

**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.)

**TRANSCANADA KEYSTONE PIPELINE, LP’S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1), OR 12(b)(6)**

Introduction and Summary of Reply

In Keystone’s Motion to Dismiss (Docket No. 25) (“Keystone Mot.”), Keystone argued that because the National Environmental Policy Act (“NEPA”) does not itself create a private right of action, Plaintiff Natural Resources Defense Council (“NRDC”) must identify other statutes to establish federal jurisdiction over this litigation challenging the U.S. Department of State’s compliance with NEPA. Keystone showed that in this case, the federal question statute, 28 U.S.C. § 1331, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, cannot

provide such jurisdiction because the sole basis for the Keystone permit – Executive Order (“E.O.”) 13337 – does not provide for a private right of action. NRDC has responded by claiming a separate right to litigate NEPA claims, independent of any challenge to the underlying agency action, and wholly apart from the exceptions to judicial review in sections 701(a)(1) and (a)(2) of the APA.

Keystone established that E.O. 13337 is the only legal authority empowering the Department of State to issue the Record of Decision/National Interest Determination that authorized Keystone’s pipeline to cross the international border. In the absence of this E.O., there would be no legal basis for Department of State permitting of the Keystone Pipeline and no Environmental Impact Statement (“EIS”). Unlike the construction of natural gas pipelines, which must be approved by the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, Congress has declined to create any federal regulatory scheme for construction of oil pipelines, leaving these issues to the states. Similarly, Congress has not acted to provide statutory authority for any federal agency to approve construction of oil pipelines that cross international borders.

Further, Keystone showed that E.O. 13337 is not tied to any statute, but instead is a delegation of the President’s inherent constitutional authority to manage international affairs. Because no statute authorizes the Keystone permit, all of the actions undertaken pursuant to the order can only be subject to judicial review if the order creating these legal rights and responsibilities contemplates a private right of action to enforce its terms. *See* Keystone Mot. at 11-18; *see also Jensen v. Nat’l Marine Fisheries Svc.*, 512 F.2d 1189 (9th Cir. 1975) (holding that the APA does not provide a jurisdictional basis for judicial review of agency action taken pursuant to an executive order delegating Presidential foreign affairs power). Here, this

Executive Order expressly recites that it is not intended to create any justiciable rights by private parties. Because the entire relationship between the Department of State and the Keystone Pipeline permit is not rooted in any delegation of Congressional authority through statute, or in any executive order promulgated pursuant to statute, the Department of State's actions fall within a narrow set of cases where neither the APA nor any other statute provides a right of judicial review for the agency's compliance with NEPA. As a result, any EIS produced and any Permit granted under these particular circumstances fall beyond the reach of the judiciary.

In response, NRDC asserts that its challenge to the Keystone Permit is simply like so many other NEPA cases where Courts have found federal jurisdiction. NRDC asserts: "That [Department of State] happened to violate NEPA in a permitting action under the [Executive] Order does not ... strip this Court of its authority to review and remedy that violation." NRDC's Memorandum in Opposition (Docket No. 36) ("NRDC Opp."), at 9-10. NRDC seemingly rejects the notion of limited federal jurisdiction and minimizes its obligation as plaintiff to demonstrate that such jurisdiction is present here. Instead, NRDC argues that "NEPA, the only statute whose substantive mandates NRDC asks this Court to enforce, contains no such bar to review." *Id.* at 13. Moreover, NRDC claims that there is no "national security" exemption for NEPA, and in any event, "NRDC does not seek to enforce the Order itself." *Id.* at 15.

NRDC has inverted the appropriate analysis of federal court jurisdiction – the question is not whether this Court has been "stripped" of its jurisdiction, or whether NEPA contains an express "bar to review." Rather, the appropriate inquiry in this context is whether NRDC can identify a statutory basis that allows this Court to exercise jurisdiction over NRDC's attack on this specific border-crossing permit. *See* Keystone Mot. at 8-11. NRDC asserts it has done so by relying upon the federal question statute and the general provisions of the Administrative

Procedure Act, claiming that the only pertinent legal authority in this case is NEPA. *See, e.g.*, NRDC Opp. at 1, 13-15. NRDC has side-stepped Keystone's arguments and failed to address Keystone's primary point. More importantly, its claim of entitlement to NEPA review independent of any challenge to the underlying agency authority to act has been rejected by the D.C. Circuit in *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

As Keystone shall now demonstrate, NRDC's complaint must be dismissed because a NEPA case can only be brought by challenging the legal basis for approving the underlying agency decision. The availability of judicial review is inextricably intertwined with the legal authority for the underlying agency decision, for it is the underlying decision that controls where, when and if, judicial review is to occur. Put simply, NEPA contains no key to unlock the Federal Courthouse door. And, if the underlying legal authority for the agency's decision is not judicially reviewable, a plaintiff's attempts to maintain such litigation by confining its lawsuit to NEPA claims will not create federal jurisdiction. As the Department of State explained in its Motion to Dismiss: "Because all duties arise directly from Executive Order 13337 and not any statute, all of the actions undertaken pursuant to the order can only be reviewed if the order creates a private right of action to enforce its terms.... it does not." Department of State Motion to Dismiss (Docket No. 26) at 8.

1. The Administrative Procedure Act does not provide a private right of action for judicial review of agency decisions grounded solely on Executive Orders that are themselves without any statutory basis. NRDC makes the sweeping assertion that 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." NRDC Opp. at

7-8. But all of the authority NRDC mobilizes for this proposition involves decisions by agencies that were taken in fulfillment of a range of federal statutory powers – including the garden variety NEPA cases offered by Plaintiff as “no different” from its suit here. *See id.* at 9-10, citing *Biodiversity Conservation Alliance v. U.S. Bureau of Land Mgmt.*, 404 F. Supp. 2d 212, 214, 216 (D.D.C. 2005) (Leon, J.) (rejecting challenge to agency actions taken pursuant to Federal Land Policy Management Act and other statutes); *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 155-56 (D.D.C. 2005) (Leon, J.) (rejecting plaintiffs’ challenges to agency action taken pursuant to Magnuson-Stevens Act and Endangered Species Act), *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 (D.D.C. 2007) (Leon, J.) (rejecting plaintiffs’ motion for preliminary injunction with respect to agency actions taken pursuant to the Federal Land Policy Management Act and other federal statutes).¹

NRDC points to no case involving judicial review of an agency decision that had been taken solely pursuant to an Executive Order, or any case in which NEPA compliance is litigated in a complete statutory vacuum. As the Court of Appeals said in *Foundation on Economic Trends v. Lyng*, “plaintiffs seeking judicial review under section 702 of the APA for an alleged violation of NEPA and claiming only an ‘informational injury’ must show the *particular* agency action – in addition to the agency’s refusal to prepare an impact statement – that allegedly triggered the violation and thereby caused the injury.” 943 F.2d 79, 87 (D.C. Cir. 1991) (emphasis in original). In that case, the court expressly rejected the claim that inadequate or non-

¹ The same principle applies to other cases cited by NRDC at pp. 9-10 in support of its argument that its NEPA claim is cognizable under the APA. *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997) (suit pursuant to citizen suit provision in Endangered Species Act (“ESA”) and APA to challenge agency action taken pursuant to ESA); *Nat’l Ass’n of Home Builders v. U.S. Army Corps. of Eng’rs*, 297 F. Supp. 2d 74 (D.D.C. 2003) (Leon, J.), *rev’d on other grounds*, 417 F.3d 1272 (D.C. Cir. 2005) (suit challenging agency action pursuant to Clean Water Act); *but cf. Public Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, (D.C. Cir. 1992) (dismissal of suit affirmed by D.C. Circuit, on basis that APA did not provide a right to judicial review for U.S. Trade Representative’s failure to conduct EIS as part of ongoing treaty negotiation).

existent NEPA compliance was sufficient by itself to constitute “agency action” that could serve as the source of plaintiff’s claimed right to seek review under section 702 of the APA. There, because the plaintiffs had failed to “target their complaint to a particular proposal for federal action” the court of appeals ruled that the complaint had been properly dismissed for lack of subject matter jurisdiction. *Id.* at 86.

This focus on the agency decision that triggers the allegation of NEPA violation is critical in establishing federal jurisdiction and securing a private right of action. If Keystone had obtained federal permission to construct this pipeline, but to transport natural gas rather than oil, NRDC could have challenged compliance with NEPA *only* by filing a petition for review in an appropriate court of appeals, pursuant to Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, because Congress has empowered FERC to authorize such pipelines and because Congress has also affirmatively authorized judicial review of such FERC decisions. If Keystone had obtained federal permission for construction and operation of a *domestic* oil pipeline that crossed federal land, NRDC would have been able to challenge the NEPA compliance of the federal land managing agency by contesting whatever final decision was taken pursuant to the statute that had guided that right-of-way determination. But, because NRDC seeks to challenge the Department of State’s NEPA compliance in the context of this permit issued to Keystone under E.O. 13337, the proper focus to determine if there is jurisdiction must be on that Executive Order itself.

As noted in Keystone’s Motion to Dismiss, Executive Orders which lack specific foundation in statute and which evince no intent to provide for review are not subject to private rights of action. *See, e.g., In re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (citation omitted) (“This court has also declared that executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits”); *Air*

Transp. 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)) (expression of intent in Executive Order not to create private right of action renders it “not subject to judicial review”)

E.O. 13337 has both of these indicia – as it lacks a specific statutory foundation and clearly expresses the President’s clear intent that it “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. 25,299 (May 5, 2004). Consequently, E.O. 13337 is in a category of Executive Orders where “the President did not undertake or intend to create any role for the judiciary...” See *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 234-36 (8th Cir. 1975); *cert. denied*, 424 U.S. 966 (1976).

NRDC disclaims the applicability of these decisions, asserting they are “inapposite” because NRDC is not challenging the “national interest determination” made pursuant to the Order. NRDC Opp. at 1, 20, fn. 11. But it offers no basis for the implicit assertion that it does have a private right of action if it frames its attack on the Keystone permit solely in terms of NEPA violations.

Despite the clear expression of Presidential intent to foreclose judicial review in Section 6 of E.O. 13337, NRDC relies upon a statement in Section 5 of that Order to establish a contrary intent. *Id.* at 15-16. Specifically, NRDC seizes upon language that the Executive Order “shall be construed ... not to supersede or replace the requirements established under any other provision of law...” as evincing an intent not to supersede the obligations of NEPA or foreclose review thereon. *Id.* (citing 69 Fed. Reg. at 25,301). This assertion that Section 5 evinces an intent to permit judicial review of actions pursuant to E.O. 13337 effectively reads Section 6 out

of that Order. Section 6's phrasing closely tracks language in other Executive Orders which courts have found to preclude a right to judicial review, *see, e.g., State of Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (holding that E.O. 12291's express statement that it "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person" constitutes "clear and unequivocal intent that agency compliance with [the Order] not be subject to judicial review") (citation omitted).

As a consequence, Section 5 should not be read as negating the clear intent of Section 6. Rather, because E.O. 13337 was promulgated to amend an already in-force Executive Order governing cross-border energy facilities – E.O. 11423 – Section 5 is more readily read to not "replace or supersede" already in force permits for operating cross-border energy facilities. In other words, Section 5 indicates that E.O. 13337 governs *prospective* applications for such permits.

Regardless, the existence of such expressly preclusive language as that found here in Section 6 of E.O. 13337 is not necessary to demonstrate the absence of any private right to judicial review under the Executive Order. This Circuit and others have concluded that Executive Orders without specific foundation in statute and without an *affirmative expression of intent* to create a private right of action are not subject to judicial review. *See, e.g., Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-36 (8th Cir. 1975) (holding, because of absence of affirmative expression of intent to create private right of action in E.O. 11821, that no private right of action existed to challenge compliance with that Executive Order), *cert. denied*, 424 U.S. 966 (1976); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990) (finding in E.O. 11246 "no evidence of an intent to create" an implied private right of review and

thus rejecting the creation of any such right of action). Even under NRDC's strained reading of Sections 5 and 6, E.O. 13337 contains no such affirmative expression of Presidential intent to provide a right to judicial review of Department of State's actions here.

2. NRDC is wrong to assert that the Keystone permit is itself action reviewable under the APA notwithstanding the sole authority of E.O. 13337 or the residual powers of the President. In an attempt to avoid dealing with the jurisdictional impediments to challenging actions taken pursuant to Executive Orders, NRDC argues that the President has little, if anything, to do with the availability of judicial review. It asserts that issuance of the Keystone permit itself represents final agency action by the Department of State that is reviewable under section 702 of the APA. NRDC has missed the point – Keystone contended that this E.O. is an expression of purely Presidential authority, in which the President retains substantial discretion and review is unavailable for that reason.

NRDC argues that because the President was not required to act before the Keystone permit became final, the Department of State's permitting action is not insulated from APA review and stands as ordinary agency action reviewable under section 702. NRDC's argument for the availability of APA review founders against the weight of jurisprudence demonstrating *not only* that an APA right of action is unavailable to challenge the actions of the President, *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), *but also* is unavailable to challenge an agency's exercise of delegated authority where the President retains a substantial measure of discretion, *see, e.g., Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994); *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

NRDC does not seem to dispute that the President retains ultimate discretion over permit issuance and maintains a formal role in E.O. 13337 in specified circumstance. Rather, it relies on the observations that (i) the President need not always act for a permit to take effect, and (ii) that the President has not acted here with respect to the issuance of Keystone's permit. NRDC Opp. at 10-12. Consequently, NRDC suggests, whenever the President has not exercised his discretion relative to the permitting process, the agency grant of the permit is agency action subject to review under the APA.

Yet, NRDC's argument fails to engage the D.C. Circuit's reasoning in *Public Citizen*, which – in holding that the APA Section 702 did not grant a private right of judicial review over allegations that the United States Trade Representative's ("USTR") actions in preparing a treaty violated NEPA – rejected that the distinction turned on whether the President "will change" the treaty as prepared by USTR prior to submitting it to Congress. 5 F.3d at 552. Rather, the D.C. Circuit found sufficient the retention of final Presidential discretion sufficient to foreclose APA review. *Id.*

Moreover, the distinction sought by NRDC cannot explain the many cases rejecting judicial review of agency action pursuant to an executive order (i) without specific statutory foundation and (ii) without an expressed Presidential intent for such review, as discussed above and in Keystone's Motion to Dismiss. Because it shares those features, E.O. 13337 can be contrasted with other situations where the courts have found agency action pursuant to an Executive Order reviewable. For example, in *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, the Ninth Circuit considered, *inter alia*, whether plaintiffs' claims, that the Federal Highway Administration's EIS and findings were inconsistent with two Executive Orders, were cognizable under the APA. 123 F.3d 1142, 1165-66 (9th Cir. 1997). The court answered in the

affirmative because “[t]he Executive Orders here do not preclude judicial review and there is ‘law to apply,’ as these Executive Orders set objective standards,” and specifically noted that the Ninth Circuit has “recognized ... that under certain circumstances, Executive Orders, *with specific statutory foundation*, are treated as agency action and reviewed under the Administrative Procedure Act.” *Id.* (citations omitted). The provisions at issue here also can be contrasted with those in *Bennett v. Spear* – upon which NRDC heavily relies for its argument regarding the presumptive availability of APA review – since judicial review in *Bennett* was premised upon a citizen suit provision in the Endangered Species Act, the statute underlying the agency action at issue there, in tandem with the APA. *See* 520 U.S. 154 (1997).

3. NEPA does not provide NRDC with an independent basis for judicial review of the Department of State’s actions pursuant to E.O. 13337. NRDC vigorously contends that because NEPA contains no bar to judicial review, the APA’s exceptions to judicial review in Sections 701(a)(1) and (a)(2), as relied upon by Keystone and the Department of State, are inapplicable. NRDC Opp. at 13-15. Of course NEPA contains no bar to judicial review because as we have repeatedly stated, the statute is wholly silent with respect to any type of judicial review. And, since NEPA is the only statute implicated in this litigation, looking to other *statutes* for any indication of an intent to preclude judicial review would be a fool’s errand.

NRDC asserts that no court has ever implied any intent to limit a plaintiff’s enforcement of NEPA’s mandate. *Id.* at 14-15. In *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), the District of Columbia Circuit rejected the plaintiff’s effort to obtain an EIS for the North American Free Trade Agreement. On the government’s appeal, the court examined whether the final action was that of the President or the Office of Trade Representative (“OTR”):

Public Citizen seeks to distinguish *Franklin* by arguing that the EIS requirement is an independent statutory obligation for the OTR and thus the agency's failure to prepare an EIS is reviewable final agency action. But the preparation of the census report in *Franklin* was also an "independent statutory obligation" for the Secretary of Commerce. The Court held nonetheless that because the report would have no effect on the plaintiffs without the President's subsequent involvement, the agency's action would not have the "direct effect" necessary for "final agency actions." Furthermore, although the argument that the absence of an EIS "directly affects" Public Citizen's ability to lobby Congress and disseminate information seems persuasive on its face, this court has stated that an 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.

Public Citizen, 5 F.3d at 552.

Thus, if the focus must be on the "identifiable substantive agency action putting the parties at risk" to determine if APA review is available, here we must look to the E.O. which delegated Presidential power to the Department of State to issue this permit to Keystone, rather than to NEPA. As in *Public Citizen*, the absence of an EIS (or the presence of an inadequate EIS) could have no impact on NRDC or anyone else without some federal action authorizing the underlying activity that might be the subject of that EIS. For that reason, the D.C. Circuit in *Public Citizen* found no independent basis for APA review of NEPA compliance. NRDC has presented no reason here to depart from that analysis.

4. NRDC's other reasons for not applying the exceptions in sections 701(a)(1) and (a)(2) are not persuasive. Having refuted NRDC's assertion that Keystone needs to identify a statute expressly *precluding* judicial review in order to defeat its challenge to action taken pursuant to E.O. 13337, and also having shown that NRDC's reliance upon the clauses in section 5 of this E.O. does not save it from the clear intent in section 6 that the E.O. not provide a

private right of action, Keystone now turns to NRDC's other arguments raised in opposition to the Motions to Dismiss.²

First, NRDC has either misperceived or misunderstood a portion of Keystone's Motion to Dismiss. The array of cases marshaled by NRDC showing judicial review of NEPA compliance where the military is a defendant is wholly beside the point. At this point, this litigation is not expected to "impermissibly intrude on sensitive foreign policy or national security matters." NRDC Opp. at 17. Thus, this concern is truly a red herring and should be discarded.

Second, Keystone reaffirms its reliance upon those cases cited in its Motion to Dismiss at pp. 23-24 that are not NEPA cases but are Executive Orders under mandates not involving environmental protection. Those decisions are fully applicable here, as Keystone has shown there is no independent basis for NEPA review under the APA. In essence, the EIS done for Keystone pursuant to this E.O. is no different from obligations for military security clearances or certain immigration processes, since these are all decisions pursuant to Executive Order. Thus, the holdings in those cases are instructive and applicable here.

Third, NRDC finds solace in Keystone's reliance upon *No Oilport v. Carter*, 520 F. Supp. 334 (W.D. Wash. Feb. 9, 1981), asserting that there, "[t]he Court in that case found plaintiffs' challenge to the merits of the agency's decision to issue a permit for a pipeline unreviewable ... but did review plaintiffs' claims that the decision violated NEPA." NRDC

² Even less persuasive is NRDC's repeated invocation of the specter of "grave separation of powers concerns" as an argument against dismissal, *see* NRDC Opp. at 1, 18-19. Yet, again, NRDC's argument ignores that the Department of State actions at issue here were not taken pursuant to delegated Congressional authority – instead, Department of State is acting in an area exclusively within the purview of the executive branch, and moreover in an area in which Congress has elected not to legislate. As a result, the sole support NRDC offers for its assertion – the opinion in *De Jesus Ramirez v. Reich* – is clearly inapposite. There, the D.C. Circuit raised *sua sponte* the question of prudential standing for challenges of Department of Labor certifications, made pursuant to the Immigration and Nationality Act, of the ineligibility of plaintiff aliens for work visas. 156 F.3d 1273, 1276 (D.C. Cir. 1998). The court found no barrier to standing in the form of an expressed intent of Congress in the Immigration and Nationality to foreclose aliens' private right to sue for agency actions *pursuant to that Act*, and also noted that such an expression of Congressional intent would not be found in Department of Labor regulations promulgated pursuant to the Act. *Id.*

Opp. at 15, fn. 8. While NRDC correctly states that the court found judicial review unavailable with respect to the President's decision to grant a permit to construct the pipeline, pursuant to his authority under the Public Utility Regulatory Policies Act, *id.* at 352, NRDC glosses over the fact that the NEPA challenges that the court examined (and ultimately rejected) related to *a separate action* by Department of Interior, *pursuant to a separate statutory authority* – the granting of a right of way permit pursuant to the Mineral Leasing Act. *Id.* at 353-59; *see also id.* at 342-43 (clarifying that the NEPA issues relate to Secretary of the Interior's issuance of the right of way permit under the Mineral Leasing Act). Consequently, the NEPA review in *No Oilport* readily fits the classic scenario in which an agency prepares an EIS as part of permitting decision authorized and controlled by statute.

Fourth, NRDC's attempt to distinguish the important decision in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) as the "exception" to the normal rule misses the point. The reason why that case could not be litigated – a law forbidding the location of nuclear weapon storage sites – demonstrates there are limitations to NEPA and judicial review involving NEPA. While NRDC correctly notes that in *dictum*, the Court observed that the Navy may need to prepare an internal EIS, even if it is unable to share its decision making processes with the public, *Weinberger*, 454 U.S. at 146, the bottom line was that – as in this case – there are some NEPA claims that simply cannot be litigated.

CONCLUSION

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

Dated: November 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter R. Steenland, certify that on November 21, 2008, I electronically filed the foregoing REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1), OR 12(b)(6) 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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