

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATURAL RESOURCES DEFENSE	)	
COUNCIL, INC.,	)	
	)	
Plaintiff	)	Civil Action No. 08-1363 (RJL)
	)	
-v.-	)	
	)	
UNITED STATES DEPARTMENT OF	)	
STATE, et al.,	)	
	)	
Defendants	)	
	)	
TRANSCANADA KEYSTONE	)	
PIPELINE, LP,	)	
	)	
Defendant-Intervenor	)	

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**PLAINTIFF NRDC'S MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS  
OF DEFENDANTS AND DEFENDANT-INTERVENOR**

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## INTRODUCTION

Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) submits this Memorandum in opposition to the Motions to Dismiss of Defendants U.S. Department of State, et al. (“DOS”) and Defendant-Intervenor TransCanada Keystone Pipeline, LP (“Keystone”) (collectively “Defendants”). *See* Docket Nos. 25, 26. The Motions wrongly suggest that NRDC’s lawsuit invites this Court to second-guess DOS’s determination that issuance of a Presidential Permit for the Keystone pipeline project was in the “national interest” under the terms of a 2004 Executive Order. NRDC does not ask this Court to do any such thing. NRDC asks this Court to decide whether DOS violated its separate obligation under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4331-4370f, to consider the Keystone project’s reasonably foreseeable environmental impacts before issuing that Permit. Defendants’ contention that the Executive Order bars judicial review of not only its own terms, but also DOS’s compliance with an independent statutory mandate Congress has made presumptively enforceable against DOS through the Administrative Procedure Act (“APA”), is unsupported and raises grave separation of powers concerns. This Court should reject Defendants’ bids to cast aside the important and settled justiciability principles on which NRDC’s NEPA claim rests and decide this case on its merits.<sup>1</sup>

## BACKGROUND

NRDC’s First Amended Complaint in this action (hereinafter “Complaint”) asks this Court to review a single claim: that DOS violated NEPA by failing to consider fully and share with the public, in its Final Environmental Impact Statement (“FEIS”) for the Keystone project, the impacts of refining the Western Canadian heavy crude oil the project will carry to the United

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<sup>1</sup> NRDC joins Defendants’ request for oral argument on the Motions to Dismiss.

States. First Am. Compl., Docket No. 21. DOS relied on that FEIS to issue a Permit that allows Keystone to begin constructing the project, and that will soon expose NRDC's members and other Americans to injury from pollution the FEIS does not address. *Id.* at ¶¶ 1-5, 11, 30-73, "Prayer for Relief" ¶¶ 1-5. NRDC asks this Court to use the authority vested in it by 28 U.S.C. § 1331 and the APA to find that DOS has violated NEPA by relying on an insufficient Environmental Impact Statement ("EIS") in issuing its Permit to Keystone, and to redress that NEPA violation by both directing DOS to revoke the Permit and enjoining all activity under the Permit until DOS has complied with NEPA. First Am. Compl. at ¶¶ 6, 65-73, "Prayer for Relief" ¶¶ 1-5.

#### **DOS's Permitting and NEPA Review Process for Transboundary Oil Pipelines**

DOS approved the Keystone project pursuant to a 2004 Executive Order that empowers the Secretary of State 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 . . . importation of petroleum [or] petroleum products . . . from a foreign country." Exec. Order No. 13,337, 69 Fed. Reg. 25,299, 25,299 (Apr. 30, 2004) (§ 1(a)) (hereinafter "Order" or "2004 Executive Order"). The Order succeeds a 1968 Executive Order that also delegated to the Secretary of State the authority to approve transboundary oil pipelines. *Id.* at 25,299; Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968). The 2004 Order outlines essentially the same permitting process described in the 1968 Order, but also applies to that process a policy to "expedite . . . review of permits or take other actions as necessary to accelerate the completion of [energy-related] projects, while maintaining safety, public health, and environmental protections." Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001) (§ 2); *see also* Exec.

Order. No. 13,337, 69 Fed. Reg. at 25,299 (Preamble, referring to policies expressed in Executive Order 13,212).

When the Secretary of State receives an application for a Presidential Permit, she must “[r]efer the application and pertinent information to, and 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 . . . .” Exec. Order No. 13,337, 69 Fed. Reg. at 25,299 (§ 1(b)(ii)). The Secretary also may, but is not required to, solicit input from “other Federal Government department and agency heads,” *id.* at 25,299 (§ 1(b)(iii)), as well as from state, tribal, and local officials and members of the public. *Id.* at 25,300-01 (§§ 1(e), (f), 3(a)). After this consultation process, “if the Secretary . . . finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary’s judgment require . . . .” *Id.* at 25,300 (§ 1 (g)). The Secretary also must notify the federal “officials required to be consulted [on the Permit application] of the proposed determination that a permit be issued.” *Id.*

The Order states that the Secretary “shall issue . . . the permit in accordance with the proposed determination unless, within 15 days after notification” one of the officials the Order requires the Secretary to notify of her proposed determination informs the Secretary that he or she disagrees with that proposed determination “and requests the Secretary to refer the application to the President.” *Id.* at 25,300 (§ 1(i)). If she receives such a request, the Secretary “shall consult with any such requesting official and, if necessary, shall refer the application, together with statements of the views of any official involved, to the President for consideration and a final decision.” *Id.*

The Order ends with two statements concerning its legal effect. The first provides:

*Nothing contained in this order shall be construed to affect the authority of any department or agency of the United States Government, or to supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations subject to the jurisdiction of that department or agency.*

*Id.* at 25,301 (§ 5) (emphasis added). The second provides that “[t]his order is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.” *Id.* at 25,301 (§ 6).

In issuing Presidential Permits, DOS is bound not only by the terms of the 2004 Executive Order, but also by the procedural requirements of NEPA. NEPA and its general implementing regulations, promulgated by the Council on Environmental Quality (“CEQ”), prevent federal agencies from taking actions that may significantly affect the environment without first analyzing the environmental impacts of those actions. *See* 42 U.S.C. § 4332(2)(C) (agencies to prepare a “detailed statement” for all actions “significantly affecting the human environment”); 40 C.F.R. § 1508.11 (“‘Environmental impact statement’ means a detailed written statement as required by section 102(2)(C) of [NEPA]”); 40 C.F.R. § 1508.9 (agencies to prepare a brief written assessment of an action’s impacts to determine “whether to prepare an environmental impact statement or a finding of no significant impact”). DOS has issued regulations that incorporate and supplement the CEQ regulations for “decisions on all [DOS] actions which may affect the quality of the environment within the United States.” 22 C.F.R. § 161.3; *see generally* 22 C.F.R. Part 161, Regulations for Implementation of the National Environmental Policy Act. These actions include grants “of permits for construction of

international . . . pipeline[s]” “for which [DOS] has lead-agency responsibility . . . .” 22 C.F.R. § 161.7(c).<sup>2</sup>

### **DOS’s NEPA Review and Issuance of a Presidential Permit to Keystone**

The Keystone project’s environmental impacts will reach deep into the United States, through hundreds of miles of pipe linking the border crossing facilities to refineries and other delivery sites in states including Illinois, Texas, Kansas, and Oklahoma. *See* January 28, 2008 Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, LP Application for Presidential Permit (hereinafter “ROD”), Docket. No. 26-4 (Ex. 1 to Decl. of Luther Hajek in Supp. of DOS Mot. to Dismiss), at 4-6; First Am. Compl., Docket No. 21, ¶¶ 1-15, 41-64. DOS acknowledges that its issuance of a Presidential Permit – which allowed the Keystone project to be extended across the border and into the United States – “constitutes a Federal action that may have a significant impact upon the environment and is therefore subject to the requirements of NEPA.” ROD, Docket No. 26-4, at 4; *id.* at 7 (describing the project as a “non-exempt federal action under NEPA”); *see also* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.9, 1508.11; 22 C.F.R. §§ 161.1, 161.2, 161.7(c)(1). DOS served as the lead federal agency author for a January 11, 2008 FEIS intended both “to inform [DOS’s] decision on issuance of a Presidential Permit in response to Keystone’s application and to support the decisions of other federal agencies whose actions are necessary to proceed.” ROD, Docket No. 26-4, at 4.

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<sup>2</sup> The regulations distinguish these international permitting actions from those “required under any treaty or international agreement,” which the regulations indicate “will *not* be considered major federal actions requiring the preparation of an environmental impact statement,” 22 C.F.R. § 161.7(d) (emphasis added), as well as from “actions having potential effects on . . . the environment of foreign nations,” which are governed by separate NEPA procedures. *Id.* § 161.3 (citing procedures set forth in Executive Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 4, 1979)).

On February 28, 2008, DOS issued the ROD, summarizing the FEIS and other environmental reviews for Keystone and setting forth DOS's determination that issuance of a Permit to Keystone would be in the "national interest" for purposes of the Order. ROD, Docket No. 26-4. The ROD provided that DOS's determination to issue the Permit "shall become final fifteen days after the Secretaries of Defense, Interior, Commerce, Energy, Homeland Security and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency have been notified of this determination, unless the matter must be referred to the President for consideration and final decision pursuant to section 1(i) of said Executive Order." *Id.* at 24; *see also id.* at 6-7. On March 11, 2008, DOS issued a Presidential Permit authorizing Keystone "to Construct, Connect, Operate and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada[.]". *See* Docket No. 26-5 (Ex. 2 to Decl. of Luther Hajek in Supp. of DOS Mot. to Dismiss), at 1, 5; *see also* First Am. Compl., Docket No. 21, ¶ 59.

DOS's Permit and ROD for the Keystone project were authorized and signed by Defendant Under Secretary of State for Economic, Energy and Agricultural Affairs Reuben Jeffery III, pursuant to a 2006 delegation of Defendant Secretary of State Condoleezza Rice's permitting authority under the 2004 Executive Order. Permit, Docket No. 26-5, at 1, 5; ROD, Docket No. 26-4, at 24. The Permit does not indicate that DOS ever received objections from any of the officials listed in the ROD or that DOS referred the Permit to the President for final consideration and approval under subsection 1(i) of the Order. Permit, Docket No. 26-5. It simply states that the Permit "shall issue fifteen days after the date of the determination by [DOS] that issuance of this permit would serve the national interest, provided that [DOS] does

not otherwise notify Keystone . . . .” *Id.* at 5. The Permit signed by Under Secretary Jeffery accordingly took effect without Presidential action.

## ARGUMENT

Having recognized that its issuance of a Presidential Permit to Keystone is subject to NEPA’s mandates, DOS now contends – alongside the Permittee – that the Court is powerless to decide whether DOS actually has complied with those mandates and to set aside DOS’s action if it has not. There is nothing exotic about the notion that this Court can hear this case and grant NRDC the relief it seeks. The federal question statute gives this Court jurisdiction to review NRDC’s NEPA claim; the APA waives DOS’s sovereign immunity to suit and provides a private cause of action for that claim; no exception to APA review applies; and the relief NRDC requests is likely to redress its injuries by preventing the Keystone project from proceeding until DOS conducts a full and fair discussion of its environmental impacts. Because nothing more is required to authorize this Court’s review, Defendants’ Motions should be denied.

### **I. NRDC’s NEPA Claim is Justiciable Under 28 U.S.C. § 1331 and the APA.**

The federal question statute, 28 U.S.C. § 1331, and the APA, 5 U.S.C. §§ 701-706, empower this Court to decide NRDC’s NEPA claim. NRDC’s claim that DOS has violated NEPA, a federal statute, presents a question of federal law that this Court has jurisdiction to review under 28 U.S.C. § 1331. *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001), *superseded on other grounds as recognized in Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006). The APA, in turn, operates as a general waiver of the government’s sovereign immunity to suit for relief other than money damages. *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 185-86 (D.C. Cir. 2006). In addition to waiving sovereign immunity, the APA supplies a private cause of action for challenges to final agency action that violates NEPA and other federal

statutes that do not expressly provide for private judicial review. *Karst Envtl. Educ. and Prot., Inc. v. Envtl. Prot. Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (“[B]ecause NEPA creates no private right of action, challenges to agency compliance with the statute must be brought pursuant to the [APA] . . . .”); *Public Citizen v. U.S. Trade Representative*, 970 F.2d 916, 918 (D.C. Cir. 1992) (hereinafter “*Public Citizen I*”); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“The APA, by its terms, provides a right to judicial review of all ‘final agency action for which there is no other adequate remedy in a court,’ and applies universally . . . .”) (citation omitted). DOS is an “agency” for APA purposes. *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1352-53 (D.C. Cir. 1997) (characterizing DOS as an agency for purposes of an APA claim); *see also* 5 U.S.C. § 701(b)(1) (APA definition of “agency”).

To be reviewable under the APA, agency action must be “final” in the sense that it (1) “mark[s] the consummation of the agency’s decisionmaking process” and (2) is “one by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>3</sup> *Bennett*, 520 U.S. at 177-78 (quotation marks and citations omitted). Because DOS’s issuance of a Presidential Permit to Keystone consummated its review of Keystone’s Permit application, and also enabled Keystone to begin construction in the United States – thus exposing NRDC’s members to a threat of injury from environmental impacts not analyzed in the FEIS – it was

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<sup>3</sup> Keystone selectively and erroneously cites *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (hereinafter “*Public Citizen II*”), and *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991), as supporting the proposition that NEPA’s EIS preparation requirement is not an “independent statutory obligation” enforceable against agencies through the APA. Keystone Mot. to Dismiss., Docket No. 25, at 17. Those cases provide only that the APA requires a showing of final agency action. *See Public Citizen II*, 5 F.3d at 552 (“[A]n agency’s failure to prepare an EIS, by itself, is not sufficient to trigger APA review *in the absence of identifiable substantive agency action* putting the parties at risk” (emphasis added) (citing *Lyng*, 943 F.2d at 85)); *Lyng*, 943 F.2d at 86-87 (finding case below should have been dismissed because plaintiffs did not identify “any particular ‘agency action’ within the meaning of section 702 of the APA sufficient to entitle them to judicial review”).

“final” action for purposes of the APA. *See, e.g., Bennett*, 520 U.S. at 178 (finding Biological Opinion and incidental take statement were final under second prong of finality test because they “alter[ed] the legal regime” by authorizing “take” of endangered species); *Natl. Ass’n of Home Builders v. U.S. Army Corps. of Eng’rs*, 297 F. Supp. 2d 74, 79 (D.D.C. 2003) (Leon, J.), *rev’d on other grounds*, 417 F.3d 1272 (D.C. Cir. 2005) (agency’s issuance of general permit authorizing and setting conditions for permit discharges final under first prong of *Bennett*); *see also Public Citizen I*, 970 F.2d at 920 n.4 (citing the Forest Service’s issuance of a use permit as an example of “final agency action” reviewable under APA).

In terms of justiciability, this case is no different than the NEPA controversies that Defendants strain to distinguish, and that federal courts like this one routinely resolve. *See, e.g., Biodiversity Conservation Alliance v. U.S. Bureau of Land Mgmt.*, 404 F. Supp. 2d 212, 214, 216 (D.D.C. 2005) (Leon, J.) (reviewing under the APA plaintiffs’ claims that agency actions violated both NEPA and a second statute); *Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 155-56 (D.D.C. 2005) (Leon, J.) (reviewing under the APA agency actions alleged to violate NEPA and two other statutes), *aff’d, Oceana, Inc. v. Gutierrez*, 488 F.3d 1020 (D.C. Cir. 2007); *Natural Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 119-20 (D.D.C. 2007) (Leon, J.) (reviewing NEPA claims under the APA).<sup>4</sup> That DOS happened to violate NEPA in a

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<sup>4</sup> Keystone asserts, by citation to this Court’s opinion in *Biodiversity Conservation*, that NEPA jurisdiction lies not in § 1331, but rather “in the statute authorizing the underlying agency action” that Plaintiffs contend caused their injury. Keystone Mot. to Dismiss, Docket No. 25, at 12. *Biodiversity Conservation* does not state this proposition. It merely recites the plaintiffs’ contention that the agency actions challenged in that case violated both NEPA and the Federal Land Policy Management Act, and goes on to state that those actions “are reviewed by this Court in accordance with the judicial review provisions of the APA.” *Biodiversity Conservation*, 404 F. Supp. at 214, 216. Nor does Keystone’s alternative citation to the decades-old, out-of-Circuit decision in *Suburban O’Hare Commission v. Dole*, 787 F.2d 186 (7th Cir. 1986), support its theory. The *O’Hare* court found that the APA did not govern its review because “Congress [had] created a special review provision specifically designed to address precisely the type of

permitting action under the Order does not, as we explain below, strip this Court of its authority to review and remedy that violation.

**A. DOS's Issuance of a Presidential Permit for the Keystone Project Was Final Agency Action, Not "Presidential" Action.**

Defendants' arguments that DOS's March 2008 issuance of a Presidential Permit for the Keystone project constituted "Presidential" rather than final agency action, and is therefore not subject to APA review, are unavailing. The Supreme Court has made clear that agency action is presumptively reviewable under the APA if the agency takes the final step that subjects the parties to the "legal consequences" of the challenged action. *See Bennett*, 520 U.S. at 178 (distinguishing defendant agency's issuance of a Biological Opinion, with its "direct and appreciable legal consequences" for the parties, from the "purely advisory" actions at issue in cases involving recommendations that did not become final until acted on by the President). As noted above, the 2004 Executive Order does not contemplate the President's involvement in the permitting process except when one of the federal officials DOS is required to consult raises an objection and DOS decides to refer the permit to the President for consideration and approval. *See* Exec. Order No. 13,337, 69 Fed. Reg. at 25,300 (§ 1(i)). Defendants do not contend that DOS referred Keystone's March 2008 Presidential Permit application to the President for approval under subsection 1(i) of the Order, nor do DOS's Permit and ROD mention any such referral. *Supra* pp. 6-7; Exec. Order No. 13,337, 69 Fed. Reg. at 25,300 (§ 1(i)). Rather, both the ROD and the Permit indicate that the Permit simply took effect, *without* further review, after DOS issued its "national interest" finding. *Supra* pp. 6-7. Because DOS, not the President, took

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case before the court" – a challenge to Federal Aviation Administration ("FAA") action – that in those circumstances took "precedence over the general provisions of the APA." *Suburban O'Hare*, 787 F.2d at 194.

the final action on Keystone's Permit, Defendants' speculation that the President *could* have taken the final action on some other Permit is beside the point.

This case is thus wholly distinguishable from the primary authorities relied on by Defendants, which concern actions that could not become final until the President himself acted. *See Dalton v. Specter*, 511 U.S. 462, 469-71 (1994) (agency's submission of a nonbinding base closure recommendation to the President was not final agency action); *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (agency's presentation of a report that had "no direct consequences," and was "more like a tentative recommendation [to the President] than a final and binding determination" was not final agency action); *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 112 (1948) (agency order that did not become public and binding until the President reviewed and approved it not final agency action); *Public Citizen II*, 5 F.3d at 551-52 (U.S. Trade Representative's draft of North American Free Trade Agreement not final agency action because President was required to submit it to Congress for ratification); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 272-73 (D.D.C. 2005) (President's order of missile strike on suspected chemical weapons facility not final agency action); *see also Tulare County v. Bush*, 185 F. Supp. 2d 18, 27-29 (D.D.C. 2001) (Presidential designation of National Monument unreviewable under APA), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002); *Armstrong v. Bush*, 924 F.2d 282, 288-89 (D.C. Cir. 1991) (President's compliance with Presidential Records Act unreviewable under the APA).

What separates Presidential from final agency action is the presence of some *requirement* that the President act on the agency's determinations before those determinations take legal

effect, not merely the possibility that he could act.<sup>5</sup> See *Bennett*, 520 U.S. at 178 (distinguishing *Franklin v. Massachusetts* and *Dalton v. Specter*). Because the President was not required to act before Keystone's Permit became final, Defendants' speculation that he could have stepped in to upset a four-decades-old delegation that Defendant Secretary Rice has herself delegated (to Defendant Under Secretary Jeffery), *supra* p. 6, does not insulate DOS's permitting action from APA review.<sup>6</sup>

**B. The APA's Narrow Exceptions to Judicial Review Do Not Apply.**

The Court should also reject Defendants' alternative argument that DOS's approval of the Keystone project, if not "Presidential" action, is one of the rare final agency actions the APA exempts from judicial review. The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' so long as no statute precludes such relief or the action is not one committed by law to agency discretion." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977) (citing 5 U.S.C. §§ 702, 704). The APA's "generous review provisions must be given a hospitable interpretation." *Id.* at 140-41 (quotation marks and citations omitted). "A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent

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<sup>5</sup> *Corus Group PLC v. International Trade Commission*, 352 F.3d 1351 (Fed. Cir. 2003), cited by Keystone for another proposition, recognizes and applies this distinction. See *id.* at 1359 ("[T]his case is controlled by *Bennett*, rather than by *Dalton* and *Franklin*, because the President does not have complete discretion under the statute, and the [agency's] report had direct and applicable legal consequences." (quotation marks and citation omitted)).

<sup>6</sup> Nor, for reasons addressed in our standing discussion at Part II, *infra*, does Defendants' speculation that the President could intervene in the future bar judicial review.

some clear and convincing evidence of legislative intention to *preclude* review.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (emphasis added).

DOS’s final actions are thus reviewable under the APA except where either of two narrow exceptions – codified at 5 U.S.C. §§ 701(a)(1) and (a)(2) – applies. *Abbott Labs.*, 387 U.S. at 140. Neither one does.

**1. Judicial review of DOS’s NEPA violation in approving the Keystone project is not precluded under 5 U.S.C. § 701(a)(1).**

Section 701(a)(1) exempts from judicial review under the APA those actions for which “statutes preclude judicial review.” 5 U.S.C. § 701(a)(1). The preclusion exception is a narrow one. *Abbott Labs.*, 387 U.S. at 141. “Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” *Filebark v. U.S. Dep’t of Transp.* 542 F. Supp. 2d 1, 6 (D.D.C. 2008) (Leon, J.) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)). “Absent an express statutory prohibition of judicial review, courts require a showing of ‘clear and convincing’ legislative intent to preclude judicial review[.]” *Filebark*, 542 F. Supp. 2d at 6 (quoting *Abbott Labs.*, 387 U.S. at 141), that is “fairly discernible in the statutory scheme,” *Clarke v. Nat’l Secs. Indus. Ass’n Sec. Pac. Nat’l Bank*, 479 U.S. 388, 399 (1987) (quoting *Block*, 467 U.S. at 351). No such exemption applies to NRDC’s NEPA claim.

**a. No statute bars judicial review.**

Defendants have not pointed to any express statutory language that could preclude review here. NEPA, the only statute whose substantive mandates NRDC asks this Court to enforce, contains no such bar to review. Nor is there any other evidence that Congress meant to limit judicial review of claims that agencies have violated NEPA. To the contrary, NEPA evinces

Congress's intent to provide a broad mandate for general public benefit. 40 C.F.R. § 1500.1(b) ("NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before action is taken"); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (describing "the broad dissemination of information mandated by NEPA").

In *Block*, the Supreme Court explained that "the preclusion issue turns ultimately on whether Congress intended for [plaintiff's class] to be relied upon to challenge agency disregard of the law." *Block*, 467 U.S. at 347. Absent explicit statutory language, Congress can signal such intent by providing for judicial review of only enumerated types of claims, or on behalf of only certain classes of claimants, to the exclusion of others. *See Block*, 467 U.S. at 349 (finding that a "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" impliedly precludes review of claims by others); *see also Filebark*, 542 F. Supp. 2d at 7-9 (finding that provision of exclusive remedies for certain personnel actions in the Department of Transportation Appropriations Act and the defendant agency's implementing procedures precluded APA review of plaintiffs' challenges to other personnel actions); *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (Leon, J.) (Congress's express provision for judicial review of some agency action under the Indian Gaming Regulatory Act ("IGRA") precluded APA review of challenges to other agency actions under IGRA).

NEPA contains no such scheme, and there is no other evidence of congressional intent to limit its enforcement.<sup>7</sup> Defendants have identified no court that has ever implied such intent,

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<sup>7</sup> Defendants, unable to point to any statute or scheme that precludes review, argue instead that NRDC's claim should be precluded because no statute expressly *authorizes* it. *See, e.g.,* *Keystone Mot. to Dismiss*, Docket No. 25, at 20. This theory must be rejected because it

which would run counter to NEPA's sweeping aims. NRDC and its members plainly fall within that broad class of persons Congress intended to enforce NEPA. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1271, 1287 (D.C. Cir. 2005) (a "cognizable injury to environmental values" brings plaintiffs within NEPA's zone of interests (quotation omitted)).

**b. The Executive Order does not bar judicial review.**

Failing to identify any statutory bar to judicial review, Defendants claim that review is barred by the 2004 Executive Order. *See, e.g.,* Keystone Mot. to Dismiss, Docket No. 25, at 20. As discussed *infra* Part I.B.2, NRDC does not seek to enforce the Order itself. Moreover, the Order states that nothing in it "shall be construed . . . to supersede or replace the requirements established under any other provision of law," Exec. Order No. 13,337, 69 Fed. Reg. at 25,301 (§ 5), including NEPA. Given this language, the Order's subsequent instruction that it does not "create any right . . . substantive or procedural, enforceable at law[,]" *id.* at 25,301 (§ 6) (emphasis added), can mean only that the Order is not intended to *supplement* preexisting legal rights, not that it renders those rights unenforceable. The simple fact that DOS issued Keystone's Permit under color of an Executive Order does not shield that permitting action from NEPA review under the APA.<sup>8</sup> *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (noting, in challenge to regulations Secretary of Labor promulgated under Executive Order, "that the Secretary's regulations are based on the President's Executive Order hardly

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erroneously inverts the APA's strong general presumption that judicial review is available to NRDC unless section 701(a) applies. *See supra* pp. 12-13.

<sup>8</sup> *No Oilport v. Carter*, 520 F. Supp. 2d 334 (W.D. Wash. 1981), cited by Defendants, underscores the distinction between the review Defendants contend NRDC seeks in this case, and the review NRDC in fact seeks. The Court in that case found plaintiffs' challenge to the merits of the agency's decision to issue a permit for a pipeline unreviewable, *id.* at 352, but did review plaintiffs' claims that the decision violated NEPA. *Id.* at 353-59.

seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question”); *see also Nat’l Trust for Historic Pres. v. Dep’t of State*, 834 F. Supp. 443, 448 (D.D.C. 1993) (Although the Foreign Missions Act gives State Department’s Director of Foreign Missions discretion in deciding “whether to grant or deny a benefit [sought under that Act], it does not give him discretion as to whether or not to comply with NEPA and NHPA in acting under the Foreign Missions Act.”).

That the 2004 Executive Order concerns transboundary permits that DOS may find in the “national interest” for reasons including energy security also does not preclude review of NRDC’s NEPA claim under section 701(a). DOS’s FEIS purported to analyze the impacts of the entire U.S. portion of the Keystone project on behalf of DOS and other federal agencies, *see* ROD, Docket No. 26-4, at 4, and the refining activities the FEIS unlawfully neglected would originate deep inside the United States. First Am. Compl., Docket No. 21, ¶¶ 41-64 (discussing DOS’s neglect of potential impacts from refineries in states including Texas, Kansas, and Illinois). The federal courts have not hesitated to review even military action to assure adequate consideration of domestic environmental impacts under NEPA. *See Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 820-22, 823 (D.C. Cir. 1976) (reviewing adequacy of EIS Navy prepared for a nuclear submarine site in Washington state and finding “no support in either the statute or the cases for implying a ‘national defense’ exemption from NEPA”); *see also Lemon v. Geren*, 514 F.3d 1312, 1314-15 (D.C. Cir. 2008) (finding standing to sue Army Secretary for violating NEPA in preparing an EIS for a military base closure). Courts also have reviewed NEPA challenges to federal agency actions both at and beyond our borders, including challenges to the issuance of Presidential Permits for transboundary energy projects. *See Power Plant Working Group v. Dep’t of Energy*, 467 F. Supp. 2d 1040, 1059-71 (S.D. Cal. 2006) (reviewing

adequacy of FEIS for issuance of Presidential Permits for electric transmission facilities at the U.S.-Mexico border); *Envtl. Def. Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding federal agency action in Antarctica reviewable under NEPA). As the D.C. Circuit noted in *Massey*, refusing review “would result in a federal agency being allowed to undertake actions significantly affecting the human environment” in an area where “the United States has substantial interest and authority, without ever being held accountable for its failure to comply with the decisionmaking procedures instituted by Congress . . . .” *Massey*, 986 F.2d at 536. It would be incongruous to find that the project’s crossing of a border insulates from review the failure to consider the project’s environmental effects within the United States.

The Supreme Court’s decision in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), is the exception that underscores the rule that agency action with domestic environmental impacts is subject to review for NEPA compliance even where the action implicates national security concerns. The *Weinberger* Court found it could not review the alleged naval nuclear weapons storage activity challenged in that case for NEPA compliance, not because the national security interests at stake relieved the Navy of its NEPA duties, but because the Navy was forbidden to reveal whether it in fact intended to store weapons at a particular location – a classified matter. *Weinberger*, 454 U.S. at 146. The Court noted in *dictum* that if the Navy ever in fact proposed to store the weapons at that site, it would have to prepare an internal EIS and “consider environmental consequences in its decisionmaking process,” even if it were unable to share that analysis with the public. *Id.*

In light of these authorities, there is no merit to the suggestion that this Court would impermissibly intrude on sensitive foreign policy or national security matters by reviewing the adequacy of DOS’s assessment of the domestic environmental impacts of a private, unclassified

pipeline project. The 2004 Executive Order's express incorporation of a policy to "maintain[ ] . . . public health[ ] and environmental protections," Exec. Order No. 13,212, 66 Fed. Reg. at 28,357; Exec. Order No. 13,337, 69 Fed. Reg. at 25,299 (Preamble, incorporating Executive Order No. 13,212), reinforces that there is no inherent conflict between DOS's exercise of its permitting discretion under the Order and this Court's enforcement of DOS's independent statutory obligation to analyze the domestic pollution impacts likely to result from that exercise.<sup>9</sup> *See, e.g., Japan Whaling*, 478 U.S. at 229-30 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." (quotation marks and citation omitted)); *Concerned About Trident*, 555 F.2d at 823-24 (emphasizing, in finding Navy's EIS for siting of a naval submarine facility reviewable under NEPA, that "appellants here do not attack the Navy's [siting] decision on the merits").

Defendants also do not cite a single authority for their sweeping proposition that an Executive Order not issued pursuant to statute may preclude an action to enforce a law that Congress has made presumptively reviewable through the APA.<sup>10</sup> "[J]udicial review of a final

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<sup>9</sup> Defendants' citations to non-NEPA cases concerning agency and executive action under mandates that did not provide expressly for environmental protection, and that expressly concerned national security or foreign policy matters, thus do not support application of section 701(a)(1) to this case. *See Dep't of Navy v. Egan*, 484 U.S. 518, 528-29 (1988) (denial of military security clearance); *Webster v. Doe*, 486 U.S. 592, 594-95 (1988) (termination of Central Intelligence Agency covert electronics technician under provision of National Security Act); *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 311-13 (1936) (presidential proclamation suspending Congressional prohibition on arms sales to Bolivia and Paraguay); *Legal Assistance for Vietnamese Asylum Seekers*, 104 F.3d at 1353 (immigration screening and repatriation process); *U.S. Ordnance, Inc. v. U.S. Dep't of State*, 432 F. Supp. 2d 94, 95 (D.D.C. 2006), *vacated as moot*, 231 Fed. Appx. 2 (D.C. Cir. 2007) (licensing of arms exports to foreign countries).

<sup>10</sup> The D.C. Circuit has rejected similar arguments to the effect that the discretion afforded executive officers under one mandate should bar review of executive action that violates other, independent statutory mandates. *Chamber of Commerce v. Reich*, 74 F.3d at 1331 ("It does not follow . . . that the President's broad authority under the Procurement Act precludes judicial

agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” *Abbott Labs.*, 387 U.S. at 140. Because the President cannot make law alone, the notion that the President could – in an Order untethered to statute – strip private rights of action that Congress has conferred by statute raises grave separation of powers concerns. The D.C. Circuit has held that “it is only statutes, not agency regulations, that can preclude otherwise available judicial review” under section 701(a)(1), because regulations, unlike statutes, provide “no indication . . . that *Congress itself* considered the mechanism” governing the agency decision challenged by plaintiffs, “or how (and at the request of whom) such decisions would be reviewable in the federal courts.” *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (emphasis added). For the same reason, an Order bereft of Congressional intent to preclude judicial review should not bar NRDC’s claim here.

**2. DOS’s violation of NEPA is not a matter “committed to agency discretion by law” under 5 U.S.C. § 701(a)(2).**

Section 701(a)(2) exempts from judicial review under the APA those cases in which “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). “This is a very narrow exception.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). It withdraws from APA review those claims in which the relevant “statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *see also Overton Park*, 401 U.S. at 410 (section 701(a)(2) is

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review of executive action for conformity with that statute – *let alone review to determine whether that action violates another statute.*”) (emphasis added) (finding a claim that an Executive Order issued under color of the Procurement Act conflicted with provisions of the National Labor Relations Act was justiciable).

“applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.” (quotation marks and citation omitted)).

Defendants’ argument that this exception applies because the Order lacks any “meaningful standard” for this Court to apply misses the point. NRDC does not ask the Court to apply the Order. *See* DOS Mot. to Dismiss, Docket No. 26-2, at 20-23; Keystone Mot. to Dismiss, Docket No. 25, at 20-21. NRDC does not challenge DOS’s determination that issuing a Permit to Keystone was in the “national interest” pursuant to the Order, nor does NRDC challenge DOS’s application of any other part of the Order.<sup>11</sup> *See supra* pp. 1-2; First Am. Compl., Docket No. 21. Rather, NRDC asks this Court to do just what it has done in past NEPA cases: to decide whether the NEPA document the agency prepared before taking final action adequately disclosed and analyzed the environmental impacts of that action. *See supra* pp. 1-2; First Am. Compl., Docket No. 21, ¶¶ 1-5, 60-73, “Prayer for Relief” ¶¶ 1-5. The “standards” this Court must apply to this exercise are those set forth in NEPA, the CEQ regulations, DOS’s NEPA regulations, and ample case law, all of which recognize that NEPA applies to DOS actions like the one NRDC challenges here. *See supra* pp. 4-5.

That DOS may have exercised discretion in deciding that issuing a Permit for the Keystone project would serve the “national interest” does not bear on whether, at an earlier stage

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<sup>11</sup> The cases Defendants cite for the proposition that Executive Orders not rooted in any express congressional mandate are not privately enforceable, *see* Keystone Mot. to Dismiss, Docket No. 25, at 12-15; DOS Mot. to Dismiss, Docket No. 26-2, at 9-10, 13-15, are therefore inapposite. *See Air Transp. Ass’n v. FAA*, 169 F.3d 1, 8 (D.C. Cir. 1999) (finding Order that provided that it “does not create any right . . . enforceable against the United States” was not subject to judicial review and that petitioner could not “enforce private rights *under the order*” (emphasis added)); *In Re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (Executive Order not based in statute “provide[s] no basis for overturning the interim regulations” plaintiffs challenged); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965) (plaintiffs could not challenge agency action on grounds that it violated Order not based in statute).

of its review process, DOS prepared an adequate FEIS. Defendants' citations to cases finding that certain Executive Orders and other authorities besides NEPA vest agencies with unreviewable discretion under section 701(a)(2) accordingly do not support the application of 701(a)(2) here. *See Claybrook v. Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997) (Federal Advisory Committee Act); *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 62-63, 70 (D.C. Cir. 2002) (FAA organic statute and regulations); *Egan*, 484 U.S. at 526-27 (Civil Service Reform Act); *Webster*, 486 U.S. at 600 (National Security Act). Because NEPA supplies all the "meaningful standards" the Court needs to review NRDC's claim, section 701(a)(2) does not apply.<sup>12</sup>

## II. NRDC Has Standing to Bring This Action.

Defendants argue that NRDC lacks Article III standing to sue in this case because it "is unable to show that its injury will be redressed by a favorable decision." DOS Mot. to Dismiss, Docket No. 26-2, at 23 (quotation marks, brackets, and citation omitted); *see also* Keystone Mot. to Dismiss, Docket No. 25, at 22 n.6. Defendants' contention is both unsupported and wrong as a matter of law.

A plaintiff's injury suffices for Article III standing if it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations and internal quotations omitted).<sup>13</sup> It is well

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<sup>12</sup> Defendants' alternative contention that section 701(a)(2) bars review because review would intrude on foreign policy or national security matters committed to Presidential or "executive" discretion, Keystone Mot. to Dismiss, Docket No. 25, at 22-24; DOS Mot. to Dismiss, Docket No. 26-2, at 21-22, is unavailing for the reasons discussed at Parts I.A and I.B.1. *See supra* pp. 10-12; 13-19.

<sup>13</sup> Under Article III, the plaintiff's injury (or, in the case of an organization, that of its members) also must be "concrete and particularized," "actual or imminent," and "fairly traceable to the challenged action of the defendant . . ." *Lujan*, 504 U.S. at 560 (citations and internal

established, and DOS acknowledges, that a plaintiff's injury is "redressable" where she alleges a violation of a procedural right tied to a concrete interest, such as agency compliance with NEPA for a project that would affect her, even though compliance with the procedure would not necessarily alter the ultimate result of the process. *See Lujan*, 504 U.S. at 573 n.7 (stating that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy" and noting compliance with NEPA as an example of such a procedural right); *Lemon*, 514 F.3d at 1315 (noting that standing has been upheld in "[c]ountless lawsuits" based on NEPA violations, correction of which may not ultimately change the outcome); DOS Mot. to Dismiss, Docket No. 26-2, at 23-24. NRDC's allegation that DOS violated NEPA by issuing a Presidential Permit based on an FEIS that failed to consider foreseeable environmental impacts at refineries near which NRDC members live satisfies these standards for redressability. *See First Am. Compl.*, Docket No. 21, ¶¶ 8, 11, 30-64.

Defendants allege that this straightforward analysis does not apply here because the President, despite having delegated the task of issuing Presidential Permits to DOS in successive Executive Orders spanning four decades, might scrap the procedures in those Orders and bypass any requirements this Court may impose on DOS by issuing the Permit himself. *See DOS Mot. to Dismiss*, Docket No. 26-2, at 25; *see also Keystone Mot. to Dismiss*, Docket No. 25, at 22 n.6. This possibility, they argue, means that it is "entirely conjectural" that a favorable decision from

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quotations omitted); *see Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (an organization has standing if its members would have standing, the interests at stake are germane to the organization's purpose, and the lawsuit does not require participation of individual members). Neither DOS nor Keystone contests that NRDC satisfies these requirements.

this Court would redress NRDC's injuries. *See* DOS Mot. to Dismiss, Docket No. 26-2, at 25. Their argument does not withstand scrutiny.

First, as explained above, no Presidential action was required for DOS's grant of the Permit to be effective, nor did any occur. *See supra* pp. 3, 4-6. As it now stands, an order declaring that DOS violated NEPA, rescinding the Permit, and requiring NEPA compliance before it is reissued would bind DOS and redress NRDC's injuries. Such an order would require DOS to perform the proper NEPA analysis NRDC seeks in this case before it decides whether to reissue the Permit, and regardless of whether a later referral to the President is made under the procedures of the 2004 Executive Order. Thus, contrary to DOS's argument, the current situation is not one where "redressability is dependent upon the actions of a third party and it is entirely conjectural whether the third party will act to alleviate the alleged harm." DOS Mot. to Dismiss, Docket No. 26-2, at 24. Rather, it is DOS's action that has injured NRDC, and an order from this Court that binds DOS can redress that harm, all without any third party involvement.

Moreover, neither DOS nor Keystone explains why it is likely that the President will intervene in a manner that would defeat the redress that a favorable decision from this Court currently would provide. Indeed, the only evidence before the Court of Presidential intentions in this regard – the 2004 Executive Order delegating authority to DOS over the permitting process and the previous Orders it reaffirms or incorporates – suggests the opposite. Since, as explained above, the 2004 Executive Order provides for Presidential involvement in the permitting process only when referral to him is requested by one of a select list of non-DOS officials (not including the President) and after DOS confers with that official and deems referral necessary, *see supra* p. 3, the spontaneous Presidential intervention Defendants hypothesize would violate the terms of the Order. It also would run counter to the desire to "provide a systematic method in connection

with the issuance of [such] permits” upon which the delegation and its procedures have been predicated since 1968. Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968) (Preamble). Finally, such Presidential intervention would contradict the Order’s mandate not to “supersede or replace” other legal requirements and its policy to maintain environmental protections. *See supra* p. 1, 3; Exec. Order No. 13,337, 69 Fed. Reg. at 25,299 (Preamble), 25,301 (§ 5); Exec Order No. 13,212, 66 Fed. Reg. at 28,357 (§ 2).

For these reasons, the cases DOS relies on in support of its contention that the President’s authority to issue the Permit defeats redressability are inapposite. In *St. John’s United Church of Christ v. Federal Aviation Administration*, 520 F.3d 460 (D.C. Cir. 2008), plaintiffs challenged a grant by the FAA to the City of Chicago for an airport improvement project, which plaintiffs alleged would harm them. The court, in finding no redressability, noted that it was entirely up to the City of Chicago, not the FAA, whether to proceed with the project and that the grant being challenged would play no role in that decision: “Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable . . . . Chicago is committed to completing the project anyway.” *Id.* at 463. In *Lujan*, the Court found no redressability because the Interior Department regulations that the plaintiffs wanted revised were not clearly binding on the non-Interior agencies providing funding for the projects that allegedly injured the plaintiffs. 504 U.S. at 568-71. In addition, the Court noted, federal agencies provided only a fraction of the funding for the allegedly injurious projects, and there was no reason to believe the projects would be suspended or be less harmful without federal funding. *Id.* at 571.

In this case, however, unlike *St. John’s* and *Lujan*, the future of the Keystone project depends on the Presidential Permit, which was granted by DOS and which this Court can order

DOS to rescind. Moreover, unlike Chicago in *St. John's* and the non-Interior agencies in *Lujan*, which had made clear that their decisions to complete or fund the controversial projects did not turn on the Court's decisions, there is no indication here that the President will intervene and issue the Permit for the Keystone project despite an order from this Court requiring DOS to comply with NEPA. *See St. John's*, 520 F.3d at 463; *Lujan*, 504 U.S. at 569-70. None of the cases Keystone cites in its footnote on standing is any more apt. *See Sierra Club v. Env'tl. Prot. Agency*, 292 F.3d 895 (D.C. Cir. 2002) (dismissing case without addressing redressability); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590-94 (D.C. Cir. 2006) (finding no redressability where the relief plaintiffs sought would not trigger any legal consequence and would require several speculative assumptions even to have the potential of redressing plaintiffs' alleged injury).

In sum, Defendants ask this Court to deny NRDC standing and dismiss this case based on speculation that the President himself might intervene in a future permitting process for the Keystone project to nullify any remedy this Court imposes on DOS. As demonstrated above, Defendants offer no factual support for their prognostication of possible future Presidential intervention, let alone authority for their legal premise that such a possibility defeats Plaintiffs' standing to challenge existing agency action. In any event, on a motion to dismiss, it is the plaintiff's allegations, not the defendant's unsupported conjecture, that are assumed to be true. *See Lujan*, 504 U.S. at 561. NRDC's injuries are likely to be redressed by a favorable decision in this case, and NRDC has standing to sue.

## CONCLUSION

For the reasons above, this Court should deny Defendants' Motions to Dismiss and proceed to the merits.

Dated: San Francisco, California  
November 7, 2008

Respectfully submitted,

/s/ Selena K. Kyle  
Selena K. Kyle (CA Bar No. 246069,  
admitted *pro hac vice*)  
Natural Resources Defense Council, Inc.  
111 Sutter Street, 20th Floor  
San Francisco, CA 94104  
Phone: (415) 875-6158  
Fax: (415) 875-6161

Aaron Colangelo (D.C. Bar # 468448)  
Natural Resources Defense Council, Inc.  
1200 New York Avenue, N.W., Suite 400  
Washington, D.C. 20005-6166  
Phone: (202) 289-2376  
Fax: (202) 289-1060

Nancy S. Marks (SDNY Bar No. NM3348,  
admitted *pro hac vice*)  
Aaron M. Bloom (SDNY Bar No. AB1977,  
admitted *pro hac vice*)  
Natural Resources Defense Council, Inc.  
40 West 20th Street  
New York, NY 10011  
Phone: (212) 727-2700  
Fax: (212) 727-1773

Counsel for Plaintiff Natural Resources Defense  
Council, Inc.

**CERTIFICATE OF SERVICE**

I, Selena K. Kyle, hereby certify that on November 7, 2008, I served the foregoing document:

**PLAINTIFF NRDC'S MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS  
OF DEFENDANTS AND DEFENDANT-INTERVENOR**

on the following counsel via the Court's electronic filing system:

Luther L. Hajek  
U.S. DEPARTMENT OF JUSTICE  
P.O. Box 663  
Washington, DC 20044  
(202) 305-0492  
luke.hajek@usdoj.gov

Timothy K. Webster  
Peter R. Steenland  
William E. Gerard  
SIDLEY AUSTIN, LLP  
1501 K Street, NW  
Washington, DC 20005-1401  
twebster@sidley.com; psteenland@sidley.com; wgerard@sidley.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 7, 2008:

/s/ Selena K. Kyle  
Selena K. Kyle