

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATURAL RESOURCES DEFENSE COUNCIL,)
INC.,)

Plaintiff,)

v.)

Case No. 1:08-cv-01363-RJL

UNITED STATES DEPARTMENT OF STATE;)
CONDOLEEZZA RICE, in her official capacity as)
Secretary of State; and REUBEN JEFFREY III, in)
his official capacity as Under Secretary of State for)
Economic, Energy, and Agricultural Affairs,)
Defendants,)

and)

TRANSCANADA KEYSTONE PIPELINE, LP,)
Defendant-Intervenor.)

**MOTION BY TRANSCANADA KEYSTONE PIPELINE, LP, TO DISMISS
COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1), OR
12(b)(6), AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

Defendant-Intervenor TransCanada Keystone Pipeline, LP (hereinafter, “Keystone”), hereby moves and respectfully seeks an order dismissing with prejudice the Complaint filed by Plaintiff Natural Resources Defense Council (“Plaintiff”) against Defendants United States Department of State, Condoleezza Rice, and Reuben Jeffrey III, in this matter pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Alternatively, this matter should be dismissed with prejudice pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Keystone believes that oral argument would be helpful and appropriate, and therefore requests the same.

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STATEMENT OF FACTS

Introduction and Summary. Acting on behalf of the President of the United States, the Department of State (or alternatively, “State Department”) has determined that the issuance of a Presidential Permit for the Keystone crude oil pipeline to cross the border between the United States and Canada serves the national interest of the United States. In its February 28, 2008, Record of Decision and National Interest Determination (“ROD/NID”), the State Department found “that the Keystone Pipeline Project serves the national interest by providing additional access to a proximate and newly available supply of crude oil with minimum transportation requirements from a reliable trading partner of the United States.” ROD/NID at 2.¹ The State Department gave four reasons for this finding. First, it found that an oil pipeline transporting crude oil from Alberta, Canada, to refineries and oil distribution terminals in the United States would increase the diversity of available supplies among crude oil sources. Second, it recognized that Canadian crude oil is the largest and closest supply source to U.S. refineries that does not require marine transport. Third, it stated that Canada is a stable and reliable trading partner, and a Canadian pipeline is safer and more environmentally responsible than marine or railway transport. Fourth, the State Department found that this pipeline provides additional crude oil to make up for the continued decline in imports from other major U.S. suppliers. ROD/NID at 22. Accordingly, the Department of State issued a Presidential Permit on March 11, 2008, allowing Keystone to construct, operate, and maintain the Keystone Pipeline at the international boundary between the United States and Canada.

Plaintiff Natural Resources Defense Council (“NRDC”) brought this suit to invalidate that Presidential Permit, claiming that the Department of State violated the National

¹ The Record of Decision issued in this matter by the Department of State is appended to this Motion as Attachment A.

Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, by producing an Environmental Impact Statement (“EIS”) to accompany the Presidential Permit that NRDC has deemed deficient. However, unlike other, more common NEPA cases that have been resolved on their merits, this litigation falls into that small category of NEPA cases that cannot and should not be litigated because the underlying action giving rise to the EIS is not judicially reviewable. As a result, any EIS produced and any Permit granted under these particular circumstances falls beyond the reach of the judiciary.

I. The Keystone Pipeline Application to the Department of State. TransCanada Keystone Pipeline, LP (“Keystone”) is a Delaware limited partnership, jointly owned by TransCanada Corporation, a Canadian public company organized under the laws of Canada, and by ConocoPhillips Company, a Delaware corporation, a wholly owned subsidiary of ConocoPhillips, a Delaware Corporation. The Keystone limited partnership was created for the purpose of transporting crude oil and other hydrocarbons by pipeline from the international border between the United States and Canada to facilities in the United States. Consistent with that purpose, Keystone filed on April 19, 2006, with the State Department a detailed application for a permit to construct, operate, and maintain a cross-border energy facility within the scope of Executive Order 13337. This permit allows Keystone to cross the international border and construct an international crude oil pipeline from a crude oil supply hub in Canada to oil refineries and oil distribution terminals in the United States.

Executive Order (“E.O.”) 13337 of April 30, 2004, provides the sole basis for the action by the State Department that provoked the NRDC lawsuit. Unlike some Executive Orders that find their basis in specific legislation, the President promulgated this Order pursuant to his constitutional authority over national security and foreign affairs. This Executive Order,

E.O.13337, is simply one in a series of Presidential directives for managing this constitutional authority over energy facilities that cross international borders, *see* 69 Fed. Reg. 25,299 (May 5, 2004). In fact, because proposed cross-border facilities can present important foreign relations and national security concerns, such facilities have been subject to Presidential authority for nearly a century. For example, at least as early as 1919, the President exercised his foreign relations and national security power by delegating to the Secretary of State and Department of State the authority to issue permits for the landing of foreign telegraph and other cables in the United States. *See* A. Hackworth, *Digest of International Law*, Vol. IV, section 350, at pp. 247-266 (1942); *see also* John Bassett Moore, *A Digest of International Law*, Vol. II, section 227, at pp. 461-463 (1906) (describing the assertions by Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison of the right of the executive branch to control the landing of cables on U.S. shores). Thus, the issuance of the Presidential Permit for the Keystone Pipeline is simply one more example in the lengthy history of the exercise of Presidential powers involving foreign policy and national security.

In exercising this constitutional authority, President Johnson incorporated this area of Presidential authority into a larger cross-border facility permit program with his issuance of E.O. 11423 on August 16, 1968. There, the President delegated to the Secretary of State and the State Department the authority to issue “Presidential permits for the construction, connection, operation, and maintenance at the borders of the United States of” a wide variety of “border crossing facilities” such as water supply and oil pipelines, aerial tramways and cable cars, submarine cables, ... lines for the transmission of electric energy[,] ... facilities for the transportation of persons or things, or both, to or from a foreign country” and, subject to a statutory carve-out, international bridges. 33 Fed. Reg. 11,741 (Aug. 20, 1968). With respect to

some international facilities, Congress has built additional statutory obligations that supplement this Presidential authority. For example, in the International Bridge Act of 1972, Congress recognized Presidential authority over bridges that cross international borders, requiring Presidential approval for the construction, operation, or maintenance of such bridges. *See* 33 U.S.C. § 535(b); *see also* the Submarine Cable Landing and Licensing Act of 1921, codified at 47 U.S.C. §§ 34-35 (requiring Presidential approval for the landing of submarine cables on U.S. shores). With regard to oil pipelines, however, there is no federal legislation addressing this Presidential authority – and as stated in E.O. 13337, the basis for its promulgation rests upon Presidential constitutional authority.

Consistent with this long-established practice, E.O. 13337 – which amends E.O. 11423 – creates a formal process through which the State Department, in the person of the Secretary of State, exercises the President’s delegated authority to make all national interest determinations for the construction, connection, operation or maintenance of any facility for the exportation or importation of petroleum and other fuels at the border of the United States. 69 Fed. Reg. 25,229 (May 5, 2004). Promulgated in part “to expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects,” *id.*², E.O. 13337 shifts much of the burden of permitting such cross-border projects from the President, while retaining the Chief Executive’s ultimate authority over permitting decisions. Specifically, the President has retained exclusive final decisionmaking in the permitting process whenever any of the listed Cabinet officers consulted during the permitting process disagrees with the State Department’s determination of the national interest and the State Department’s announced decision to approve or deny the permit. *Id.* At that point, the permit application is referred to the President for his

² E.O. 13337 also contains provisions relating to construction of specified types of international border crossings for motor and rail land transportation.

final decision. *Id.* Further, because E.O. 13337 derives its authority from the President's constitutional power, and not an act of Congress, the President is free to approve or deny cross-border energy facilities without recourse to that Executive Order, and is free to amend or revoke E.O. 13337 at any time. Thus, this Executive Order is simply a management tool for the exercise of the President's constitutional authority over our borders with other nations, and the concomitant foreign policy and national security issues presented in that context.

Finally, while E.O. 13337 makes provision for input from other federal agencies and for public input, it (like its predecessors) expressly rejects the intent to or effect of creating

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.

69 Fed. Reg. 25,299 (May 5, 2004).

Both the February 28, 2008, State Department ROD/NID containing the national interest findings for the Keystone Pipeline and the March 11, 2008, Presidential Permit authorizing the construction, operation, and maintenance of the Keystone Pipeline at the border between the United States and Canada were expressly and solely grounded in the powers contained in this Executive Order.

The National Environmental Policy Act of 1969 ("NEPA") is a procedural statute intended to foster "consider[ation of] environmental concerns" as part of the "decision-making process" of federal agencies. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Although several of NEPA's provisions purport to impose mandates upon federal agencies, NEPA does not address whether or how its requirements are to be judicially reviewed or enforced. *See generally* 42 U.S.C. §§ 4321 – 4370; *see also Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993), *cert. denied* 510 U.S. 1041 (1994). Of course,

there is the familiar Section 102(2)(C) of NEPA, which requires all federal agencies, “to the fullest extent possible,” to include an Environmental Impact Statement (“EIS”) in proposals for “major federal actions significantly affecting the environment.” 42 U.S.C. § 4332(2)(C).

Notwithstanding NEPA’s silence as to judicial review, courts have found that Section 102(2)(C) imposes procedural requirements on agencies – but does not mandate any particular substantive outcome – and that the procedural requirements are judicially reviewable in some circumstances. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

However, judicial review of agency compliance with Section 102(2)(C) is not always available. The Supreme Court has declared that while Section 102(2)(C) and its implementing regulations, 40 C.F.R. § 1500, *et seq.*, may impose requirements on agencies, those obligations nevertheless may not be subject to private suits for judicial review. *See, e.g., Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (rejecting the Court of Appeals’ ruling that the Navy prepare a “hypothetical EIS” for nuclear weapon storage in Hawaii, and noting that although the Navy might be required to perform an internal EIS for such an action, Navy’s NEPA compliance “is beyond judicial scrutiny” and not subject to public release).

II. The State Department’s review of the application for a Presidential Permit. The Department of State reviewed the application pursuant to the requirements of E.O. 13337, and assessed the project with respect to the national interest, a process summarized in the Department’s ROD/NID of February 28, 2008. As a corollary to its national interest determination, the State Department also completed a Draft and then a Final EIS to inform it, other federal, state and local agencies, and the public of the reasonably foreseeable environmental, social, and economic impacts of the proposed pipeline. *See* ROD/NID at 8-19.

The State Department also undertook consultations and additional assessments pursuant to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f), and it engaged in consultation with the U.S. Fish & Wildlife Service pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1536. *See* ROD/NID at 20-21. The ROD/NID summarizes the results of these processes, describing the environmental impacts, alternatives considered, possible environmental consequences and mitigation for potential adverse impacts. In the end, the ROD/NID finds that the construction, maintenance, and operation of the Keystone Pipeline “would have limited adverse impact to the environment.” *Id.* at 3.

The State Department concluded its examination of the application by determining “that the Keystone Pipeline Project serves the national interest by providing additional access to a proximate and newly available supply of crude oil with minimum transportation requirements from a reliable trading partner of the United States.” *Id.* at 22-24. The State Department therefore issued a Presidential Permit to Keystone, authorizing the company to construct, operate, and maintain the portion of the Keystone Pipeline facility located at the international border between the United States and Canada.

III. Plaintiff’s Complaint. NRDC filed a complaint on August 6, 2008 (amended September 23, 2008), alleging that the issuance of the Presidential Permit to Keystone violated NEPA and its implementing regulations. In particular, NRDC asserts that the EIS is deficient because it fails to discuss in meaningful detail “the predictable increases in pollution from the refining of oil transported through the Pipeline....” Plaintiff’s First Amended Complaint For Declaratory and Injunctive Relief (“Complaint”) at ¶ 2. NRDC charges that the State Department “failed to consider adequately the Pipeline’s indirect effects at Wood River [Refinery], and failed to consider at all its indirect effects at any other refinery.” *Id.* at ¶ 62.

Further, the Complaint alleges a failure to assess the Pipeline's cumulative impacts, and to recognize the broader and longer-range problems that global-warming inducing effects may pose. NRDC claims that the State Department's EIS fails to deal adequately with incomplete or unavailable information concerning reasonably foreseeable and significant adverse project-related impacts and does not consider or propose appropriate mitigation measures. *Id.* at ¶ 63. NRDC seeks declaratory and injunctive relief, including an order requiring the State Department to revoke the Presidential Permit for the Keystone Pipeline, and to ensure that no further construction takes place pending compliance with NEPA. *Id.*

NRDC asserts that this Court has jurisdiction over this suit on the basis of "28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-2202 (declaratory judgment), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act)." *Id.* at ¶ 6.

ARGUMENT

A motion to dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(1) challenges the jurisdictional basis for a court to consider a party's claims. For those claims to survive a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff must establish that the court has subject matter jurisdiction to hear the case. *See, e.g., In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C. Cir. 1989); *Jones v. Exec. Office of the President*, 167 F. Supp. 2d 10, 13 (D.D.C. 2001). "Federal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citations omitted). Consequently, "[a] federal court *presumptively* lacks jurisdiction in a proceeding until a party demonstrates that jurisdiction exists," *Commodity Futures Trading Com'n v. Nahas*, 738 F.2d 487, 492 n. 9 (D.C. Cir. 1984) (citations omitted; emphasis added). Thus, NRDC must demonstrate that this Court has jurisdiction over its claims against the State Department.

In ruling upon a motion to dismiss, the court must accept as true all factual allegations contained in the complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). This requirement similarly applies to a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). However, in ruling on a motion to dismiss, a court is “not bound to accept as true a legal conclusion couched as a factual allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or to “accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,” *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Moreover, given the threshold nature of subject matter jurisdiction, a “plaintiff’s factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.” *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal quotation marks omitted). Finally, “[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced.” *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 n. 6 (1986) (citations omitted).

I. The United States has neither waived its sovereign immunity nor granted a private right of judicial review for Plaintiff’s claims, which should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

NRDC relies upon Title 28, Section 1331 of the United States Code, which grants to federal district courts original subject matter jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A civil action “aris[es] under the ... laws ... of the United States,” if “federal law creates the cause of action,” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983), or alleges a state law cause of action subject with certain federal features, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003); *see also West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir. 1987) (“There are two tests under which an action may present a federal

question ... [first,] whether federal law creates the cause of action” and second, “[i]f state law creates the cause of action [,]... whether that cause of action poses a substantial federal question...”). In this case, where NRDC alleges violations of federal law, it must demonstrate an applicable private right of judicial review granted by federal law in order to establish this Court’s subject matter jurisdiction.³ Section 1331, by itself, does not provide that cause of action. *See, e.g., DeVilbiss v. Small Bus. Admin.*, 661 F.2d 716, 718 (8th Cir. 1981) (section 1331 is “merely jurisdictional” and does “not create any substantive right enforceable against the United States...”) (*citing United States v. Testan*, 424 U.S. 392, 400-02 (1976)) (remaining citations omitted).

Similarly, the Declaratory Judgment statute, 28 U.S.C. §§ 2201-2202, also invoked by NRDC, “is not an independent source of federal jurisdiction” but rather a grant of an additional remedy “the availability of [which] presupposes the existence of a judicially remediable right.” *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (citation omitted). As discussed in detail below, NEPA, the Administrative Procedure Act (“APA”), and E.O. 13337 similarly fail to provide Plaintiff with a private right of judicial review. Because Plaintiff’s Complaint fails on its face to articulate an applicable private right of action, and therefore a basis for subject matter jurisdiction, this Court should dismiss with prejudice Plaintiff’s claims.

In addition, because the Complaint raises claims against the United States and federal officials acting in their official capacity, NRDC must demonstrate that the United States, as sovereign, has consented to being sued. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“the United States may not be sued without its consent and ... the existence of consent is

³ Additionally, or in the alternative, the failure to demonstrate an applicable private right to judicial review can be challenged as a failure to state a claim upon which relief can be granted. For that reason, Keystone also raises these arguments in the alternative as subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), *see* Section II, *infra*.

a prerequisite for jurisdiction.”); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994). As with the statutory grant of subject matter jurisdiction, a waiver of sovereign immunity must be explicit, and is to be construed strictly and narrowly. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996) (a waiver of "sovereign immunity must be unequivocally expressed in statutory text" and will be "strictly construed, in terms of its scope, in favor of the sovereign.").

This requirement is independent from establishing subject matter jurisdiction, as Section 1331 does not provide a waiver of sovereign immunity. *See, e.g., Benvenuti v. Department of Defense*, 587 F.Supp. 348, 352 (D.D.C. 1984) (citations omitted). Nor does the Declaratory Judgment statute provide such a waiver. *See, e.g., id.* (citations omitted). Indeed, as discussed below, no waiver applicable to Plaintiff’s claims is contained in NEPA, the APA, or E.O. 13337. Thus, NRDC’s failure to articulate a relevant waiver of sovereign immunity acts as an additional, independent barrier to establishing subject matter jurisdiction in this Court.

It is possible that NRDC will disclaim any interest in enforcing or litigating the terms of the Executive Order, and assert instead that it merely seeks vanilla-judicial review of the State Department EIS. But, as we now show, the Department of State’s issuance of the Presidential Permit rested solely on E.O. 13337, and therefore any challenge to this EIS has to be grounded in the underlying authority that empowered the decision challenged by the plaintiff.

A. Neither NEPA nor the Executive Order authorizing the State Department’s actions provide a private right of judicial review or a waiver of sovereign immunity.

NRDC’s Complaint primarily alleges violations of NEPA, *see Complaint* at ¶¶ 65-73, but NRDC does not and cannot invoke NEPA as a basis for jurisdiction, *see id.* at ¶ 6. This is because NEPA itself makes no provision for judicial review. Similarly, NEPA does not contain a waiver of sovereign immunity. *See generally* 42 U.S.C. §§ 4321 – 4370; *see also Public*

Citizen, 5 F.3d at 551.⁴ As a matter of basic federal court jurisdiction, anyone alleging a violation of NEPA must identify both a private cause of action and a waiver of sovereign immunity, because NEPA contains neither. Normally, a court's jurisdiction to hear NEPA challenges is found in the statute authorizing the underlying agency action that provoked the allegation of a NEPA violation. *See, e.g., Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 191-94 (7th Cir. 1986) (Federal Aviation Act, which authorized the orders at issue in the case, provided the jurisdictional basis of claims of, *inter alia*, NEPA violations by FAA in issuing those orders). *See also Biodiversity Conservation v. U.S. Bureau of Land*, 404 F. Supp. 2d 212 (D.D.C. 2005) (Plaintiff's challenge to approval of seismic testing technique on federal land by Bureau of Land Management grounded upon agency's authority under the Federal Land Policy Management Act, 43 U.S.C. § 1701, *et seq.*, thereby allowing judicial review of claimed NEPA violations under the Administrative Procedure Act and 28 U.S.C. § 1331).

Here, however, the actions at issue were taken not under the authority of any statute, but instead were authorized solely pursuant to E.O. 13337 – which provides neither a private cause of action nor a waiver of immunity. What is more, Section 6 of E.O. 13337 expresses the President's clear intent that the E.O. “not[] create any right ... 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 persons.” 69 Fed. Reg.

⁴ Nor does the fact that the State Department prepared an EIS as part of its permitting process here generate a cause of action under NEPA. Since parties cannot by stipulation between them confer subject matter jurisdiction upon a federal court, *see, e.g., Barnes v. Kline*, 759 F.2d 21, 29 n.16 (D.C. Cir. 1985) (“parties may not create jurisdiction by mere stipulation”) (*vacated on other grounds*, 479 U.S. 361 (1987)), the State Department's unilateral action surely cannot confer jurisdiction upon a federal court to review an EIS that is the product of non-reviewable Presidential authority. *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (“[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it”) (internal quotation marks and citations omitted); *Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir. 1991) (“Subject matter jurisdiction cannot be conferred upon the courts by the actions of the parties...”).

25,299 (May 5, 2004). This disclaimer is consistent with settled judicial treatment of executive orders – *i.e.*, that “[g]enerally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.” *Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995) (quotations and citations removed).

The limited instances in which this Circuit and others discern an implicit, judicially enforceable private right of action in an executive order are premised upon two factors that are entirely absent here. First, those executive orders are issued pursuant to a statutory mandate from Congress – a statutory mandate which expressly or implicitly evinces a legislative intent to provide for judicial review. Absent that, this Circuit “has [] declared that executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.” *In re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (citation omitted); *see also Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990) (citation omitted). This Circuit will not involve the federal judiciary in second-guessing the actions of executive agencies pursuant to such executive orders because, at least in part, those orders can be “withdrawn at any time for any or no reason,” solely on the discretion of the President. *See Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

Second, some courts have discerned a private right of action in an executive order when the order’s terms and purpose conveyed an intent on the part of the President to create a private right of action. Conversely, this Circuit and others have rejected an implied private right of judicial review in executive orders containing clear expressions of *contrary* intent. *See, e.g., Air Trans. Ass'n of America v. Fed. Aviation Admin.*, 169 F.3d 1, 8-9 (D.C. Cir. 1999) (citing *Meyer*

v. Bush, 981 F.2d 1288, 1296 n. 8 (D.C. Cir. 1993)); *see also Indep. Meat Packers Ass'n v. Butz*, 526 F. 2d 228, 234-35 (8th Cir. 1975).

Here, each factor operates to preclude the creation of a right of judicial review under E.O. 13337, which is premised upon an exercise of the Executive's constitutional authority rather than a statutory provision. As with the executive order at issue in *Gronouski*, 350 F.2d at 456-57, E.O. 13337 can be withdrawn, revised, or replaced purely at the President's discretion. This similarity counsels against construing E.O. 13337 to contain any private right of judicial review.

Another basis for rejecting any implied right of review in E.O. 13337 is its clear articulation of contrary intent. It expressly declares that it is not intended to create any such private right of action. 69 Fed. Reg. 25,299 (May 5, 2004). Furthermore, that Order is expressly intended, *see id.*, to implement the provisions of E.O. 13212, "Actions to Expedite Energy-Related Projects," which creates a task force to "monitor and assist the agencies in their efforts to expedite their reviews of permits or similar actions, as necessary, to accelerate the completion of energy-related projects...." 66 Fed. Reg. 28,357 (May 22, 2001) (as amended by E.O. 13302, at 68 Fed. Reg. 27,429 (May 20, 2003)). In light of these repeated declarations by the President regarding the need to expedite the permitting process for energy related projects, it is highly doubtful that the President intended E.O. 13337 to be subject to a private right of action, including the exercise of a federal court's equitable jurisdiction to review and possibly enjoin a project that a Presidential Permit process concluded was in the "national interest."

Absent this Executive Order, the Department of State would have had no authority to issue a Presidential Permit for the Keystone Pipeline. Absent this Executive Order, a EIS performed by the Department of State on the Keystone Pipeline proposal would have been nothing more than another government report, because without the authority to issue a

Presidential Permit, the EIS report would have no legally cognizable impact upon Plaintiffs or any other party. Thus, while NRDC undoubtedly seeks to shine this Court's spotlight on the Keystone EIS, it needs to identify a source of power beyond NEPA to authorize judicial illumination.

B. The APA's Section 702 waiver of immunity and grant of a private right of action does not apply in circumstances where the President retains a significant degree of final discretion.

Where the underlying legal framework provides no grant of a private right to judicial review, NEPA litigants' remaining recourse is to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* See, e.g., *Public Citizen*, 5 F.3d at 551; *Natural Resources Defense Council v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007). Although the APA does not confer subject matter jurisdiction on federal courts, see *Califano v. Sanders*, 430 U.S. 99, 107 (1977), APA Section 702 provides a cause of action to private litigants and a waiver of sovereign immunity for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

However, the APA does not create a right of judicial review of the State Department's exercise of delegated, purely discretionary Presidential authority in making a national interest determination and approving Keystone's permit application. APA Section 702's grant of judicial review and immunity waiver for "agency actions" do not apply to decisions where (i) the President exercises his inherent Constitutional authority over matters of foreign relations *or* (ii) he delegates his authority to an administrative agency yet retains final discretion over the agency's exercise of those delegated powers.

It is well settled that the President is not an "agency" within the meaning of the APA, see, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); see also *El-Shifa Pharms. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 272-73 (D.D.C. 2005). As a result, "presidential actions

are not subject to review pursuant to the APA." *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003); *see also Dalton v. Specter*, 511 U.S. 462, 470 (1994). Thus, for example, APA Section 702 would not authorize judicial review in this matter if the President himself, rather than the Department of State, had determined that the construction of this cross-border crude oil pipeline is in the national interest and approved a Presidential Permit for that purpose.

Critically, this conclusion is not altered where the President, rather than acting himself, has delegated to an administrative agency those functions, but retained final discretion over their exercise. For example, in *Franklin v. Massachusetts*, the Supreme Court held that a party could not obtain judicial review under the APA for a suit challenging agency actions regarding the preparation of a census report used to apportion Congressional seats among the states. 505 U.S. 788 (1992). The Court held that the President's act of transmitting the final census report to Congress could not be challenged under the APA, because the President's actions are not subject to the APA. *Id.* at 801. It also held that the agency's preparation of the census report could not be challenged under the APA, because the President possessed final discretion to revise the report before it was transmitted to Congress, and therefore that agency preparation was not "final agency action" subject to APA review. *Id.* at 798.

The Supreme Court applied similar reasoning in a subsequent case, *Dalton v. Specter*, where individuals, organizations, members of Congress, and several states sought to enjoin the Secretary of Defense from implementing the President's decision, pursuant to the recommendations of an administrative commission, to close a naval shipyard. 511 U.S. 462 (1994). A statute authorized the commission to develop a report with recommendations regarding the closure of military bases, which were submitted to the President – but authorized

the President only to approve or reject the report and recommendations in their entirety. *Id.* at 464-65. Nevertheless, the Court found that this degree of Presidential discretion was sufficient to defeat the application of the APA's right of judicial review. *Id.* at 470-71.

This Circuit used similar reasoning to reject environmental organizations' invocation of APA Section 702 as a basis for judicial review of their allegation that the U.S. Trade Representative's failure to conduct an EIS as part of its preparation of the North American Free Trade Agreement ("NAFTA") amounted to violations of NEPA. *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993). The district court's assertion that *Franklin* was distinguishable – on the basis that NAFTA would not be changed by the President before submission to Congress, and therefore the President's final role was mere formality – was rejected by the D.C. Circuit, which noted that the President retained discretion over the agency action, whether he exercised it or not. *Id.* at 552. The D.C. Circuit also rejected the argument that NEPA's requirement to prepare an EIS "is an independent statutory obligation" and thus triggers APA Section 702 review. *Id.* (citing *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991)).

Like NAFTA, the State Department's national interest determination and permitting decisions under E.O. 13337 are subject to a substantial degree of residual Presidential discretion in two aspects. First, the President's reservation of residual authority in E.O. 13337 means that although he need not act in *all* cases for the State Department to issue a Presidential permit, Section 1(i) of the Order imposes exclusive decision making authority by the President himself if another listed Cabinet official takes issue with the Secretary of State's proposed disposition of the permit application. 69 Fed. Reg. 25,229 (May 5, 2004). Second, the President is entirely unconstrained by statute with respect to border crossings for oil pipelines, and retains full

discretion to approve or deny cross-border energy facilities without recourse to that Order, or amend or revoke it at any time. Indeed, because this Executive Order is based upon inherent constitutional authority over foreign policy and national security, NRDC would be hard pressed to deny that even *if* this Court were to exercise jurisdiction over this matter, and even *if* this Court were to rule against Defendants, the President would possess the power to nevertheless issue a Permit to Keystone. Consequently, the State Department's decision here presents a strong indication of final Presidential discretion, and demonstrates the inapplicability of Section 702 of the APA.

C. In the alternative, any private right of review is precluded by contrary Presidential intent thereby demonstrating that the limitations of Section 701(a)(1) are applicable here.

Even where otherwise applicable, APA Section 702's private right of judicial review is inapplicable where there is either an expressed *or implied* intent to preclude judicial review in the statute authorizing the underlying agency action. 5 U.S.C. § 702; *see also* 5 U.S.C. § 701(a)(1). "The APA confers a general cause of action upon persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review,' 5 U.S.C. § 701(a)(1)." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); *see also Neighbors For Rational Development, Inc., v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004). In other words, Congressional intent "fairly discernable" in a statutory scheme, even if not explicit, overcomes any statutory, regulatory, or judicial presumption of reviewability of agency action. This jurisprudence strongly suggests that, in the absence of any governing statutory authority, the President's intent to preclude judicial review, clearly expressed in E.O. 13337, should also foreclose the reviewability under APA Section 702 of State Department's actions pursuant to

that Executive Order – particularly in light of the exclusively executive authority underlying the Order.

APA Section 702 expressly limits its grant of a waiver and private cause of action, explaining that

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702; *see also Maryland Dept. of Human Resources v. Department of Health and Human Svcs.*, 763 F.2d 1441, 1448 (D.C. Cir. 1985). Where the underlying legal authority for the agency action is a statute, courts have looked to its text and structure to discern Congressional intent regarding reviewability – whether express or implied.

For example, in *Block v. Community Nutrition Institute*, the Supreme Court discerned an implicit preclusion of APA Section 702 judicial review where milk consumers sought to challenge agency action pursuant to the Agricultural Marketing Agreement Act (“AMAA”). 467 U.S. 340 (1984). The Court noted that the AMAA expressly permitted judicial review by milk handlers and thereby evinced Congressional intent to exclude suits by other groups, also noting that allowing such suits would “severely disrupt” the regulatory scheme Congress intended to create. *Id.* at 345-48. The Supreme Court rejected the appellate court’s reliance on a presumption favoring judicial review, noting that such presumption is overcome “whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.” *Id.* at 348-51 (citation, internal quotations omitted); *cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-48 (1967) (finding no implied preclusion of judicial review in the Food and Drug Act where legislative history evinced a Congressional intent of broad judicial reviewability and the

Act included a savings clause expressly preserving other remedies at law) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 104-105 (1977)).

Here, there is no statute either creating or limiting judicial review for oil pipeline border crossings. Instead, as demonstrated throughout this Motion, the State Department has acted solely pursuant to delegation of constitutional executive authority, and the relevant intent with respect to available judicial review, *vel non*, is established by the President. As noted above, the E.O. 13337 is clear on its face that it is not intended to create any right of judicial review. Because federal courts have limited jurisdiction, restricted to that conveyed by Congress, APA Section 701(a)(1) should apply in this context so as to not frustrate the President's intent to preclude reviewability of actions taken pursuant to E.O. 13337.

D. The unsuitability of review under the APA, as provided in Section 701(a)(2), is confirmed by the absence of standards to guide judicial review or application of a remedy and by the lack of judicial expertise in matters determining the "national interest."

A necessary corollary to the essential executive character of the State Department's determinations here is that the guiding considerations are unsuited for judicial review. Indeed, Sections 1(g)-(h) of E.O. 13337 instruct that if the State Department "finds that issuance of a permit to the applicant would serve *the national interest*," it "shall prepare a permit, in such form and with such terms and conditions as the national interest may in [its] judgment require..." and if it "finds that issuance of a permit to the applicant would *not* serve *the national interest*," it shall deny the permit application." 69 Fed. Reg. 25,299 (May 5, 2004) (emphasis added). In short, the President has delegated a question of foreign relations and "the national interest," broadly framed, to a subordinate executive agency with expertise in this area. Absent any statutory criteria by which this Court could judge the reasonableness of such a State Department determination, it must be concluded that this process is one in which, as provided by Section 701(a)(2) of the APA, there is no law to apply.

Such determinations require executive branch consideration of factors that are often beyond the scope of judicial cognizance and are particularly ill-suited for judicial review. Thus, “[e]ven when Congress has not affirmatively precluded judicial oversight, ‘review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” *Webster v. Doe*, 486 U.S. 592, 599-600 (1988). With respect to the State Department’s “national interest” decision regarding the Keystone Pipeline, the absence of legislation in this area is again instructive. *Compare* 30 U.S.C. § 185(s) (mandating a Presidential “national interest determination” as to exports of Alaskan North Slope oil, and specifying minimum considerations for that determination). In such a statutory environment, if there are criteria provided by Congress for the executive to apply in making such a finding, it may be possible for courts to determine if an agency’s national interest finding is consistent with those criteria, is supported by the administrative record, or is arbitrary or capricious under the APA.⁵ Here, of course, there is no legislative guidance on how a reviewing court could possibly test State Department’s determination that the Keystone oil pipeline is in the national interest.

Nor is judicial review made more palatable on the basis that NEPA’s mandates are only procedural, rather than substantive. Any such a procedural review will necessarily be intertwined with an examination of the substance of the Presidential Permit and national interest determination. Indeed, the Complaint confirms this problem, as NRDC asserts in support of its arguments regarding the necessity of review of the indirect effects of refining that “[w]ithout downstream refining, there is no purpose to the Pipeline, and no national interest in its construction.” Complaint at ¶ 62.

⁵ Indeed, in one particular case, Congress directed the President to make a public interest determination, and created an expedited judicial review process for that unique circumstance. *See No Oilport v. Carter*, 520 F. Supp. 334 (D.C. Wash. 1981).

Furthermore, the unsuitability of judicial review over the State Department's determinations is evident from an examination of the available remedies – assuming, for the sake of argument, that Plaintiff's claims had merit. Aside from declaratory relief and an award of attorneys' fees and costs, NRDC asks the Court to

direct[] [the State Department] to revoke the Presidential Permit, to require Keystone to remove the portion of the Pipeline subject to the Presidential Permit, and to ensure that no further activity in furtherance of Pipeline construction or operation is undertaken unless and until [the State Department] complies fully with the requirements of NEPA and the APA.

See Complaint at p. 19. Yet, such relief puts this Court in the position of ordering the State Department to act contrary to the President's direction in E.O. 13337 – to determine whether the cross-border energy facility is in the national interest, and if so, to issue the permit. Moreover, the President is free to ignore such a remedy, if he wishes to approve the facility himself.⁶

Both of these factors underpin the Supreme Court's refusal to review the actions of the Civil Aeronautics Board ("CAB") in *C&S Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948). In that case, the Waterman Corporation sought judicial review of the determination by the CAB, pursuant to statute, as to whether the corporation would be awarded approval for an international air route. Unlike domestic routes, the CAB's international route determinations had to be submitted to the President for approval. The Court rejected Waterman Corporation's invitation to read into the statute a right to judicial review of the CAB's determinations, observing that

the dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination even of the Board's ultimate action, and after Presidential approval the whole

⁶ Again, the residual authority of the nation's Chief Executive turns an otherwise routine NEPA case into this jurisprudential thicket. The ability of the President to issue a permit to Keystone, even if this Court were to exercise jurisdiction and deem the EIS inadequate, means that any order this Court might issue cannot redress Plaintiffs' injuries. As a result, NRDC lacks Article III standing because it cannot show that there is a "substantial probability" that their injuries would be redressed by the relief sought. *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir., 2002); *Wilderness Society v. Norton*, 434 F.3d 584, 589 (D.C. Cir. 2006)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Here, there is no basis for concluding that a judicial order invalidating the Presidential Permit issued by the State Department also would preclude the President from authorizing the border crossing activity the next day.

order, both in what is approved without change as well as in amendments which he directs, derives vitality from the exercise of unreviewable Presidential discretion.

Id. at 113; *see also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting) (“Article III courts do not sit to render decisions that can be reversed or ignored by executive officers.”) (*citing Waterman*); *No Oilport v. Carter*, 520 F. Supp. 334, 352 (D.C. Wash. 1981). Further, the Court balked at second-guessing the CAB ruling based on “certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility” which were “decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” *Waterman*, 333 U.S. at 111.

This principle has been repeatedly affirmed in federal jurisprudence – and was articulated first in *Marbury v. Madison*, where the Court observed that when the President exercises the political power of the office, this is a matter of discretion in which he “is accountable to his country only in his political character and to his conscience.” 5 U.S. (1 Cranch) 137, 166 (1803); *see also United States v. Curtis-Wright Corp.* 299 U. S. 304 (1936). In areas where the President has complete discretion whether to take action in the first place, courts are without authority to review the validity of that action, or of an agency recommendation to the President regarding such action. *See, e.g., Corus Group PLC v. International Trade Commission*, 352 F.3d 1351, 1358 (Fed. Cir. 2003).

As in *Waterman* and subsequent cases, this Court is being asked to review an executive branch agency’s determinations relating to foreign relations and the “national interest” – a determination which can be ignored or reversed by the President. Moreover, the essence of the

State Department decision is “a judgment call... [t]hus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Department of Navy v. Egan*, 484 U.S. 518, 529-30 (1988). These considerations buttress the conclusion that APA Section 702 should not be read to confer a private right of judicial review of State Department’s determinations pursuant to E.O. 13337.

We conclude this presentation where we began. NEPA does not unlock the courthouse door; it has neither a private right of action nor a waiver of sovereign immunity. As a result, a NEPA plaintiff must find another key. Where, as here, the sole basis for federal agency decisionmaking is an Executive Order grounded in the President’s inherent authority over foreign affairs and national security, that Executive Order does not operate to establish this Court’s jurisdiction to hear any claim, NEPA or otherwise, arising from the Presidential Permitting process.

II. In the alternative, Plaintiff’s Complaint fails to state any claim for which relief can be granted and thus should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

As described above, Plaintiff’s allegations that the State Department’s national interest determination and approval of Keystone’s permit application violate NEPA, its implementing regulations, and the APA, are not judicially cognizable because no applicable private right of judicial review exists for such claims. Whether a plaintiff’s claims are those upon which relief can be granted depends upon “whether there is a cause of action that permits [plaintiff] to invoke the power of the court to redress the violations of law” alleged and the legal sufficiency of the allegations in a plaintiff’s complaint. *Trudeau v. Fed. Trade. Commission*, 456 F.3d 178, 188 (D.C. Cir. 2006) (citing *Davis v. Passman*, 442 U.S. 228, 239-40 & n.18 (1979)). Consequently, and even if Plaintiff could establish subject matter jurisdiction over its allegations in this Court,

those allegations fail to state a claim upon which relief can be granted. Plaintiff's Complaint therefore is also, or alternatively, subject to dismissal with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). *See also Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006).

CONCLUSION

For the foregoing reasons, Keystone respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice.

Dated: October 20, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter R. Steenland, certify that on October 20, 2008, I electronically filed the foregoing MOTION BY TRANSCANADA KEYSTONE PIPELINE, LP, TO DISMISS COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1), OR 12(b)(6), AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

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