

Mr. Gotschall voices the concerns of the local ranchers and families who depend on the water sources that the Keystone XL puts at risk.¹¹⁰ Apparently Mr. Gotschall and others were heard, because the rejection of the permit is in large part due to the sensitivity and concerns regarding the Sandhills region.¹¹¹

With all of these possible adverse impacts, it is easy to see why the DOS and President Obama denied the permit application with the desire to further evaluate not only the negative impacts but also to balance those impacts with the positive effects the pipeline might have.

IV. THE GOOD: ARGUMENTS FROM THOSE IN FAVOR OF THE PIPELINE

As noted, the detrimental impacts cited by opponents to the pipeline include impacts against the environment, economy, and national security. Proponents for Keystone XL, however, have gone to great lengths to try to refute those claims. Project proponents claim that the plans include extensive measures to protect the environment, and they claim that the project makes economic sense and improves national security. These arguments and refutations are outlined below.

A. *Keystone XL Will Cause Gas Prices to Go Down*

In the markup of H.R. 1938, Representatives in favor of the pipeline gave little stock to the arguments claiming that the pipeline will cause prices at the pump to increase.¹¹² They argue that simple economic principles of supply and demand dictate that increasing the amount of oil coming into the U.S. can only cause prices to go down.¹¹³ This argument is supported by a study by the Congressional Research Service, which states that:

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Others speculate that the tar sands extraction process has already contaminated water in Canada to the point that it is causing cancer. They argue that subjecting Americans to similar risks is unacceptable, and that promoting further exploration of tar sands in Canada will only increase cancer risks of Canadians. See Patrick Brethour, *Why Is Cancer Sweeping Tiny Fort Chipewyan?*, MOSTLY WATER (May 25, 2006), <http://mostlywater.org/node/6332>.

¹¹¹ Broder & Frosch, *supra* note 40.

¹¹² Markup Transcript, *supra* note 44, at line 652–686.

¹¹³ See *id.* Note, though, that they recognize that such analysis is based on an assumption of all other factors being equal.

Crude oil prices are generally set in a global market. Increased supply from anywhere can, therefore, contribute to keeping oil prices lower than they would otherwise be, all other things being equal. Accordingly, building any new pipeline can lower the cost of oil and oil products in associated markets if (1) it enables lower transport or refining costs and (2) not building the pipeline would reduce global supply. The latter assumes that without the pipeline, resources would be left stranded.¹¹⁴

In this case, the Congressional Research Service posits the possibility that without the Keystone XL, at least some of the Canadian crude may go unused because of the high costs of foreseeable alternatives, namely a west coast pipeline and tanker to Asia. “[I]f an alternative transport route to market—for instance, via a west coast pipeline and then tanker to Asia—raises transport costs above an economic threshold, it could prevent certain marginal oil sands projects from being built.”¹¹⁵ Thus, it may be concluded that the Keystone XL could enhance global supplies and potentially affect prices.

Verleger’s analysis and estimations may be flawed.¹¹⁶ Verleger states that farmers spent approximately \$12.4 billion dollars on fuel in 2009, and if the pipeline is installed, those expenses could rise to about \$15 billion in 2012 or 2013.¹¹⁷ However, according to the Bureau of Labor and Statistics, the average cost of gasoline per gallon in 2009 was \$2.40, and in 2011, the average price per gallon is \$3.62.¹¹⁸ So, the increase from \$12.4 billion to \$15 billion between 2009 and 2012 or 2013, in all likelihood, is attributable to other market factors, and not attributable to the pipeline as suggested. This factor could be figured into Verleger’s analysis, but is not apparent in the text.

B. Keystone XL Will Improve National Security and Decrease Dependence on Foreign Oil

As H.R. 1938 states, “[t]he United States currently imports more than half of the oil it consumes, often from countries hostile to United States interests or with political and economic instability that compromises supply security.”¹¹⁹ In the opinion of this author, the correct analysis should not be focused on foreign oil, but

¹¹⁴ PAUL W. PARFOMAK ET AL., KEYSTONE XL PIPELINE PROJECT: KEY ISSUES, 10 (Congressional Research Service, Mar. 21, 2011), <http://www.argusleader.com/assets/pdf/DF1812431029.PDF>.

¹¹⁵ *Id.*

¹¹⁶ *See* Verleger, *supra* note 53.

¹¹⁷ *Id.*

¹¹⁸ *Top Picks, Consumer Price Index-Average Price Data*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/surveymost?ap> (check the box next to “Gasoline, all types”; then select “Retrieve data”) (last visited Oct. 24, 2011).

¹¹⁹ H.R. 1938, 112th Cong. (2011).

hostile oil, or oil from countries hostile to the United States, or with unstable political or economic situations. One commentator observed that:

Tensions flared as the members of OPEC met . . . to debate increasing oil production quotas to meet growing world demand. The leaders of Saudi Arabia, Kuwait, Qatar and the United Arab Emirates wanted to boost production, but they were overruled by Iran, Algeria, Angola, Venezuela, Ecuador and Libya, who wanted to keep gas prices high.

That's bad news for the United States. That decision by the cartel will keep gas prices high, hurting the fragile U.S. economy.

It's unsurprising that Iran, Algeria, and the other opposing nations would be unsympathetic toward the United States' plight – these are almost all countries on the Secretary of State's Do Not Travel list due to their hostility toward our nation and general instability.¹²⁰

In fact, of the top ten countries from which the United States imports oil, five are on the “Do Not Travel” list.¹²¹ By increasing the volume of trade between such a strong and valuable ally in Canada, the United States will increase both economic and political security.

Further, H.R. 1938 states that, “[c]ontinued development of North American energy resources, including Canadian oil, increases domestic refiners' access to stable and reliable sources of crude and improves certainty of fuel supply for the Department of Defense, the largest consumer of petroleum in the United States.”¹²² Certainly, stability in the fuel supply of the Department of Defense would promote national security.¹²³

¹²⁰ Stephanie Dreyer, *Keep Hostile Nations Out of the U.S. Economy*, RENEWABLE ENERGY WORLD.COM (June 10, 2011), <http://www.renewableenergyworld.com/rea/blog/post/2011/06/keep-hostile-nations-out-of-the-u-s-economy>.

¹²¹ *Current Travel Warnings*, U.S. DEP'T OF STATE, http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited Oct. 24, 2011). (Note that one of the top ten importing countries that is not on the list is Venezuela, which has questionable stability and hostility. Note also, though, that Mexico is listed, and is quite friendly, relatively).

¹²² H.R. 1938, 112th Cong. (2011).

¹²³ The trading relationship between the United States and Canada is the strongest in the world. *See* H.R. 1938(6). Canada is responsible for 16.5% of U.S. imports. *See Top Trading Partners – Total Trade, Exports, Imports*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/statistics/highlights/toppartners.html> (last visited July 9, 2012). Further, “for every dollar spent on products from Canada, including oil, 90 cents is returned to the United States economy. When the same metrics are applied to trading relationships with some other major sources of United States imports, returns are much lower.” *See* H.R. 1938(6).

C. *Keystone XL Will Create Jobs*

While estimates of job creation vary greatly, the bottom line is that jobs would be created. What seems most likely is that the number of jobs created will fall somewhere in the middle of the high and low estimates. But with the current bleak economy, any jobs created are significant.

One of the most glowing predictions may be the following from Jack Gerard, president of the American Petroleum Institute. Gerard states that Keystone XL could mean, “80,000 American jobs today, but if we approve the Keystone XL pipeline and fully utilize Canada’s energy resource we could see that number reach 500,000 by 2035. During that same time, the pipeline would spur \$775 billion in economic activity.”¹²⁴

Another estimate is also optimistic, stating that, “[a]s investment and production in oil sands ramps up in Canada, the pace of economic activity quickens and demand for US goods and services increase rapidly, resulting in an estimated 343 thousand new US jobs between 2011 and 2015.”¹²⁵ With such a significant boost in employment and overall economic impacts, “[d]emand for US goods and services continues to climb throughout the period, adding an estimated \$34 billion to US GDP in 2015, \$40.4 billion in 2020, and \$42.2 billion in 2025.”¹²⁶

Furthermore, proponents also argue that the pipeline would strengthen the U.S. economy by providing a more efficient outlet for American oil. Specifically, H.R. 1938 specifically states that Keystone XL “could also potentially bring over 100,000 barrels per day of United States Bakken crudes into the market.”¹²⁷

D. *Tar Sands Oil Is Dirty, But . . .*

No one can deny the extraction process for tar sands is more energy intensive than other types of oil. However, proponents argue along the lines of the EIS Executive Summary, which states, “[t]he proposed [p]roject is not likely to impact the amount of crude oil produced from oil sands.”¹²⁸ In other words, if the United States does not take advantage and reap the benefits of the Canadian tar sands oil, others will. Equating the Keystone XL Pipeline with tar sands exploration is simply erroneous. Other players and consumers in the oil markets will certainly step in if the U.S. chooses not to utilize the oil supply derived from the Alberta tar sands. In response to President Obama’s announcement to delay the decision until 2013, the Canadian Prime Minister, Stephen Harper, stated, “[t]his does underscore the necessity of Canada making sure that we are able to access Asian markets for

¹²⁴ Harder, *supra* note 1.

¹²⁵ PARFOMAK, *supra* note 2, at 11.

¹²⁶ *Id.*

¹²⁷ H.R. 1938, 112th Cong. (2011).

¹²⁸ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-15.

our energy products.”¹²⁹ Canada seems determined to mine the tar sands and develop the resource; if the U.S. ultimately opts to forego the pipeline, or delay the next permit decision too long, the oil will find its way in to the market elsewhere, likely in Asia.

E. Keystone XL Will Adequately Protect Water Supplies

Inevitably, a pipeline project of this magnitude will impose risks to aquifers and rivers. However, proponents of Keystone XL claim that great measures would be taken to provide protection to the endangered waters. The EIS notes that the project “would have a degree of safety greater than any typically constructed domestic oil pipeline system under current regulations and a degree of safety along the entire length of the pipeline system that would be similar to that required in high consequence areas as defined in the regulations.”¹³⁰ To further ensure safety from spills, the pipeline will have monitoring systems capable of detecting leaks as small as 1.5 to 2 percent of flow rate, an additional computer monitoring system able to detect leaks below the 1.5 to 2 percent threshold, as well as scheduled patrols and communication plans to further prevent spills and react quickly in the event of a leak.¹³¹ While these measures cannot eliminate all risks to water supplies, those risks are greatly mitigated.

V. THE UGLY DEBATE, AND THE FALLOUT

As mentioned above, the Keystone XL project submitted its application to build and operate the pipeline in 2008.¹³² Because the pipeline route crosses the U.S. border, the President and Department of State are the appropriate permitting authorities under Executive Order 13337.¹³³ This permitting process includes the responsibility of the President and DOS to “request the views of the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, [and] the Administrator of the Environmental Protection Agency”¹³⁴ This same process was implemented recently to approve the Alberta Clipper Pipeline and the Keystone Pipeline.¹³⁵ Each time the President and the DOS analyze a permit, the same factors and processes are undertaken.

¹²⁹ Andrew Shen, *Canada Will Sell Oil to China If U.S. Keeps Delaying the Pipeline*, BUSINESS INSIDER (Nov. 14, 2011) http://articles.businessinsider.com/2011-11-14/markets/30396455_1_oil-pipeline-keystone-xl-oil-exports.

¹³⁰ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-6.

¹³¹ *Id.* at ES-7.

¹³² *Id.* at ES-1.

¹³³ Executive Order, *supra* note 26, § 2(a).

¹³⁴ *Id.* § 1(b)(ii).

¹³⁵ *Permit for Alberta Pipeline Issued*, U.S. DEP’T OF STATE (Aug. 20, 2009) <http://www.state.gov/r/pa/prs/ps/2009/aug/128164.htm> [hereinafter *Permit Issued*]; *Natural Res. Def. Council, Inc. v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 106 (D.D.C. 2009).

Consultation is undergone between the DOS and the various agencies. With the input from the agencies and their respective expert areas, the President decides whether or not the project is in the national interest.¹³⁶ In both the Alberta Clipper and Keystone pipeline cases, the President and DOS determined that the projects were in the national interest.¹³⁷ For instance, in approving the Alberta Clipper line:

The Department found that the addition of crude oil pipeline capacity between Canada and the United States [would] advance a number of strategic interests of the United States. These included increasing the diversity of available supplies among the United States' worldwide crude oil sources in a time of considerable political tension in other major oil producing countries and regions; shortening the transportation pathway for crude oil supplies; and increasing crude oil supplies from a major non-Organization of Petroleum Exporting Countries producer. Canada is a stable and reliable ally and trading partner of the United States, with which we have free trade agreements which augment the security of this energy supply.¹³⁸

DOS went on to state that “[a]pproval of the permit sends a positive economic signal, in a difficult economic period, about the future reliability and availability of a portion of United States’ energy imports, and in the immediate term, this shovel-ready project will provide construction jobs for workers in the United States.”¹³⁹ DOS also noted the consideration given to the detrimental impacts of the project, stating, “[t]he National Interest Determination took many factors into account, including greenhouse gas emissions. The administration believes the reduction of greenhouse gas emissions are best addressed through each country’s robust domestic policies and a strong international agreement.”¹⁴⁰

After the Alberta Clipper approval, the permitting authority under Executive Order 13337 was challenged in *Sierra Club v. Clinton*.¹⁴¹ In that case, the presidential permitting power was upheld.¹⁴² There, the “Federal Defendants assert[ed] that the authority to issue a permit for a border-crossing facility does not derive from a delegation of congressional authority under the Commerce Clause,

¹³⁶ EIS EXECUTIVE SUMMARY, *supra* note 3, at ES-1.

¹³⁷ *Permit Issued*, *supra* note 135; *see also* Notice of Availability of the Record of Decision and National Interest Determination and the Programmatic Agreement for the Proposed TransCanada Keystone Pipeline Project, 73 Fed. Reg. 11456 (Mar. 3, 2008) and DEPARTMENT OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION TRANSCANADA KEYSTONE PIPELINE, LP APPLICATION FOR PRESIDENTIAL PERMIT, (Feb. 28, 2008), <http://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2007/hp07-001/111908/signed.pdf>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1156 (D. Minn. 2010).

¹⁴² *Id.*

but rather from the President's constitutional authority over foreign affairs and his authority as Commander in Chief."¹⁴³ The same permitting process was applied here for Keystone XL, and the law is clear—the decision lies squarely and legally with the President and the Department of State.

These previous projects and their respective permitting processes and decisions are relevant here because of the vast similarities to the Keystone XL situation. While the exact areas and routes are different, the decision making process takes into account the same pros and cons. Yet, DOS and President Obama have refused to grant the Keystone XL permit. It seems obvious that the positive and negative aspects of Keystone XL are quite similar to those of the Alberta Clipper and Keystone pipelines; therefore, logic would seem to dictate that the same analysis (as set forth in Executive Order 13337), and vastly similar pros and cons would result in the same affirmative decision. Hence, the rejection begs the question, what are the President's true reasons?

This question, in this author's opinion, is where the proverbial rubber meets the road, and where the debate truly gets ugly. One might argue the reasons given by the President in the November press release regarding the postponement ought to be taken at face value. The President's reasoning revolved primarily around the "environmental sensitivities of the current proposed route through the Sandhills area of Nebraska"¹⁴⁴

However, one might argue the true reasons behind the postponement are purely political. Many commentators quickly point out that the projected date of a decision conveniently falls just after the 2012 election.¹⁴⁵ "The [postponement of the Keystone XL permit decision] is the latest in a series of administration decisions pushing back thorny environmental matters beyond next November's presidential election to try to avoid the heat from opposing interests—business lobbies or environmental and health advocates—and to find a political middle ground."¹⁴⁶ So, one could argue, the President hopes to bolster support from environmental activists by showing his concern for their interests, and the decision to postpone is merely a political maneuver, and not an environmental policy decision.

However, one could also argue that by merely postponing the decision, and expressing concern about the route instead of the overall imprudence of the project, the President actually alienated his environmentally active constituency.¹⁴⁷ If he truly wished to appease the environmental activists, he should have flatly denied the permit. But by denying the permit based solely on a lack of time to consider the appropriate route, and all but inviting another application, one might argue this denial was simply another postponement, and ultimately approval is

¹⁴³ *Id.* at 1162.

¹⁴⁴ *Keystone Review Process*, *supra* note 14.

¹⁴⁵ Broder & Frosch, *supra* note 40.

¹⁴⁶ *Id.*

¹⁴⁷ *See Permit Issued*, *supra* note 136 (regarding the reason for delay being centered around investigating alternate routes around the Ogallala and Sandhills aquifers).

inevitable. Therefore, some of President Obama's environmentally sensitive constituency might see the denial of the permit as simply a denial to the 2008 application, and simply postponement of a project that the President already plans to approve after reelection.

VI. THE TIEBREAKER

Perhaps the one caveat to this debate that tips the scale in favor of the project is the national security aspect. While this is related to the economic security, the tipping point for this author is reducing dependence on oil from countries that are hostile to the United States. Energy independence is better achieved in partnership with strong allies, like our long-time partner to the north. The proper term for analyzing energy independence is not foreign oil, but hostile oil. A vast majority of OPEC nations have political regimes with animus toward the United States. In the process of transition and development of renewable and clean energy, security in current energy sources is essential. The Keystone XL project will further fortify an already strong economic and political relationship with a valuable ally, strengthen a rebounding economy, and reduce dependence on hostile oil.

All of this will be accomplished, this author believes, not in spite of environmental considerations, but with environmental interests and protection efforts at the forefront. And, as was mentioned above, the denial of the project to reconsider the pipeline route is an answer in itself; implicitly, the President already admits to the prudence and necessity of the project. The only thing holding back the project is finding the most sensible route.

CONCLUSION

In the author's opinion, President Obama made the wrong decision for the right reason. Americans need jobs. And until reliable alternative energies are able to replace fossil fuels, Americans need oil. Further developing a tried and true trade relationship—a relationship that returns 90 cents on the dollar to the U.S. economy—is in the interest of the nation. Reducing dependence on oil from countries that are hostile toward the U.S. should be a high priority. For these reasons, denying the permit was the wrong choice.

However, finding the appropriate route is a valid reason. Nevertheless, while environmentally sensitive areas could possibly be damaged, those concerns are not taken lightly. An appropriate route and other mitigation efforts to reduce the effects on and possible harm to Ogallala and Sandhills aquifers should be of the utmost importance. While the environmental concerns are significant, those issues can be properly addressed and alleviated through proper engineering, maintenance, and monitoring. In short, the balancing of all the interests involved leads this author to agree with the following conclusion: "Good paying jobs. Economic growth. Energy security. Most Americans wouldn't question whether these

benefits are in the national interest. This is what the Keystone XL pipeline promises for America.”¹⁴⁸

The President’s denial, however, goes against the national interest. Many claim that postponement and denial were simply part of a political chess match to bolster President Obama’s 2012 campaign. If that is indeed the case, he abused his permitting authority. The purpose of the Executive Order is clear: “to expedite reviews of permits as necessary to accelerate the completion of energy production.”¹⁴⁹ Further postponing a decision on a project application—an application that dates back to 2008—directly contradicts the intent of the Executive Order.¹⁵⁰ And while all of the negative impacts must be given due consideration, that same care and consideration must be afforded to the positive impacts that are so abundant.

¹⁴⁸ Harder, *supra* note 1 (this comment is from Mr. Gerard).

¹⁴⁹ Executive Order, *supra* note 26

¹⁵⁰ *Id.*