

**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 MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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BACKGROUND AND STATEMENT OF FACTS

A. Background and summary.

This is a lawsuit brought by Natural Resources Defense Council (“NRDC”), a national environmental organization, challenging the issuance of a Presidential Permit by the U. S. Department of State to TransCanada Keystone Pipeline, LP (“Keystone”) for an oil pipeline (“Keystone Pipeline”) that will cross the border of the United States. Although the administrative record for this permit reflects several years of detailed examination, especially with respect to environmental concerns, NRDC’s challenge is a narrow one, based solely on alleged violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, that involve not the impacts of the pipeline itself but instead relate to potential impacts at the refineries that will ultimately process the oil into a commercial product. Previously, Keystone, along with the United States, filed motions to dismiss the NRDC claims on jurisdictional grounds. Moreover, Keystone, along with the United States, has challenged the propriety of NRDC’s efforts to supplement the administrative record through its proffer and reliance upon declarations not presented during the NEPA process. Here, Keystone argues that, for the reasons given below, NRDC’s motion for summary judgment should be denied, and the cross-motions for summary judgment filed by the United States and Keystone should be granted.

B. The administrative process leading up to issuance of Keystone’s Presidential Permit.

Through Executive Order (“E.O.”) 13337, 69 Fed. Reg. 25,299 (May 5, 2004), the President of the United States has delegated to the Department of State a narrow measure of his constitutional authority over foreign relations and management of international borders. Specifically, the Department of State, through the office of the Secretary of State, is bestowed with the authority to make a critical national interest determination approving or denying

applications for the construction, connection, operation or maintenance of any facility at the border of the United States that involves the exportation or importation of petroleum and other fuels, *id.*¹ In considering these applications, the President has directed the Secretary of State to consult with other, named federal agencies, and to grant permits if there is concurrence regarding the Secretary's proposed national interest finding. *Id.*

Pursuant to that authority, Keystone submitted a detailed application for a permit to construct, operate, and maintain a cross-border facility for the transportation of crude oil and other hydrocarbons by pipeline between Canada and the United States. *See* Keystone Permit Application (Apr. 19, 2006) [Doc. 01331, KAR 018021-018638].² In response, the Department of State initiated its National Interest Determination ("NID") review process, including environmental and other reviews. That environmental review process formally began with the issuance on October 4, 2006, of a Notice of Intent ("NOI") – which informed the public about the proposed action, announced plans for scoping meetings, invited public participation in the scoping process, and solicited public comments for consideration in establishing the scope and content of the environmental review process – and which was published in the Federal Register, *see* 71 Fed. Reg. 59,849 – 59,851 (Oct. 11, 2006), and distributed to interested state, local, tribal, and private parties. Through this NOI scoping process, the Department of State held thirteen public meetings in seven states along the proposed Keystone Pipeline route and received, considered, and responded to numerous comments, *see, e.g.*, Final Environmental Impact Statement ("FEIS"), App. A, at 1-10 [Doc. 01249, KAR 015943-015952].

¹ E.O. 13337 also contains provisions relating to construction of specified types of international border crossings for motor and rail land transportation. *See* 69 Fed. Reg. 25,299 (May 5, 2004).

² For the convenience of the Court, Keystone includes parallel citations to the Department of State's administrative record, in brackets and by KAR number, for documents included therein. Keystone also includes the document record number for the first citation to each document. Keystone anticipates that the Department of State will file the administrative record on Dec. 22, 2008, per the proposed Joint Case Management Statement (Docket No. 39).

After completing the scoping process, the Department of State, in consultation with other relevant federal agencies, conducted a comprehensive review of Keystone's application, including the preparation of a Draft Environmental Impact Statement ("DEIS"), which was released for public comment on August 10, 2007, and a Final Environmental Impact Statement. *See* FEIS at 1-14 [Doc. 01230, KAR 015289]. The Department of State received, considered, and responded to more than 1,200 comments received via mail, phone calls, and email, and as part of an additional thirteen public meetings held in seven states along the proposed pipeline route. *Id.*; *see also id.*, App. A (individual comments and responses) [KAR 015953-016032].

The Department of State also engaged in consultation with state and tribal historic preservation officials that led to the adoption of a Programmatic Agreement pursuant to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f). *See, e.g.*, FEIS at 1-8 to 1-12 [KAR 015283-015287] (summary of the various consultation sessions with federal, state and local officials). Another such consultation with the U.S. Fish & Wildlife Service resulted in the preparation of a biological assessment pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1536. *See* Final Biological Assessment [Docs. 01318-01326, KAR 016599-017255].

The Keystone FEIS states that the purpose and need of the proposed action is "to transport incremental crude oil production from the [Western Canadian Sedimentary Basin ("WCSB")] across the border to meet the growing demand by refineries and markets in the United States." FEIS at 1-3 [KAR 015278]. To satisfy this purpose and need, the FEIS considers a range of alternatives, including (i) a "No Action" alternative; (ii) system alternatives, including the expansion of existing Canada-US pipeline systems and the construction of any combination of four other new cross-border pipelines; (iii) three major route alternatives; and (iv) aboveground facility site alternatives. *See generally id.* at 4-1 to 4-15 [Doc. 01246, KAR

015898-015912]. The FEIS also considered numerous route variations, as summarized in Table 4.4-1, *id.* at 4-9 to 4-11 [KAR 015906-015908], as well as, in response to public comments, three packages of route variations, *id.* at 4-11 to 4-14 [KAR 015908-015911].

The FEIS addresses the reasonably foreseeable environmental and other impacts attributable to the permitted action – the construction, connection, operation, and maintenance of pipeline facilities *at the border* of the United States and Canada, Presidential Permit at 1 [Doc. 00567, KAR 004449]. Then, the FEIS goes beyond that point to analyze as well the environmental and other impacts attributable to the construction and operation of the domestic segment of the Keystone Pipeline. *See generally* FEIS at 3.0-1 to 3.13-46 [Docs. 01232-01244, KAR 015338-015885]. Although the Department of State permit is itself confined to approval of the cross-border facility, that cross-border facility is connected to new and existing pipelines and terminal facilities in Canada and the United States. *See, e.g., id.* at 1-1 [KAR 015276]. The FEIS covers every mile of the 1,377.9 mile long pipeline in the United States, addressing impacts to geology, soils, fisheries, wildlife and plant life, socioeconomic issues, water resources, wetlands, land use, cultural resources, and air resources and noise. *See generally id.* at 3.0-1 to 3.12-20 [KAR 015338-015839]. The FEIS also addresses issues of reliability, safety, the risk of accidents, and emergency preparedness, *id.* at 3.13-1 to 3.13-46 [Doc. 01244, KAR 015840-015885].

During the process of preparing the EIS, the applicant informed the Department of State that ConocoPhillips had taken a 50% ownership in the pipeline, and that ConocoPhillips had announced its commitment to increase the capability of its Wood River refinery in Roxanna, Illinois to refine heavy crude oil that would be transported from Canada by this proposed pipeline, *see, e.g., id.* at 1-17 [KAR 015292]. Accordingly, the Department of State included a

discussion in the FEIS of that expansion as a “connected action” and considered its potential impacts. *See id.* at 2-18, 2-19 [Doc. 01231, KAR 015315, 015316], 3.3-29 to 3.3-30 [Doc. 01234, KAR 015408-015409], 3.12-11 to 3.12-12 [Doc. 01243, KAR 015830-015831].

In addition, the FEIS examines the “cumulative impacts” of the construction and operation of the permitted cross-border facility, the construction and operation of the domestic Keystone Pipeline, and the “the impacts of projects that have occurred in the past, are currently occurring, or are proposed in the future within the pipeline corridor or in the vicinity of the pipeline [right of way],” FEIS at 3.14-1 [Doc. 01245, KAR 015886]. The FEIS also addresses the issue of impacts from greenhouse gas emissions associated with the Keystone pipeline, *id.* at 3.14-9 to 3.14-10 [KAR 015894-015895], and in light of any significant effects described throughout the FEIS, adopts mitigation and minimization measures, *see, e.g., id.* at ES-12 to ES-21 (Table ES-5) [Doc. 01229, KAR 015251-015260].

Also included in the FEIS are the Department of State’s response to public comments that it had invited and received in response to the DEIS. *See generally id.* at App. A [KAR 015953-016032]. Plaintiff NRDC, along with several other organizations, submitted some 12 pages of comments, arguing that (i) the Keystone Pipeline is not in the National Interest; (ii) the DEIS failed to consider specific other alternatives – including “energy efficiency, renewable energy, clean technologies, and demand-side management” – and should have selected the No Action alternative; (iii) the DEIS should have considered as part of its cumulative effects analysis the pollution impacts of increasing refining due to the Keystone Pipeline and increasing extraction of tar sands in Canada; (iv) the DEIS failed to adequately consider the possible impact of spills on local aquifers and soils, the impact of the Pipeline on soil temperature, the risks associated with various types of stream crossings, and the spill risks associated with the higher pressure sections

of the Pipeline; and (v) the Department of State failed to adequately consult with nearby tribes. *See* NRDC DEIS Comments [Doc. 00422, KAR 003590-003601].³

In the FEIS, the Department of State addressed each of these comments. FEIS App. A, Table 2, Responses to Comments No. 360-389 [KAR 015993-015995]. For example, with respect to NRDC's suggested alternatives and criticism of the NID, the Department of State notes that the project responds to an appropriately limited purpose and need, whereas the alternatives suggested and the NID criticisms raised by NRDC are properly seen within a broader context and longer time horizon of federal energy policy. *See, e.g., id.* at Response to Comment No. 363 [KAR 015993]. With respect to treating as cumulative impacts the environmental impacts in Canada from increased tar sands extraction and the domestic impacts from increased Canadian crude refining, the Department of State notes that "[t]he DEIS addresses the reasonably foreseeable environmental impacts of the construction and operation of the proposed Keystone Pipeline within the United States[,] [] is limited to the pipeline which is a transportation system" and "does not extend to the supply of crude oil to the transportation system or the operation of refineries that are supplied by it." *See id.* at Responses to Comments No. 361, 388, 389 [KAR 015993-015995]. Moreover, the FEIS notes that the extraterritorial "impacts of the construction or operation of the Keystone Pipeline in Canada are properly the subject of review by appropriate Canadian governmental entities," but not of the Department of State, which is directed by Executive Order to consider such extraterritorial effects only in limited circumstances which are inapplicable here. *Id.* Lastly, while Department of State references its analysis of the Wood River refinery expansion, it observes that:

The identity of other refineries where Keystone crude oil would be sent varies depending on market conditions, availability of imports from

³ NRDC and other organizations also submitted, subsequent to the FEIS, seventeen pages of comments raising the same issues as raised in their DEIS comments. *See* NRDC FEIS Comments [Doc. 00542, KAR 004250-004266].

other countries, weather conditions, etc. ... any [] refinery [other than U.S. West Coast refineries] could be a long-term or short-term recipient, depending on decisions made by the shippers and/or the refinery. Some of these refineries may elect to install upgrades similar to those approved for Wood River but they are speculative at this time. The capacity of the Keystone Pipeline represents only about 2% of daily domestic oil consumption; thus the impacts associated with delivery of Keystone crude oil to refineries other than Wood River would be extremely difficult to quantify. It is purely speculative to identify any refinery other than Wood River that is reasonably certain to process Keystone crude oil.

Id. at Responses to Comments No. 365, 368-370 [KAR 015993-015994]. The FEIS also responds to the other concerns raised, including those of specific types of local impacts and risks from accidental spills. *See id.* at Responses to Comments No. 371-386 [KAR 015994-015995].

On the basis of information gathered during this review process – compiled into the administrative record on file with the Court⁴ – and the discretion granted by E.O. 13337, the Department of State 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”) [Doc. 00564, KAR 004417-004440], 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 [KAR 004418]. The environmental review undertaken in the FEIS was explicitly considered as part of this determination. ROD/NID at 2-3 [KAR 004418-004419]. Consequently, the Department of State issued a Presidential Permit to allow Keystone “to construct, connect, operate, and maintain pipeline facilities at the border of the United States and Canada at Cavalier County, North

⁴ *See supra* note 2.

Dakota, for the transport of crude oil and other hydrocarbons between the United States and Canada,” Presidential Permit at 1 [KAR 004449].

C. This lawsuit.

Plaintiff NRDC brought this suit to invalidate Keystone’s Presidential Permit, claiming that the Department of State violated NEPA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.*, by producing an FEIS to accompany the Presidential Permit that NRDC has deemed deficient. After filing its complaint on August 6, 2008 (Docket No. 1), as amended on September 23, 2008 (Docket No. 21), NRDC filed a Motion for Summary Judgment on October 17, 2008 (Docket No. 22) (“Pl. MSJ” or “NRDC Motion”).

On October 20, 2008, Keystone moved to dismiss NRDC’s Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and, in the alternative, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. *See* Keystone Motion to Dismiss (Docket No. 25). The Department of State also moved to dismiss on similar and additional grounds, *see* Department of State Motion to Dismiss (Docket No. 26). Those motions are still pending before this Court.

In its Motion for Summary Judgment, NRDC takes no issue with virtually all of the content in the FEIS with respect to the potential impacts of building and operating the pipeline itself. Instead, NRDC alleges that when the Department of State adopted its ROD/NID and issued the Presidential Permit to Keystone, it violated NEPA and the APA because the FEIS failed to examine environmental impacts attributable to *refining* the product which will be sent through the Keystone Pipeline, once it is constructed. Thus, NRDC believes that the Department of State was required by NEPA to present a detailed discussion of the potential air and water impacts in the vicinity of each refinery that might receive Keystone product, as well as the climate change impacts attributable to that refining. *See* Pl. MSJ at 12-33. In the absence of

such analyses, NRDC alleges, the Department of State's analysis of cumulative impacts and its mitigation and minimization analysis are deficient. *See id.* at 33-37. Therefore, NRDC seeks summary judgment and injunctive relief against the Department of State. *Id.* at 37-40.

However, NRDC's assertions are premised on a misunderstanding of the scope of indirect and cumulative impact analysis required by NEPA. Because any impacts attributable to the future refining of product shipped via the Keystone Pipeline are outside the Department of State's jurisdiction and are not closely or causally linked to the Department of State's approval of the energy facility *at the United States-Canada border*, such impacts are not "indirect effects" which NEPA requires the Department of State to assess. Moreover, where, as here, such an assessment is fundamentally speculative and indefinite – and therefore of no practical use to the decisionmaker – NEPA does not require the Department of State to nevertheless produce such an assessment. NRDC's allegations also misapprehend the scope of cumulative impact analysis required by NEPA, and improperly second-guess the greenhouse gas emission impacts analysis conducted by the Department of State. Also, NRDC's argument that the Keystone FEIS failed to include an adequate mitigation analysis is merely a corollary to NRDC's erroneous impact analysis arguments; that mitigation analysis claim also must fail. Consequently, there is no merit to the alleged violations claimed by NRDC in its Amended Complaint or Motion for Summary Judgment, and, should the Court elect not to dismiss this case pursuant to the Motions to Dismiss filed by Keystone and the Department of State, it should grant summary judgment to Keystone and the Department of State.

LEGAL STANDARD

Statutory Authority: NEPA serves the goal of "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."

Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983).

NEPA does not require agencies "to elevate environmental concerns over other appropriate considerations," but instead, requires agencies to "take a 'hard look' at the environmental consequences before taking a major action." *Id.* NEPA is a procedural statute; it does not mandate a particular substantive result. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (*per curiam*) (citation omitted) ("once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken'"). Primary among its procedural requirements, NEPA requires federal agencies to prepare an EIS for major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C).

Standard of Review: As with other instances of judicial review of agency action, a court's role is a limited one when reviewing agency decisionmaking pursuant to NEPA. The Court is not empowered to substitute its judgment for that of the agency, but is to evaluate whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton, Inc. Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 555 (1978). In other words, a court is only to assess whether the agency's decision is "within the bounds of reasoned decision making," *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983); *Vermont Yankee*, 435 U.S. at 555.

Because NEPA does not provide a standard for review, the APA provides the standard of review for justiciable claims of NEPA violations – a narrow and highly deferential review, under which the agency action is presumed valid and must be upheld unless "arbitrary, capricious, or otherwise not in accordance with law." 5 U.S.C. § 706; *Overton Park*, 401 U.S. at 415-16; *Baltimore Gas & Electric Co.*, 462 U.S. at 97-98; *Nevada v. Dep't of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006); *Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 70-71 (D.C. Cir. 2006) ("A party seeking to have a court declare an agency action to be arbitrary and capricious carries 'a heavy burden indeed'") (citations omitted).

In so doing, "a court reviewing an EIS for NEPA compliance must take a holistic view of what the agency has done to assess environmental impact" and "may not 'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." *National Audubon Society v. Dept. of the Navy*, 422 F.3d 174, 186 (4th Cir. 2005) (citations omitted); *see also Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (describing the inquiry as "deciding whether claimed deficiencies in a FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment") (quotation marks omitted); *Coalition for Responsible Regional Development v. Coleman*, 555 F.2d 398, 400 (4th Cir. 1977) ("court is not to be led into construing the mandating statutes as a device to be used as a 'crutch for chronic faultfinding'").

Summary Judgment: Claims of agency violation of NEPA, brought pursuant to the APA, are subject to judicial review on the basis of an existing administrative record and thus such claims are properly decided on summary judgment. *See, e.g., Young v. General Services Admin.*, 99 F. Supp. 2d 59, 65 (D.D.C. 2000), *aff'd*, 11 Fed. Appx. 3 (D.C. Cir. 2000). Consequently, Keystone agrees with NRDC, *see* Pl. MSJ at 9-10, to the extent that NRDC's claims can be

resolved by this Court on cross-motions for summary judgment by the parties. However, as explained in Keystone's Memorandum in Opposition to Plaintiff's Motion for Leave to Submit Extra-Record Evidence, the uncontested facts as set forth in the administrative record filed with this Court should serve as the sole basis for this Court's review of the legal issues presented.

ARGUMENT

I. THE DEPARTMENT OF STATE COMPLIED WITH NEPA AND THE APA IN GRANTING A PRESIDENTIAL PERMIT TO KEYSTONE.

NEPA Section 102(2)(C) requires "a detailed statement," or EIS, that fully analyzes "the environmental impact of the proposed action" and its alternatives for any "major federal action" which "significantly affect[s] the quality of the human environment," 42 U.S.C. § 4332(2)(C). As defined in regulations promulgated by the Council on Environmental Quality ("CEQ") pursuant to NEPA, *see* 40 C.F.R. § 1500, *et seq.*, such major federal "actions" include, *inter alia*, federal agency "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area, ... [and] includ[ing] actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 C.F.R. § 1508.18(b)(4).

Pursuant solely to the delegation of Presidential foreign policy power in E.O. 13337, *see* Presidential Permit at 1 [KAR 004449] and the Department of State's ROD/NID at 2 [KAR 004418], the Department of State permitted Keystone "to construct, connect, operate, and maintain pipeline facilities *at the border* of the United States and Canada at Cavalier County, North Dakota, for the transport of crude oil and other hydrocarbons between the United States and Canada," Presidential Permit at 1 [KAR 004449] (emphasis added). That permit is the sole approval under the Department of State's jurisdiction and thus that permit serves as the only agency "action" at issue here for the purposes of NEPA and the CEQ regulations.

For any “action” for which an EIS is required, the CEQ regulations direct the agency to examine in the EIS “[i]mpacts, which may be: (1) [d]irect; (2) indirect; (3) cumulative.” 40 C.F.R. § 1508.25(c). As considered in greater detail below, the Keystone FEIS complied with these requirements by considering all required direct, indirect, and cumulative impacts.

In its Motion for Summary Judgment, two fundamental flaws permeate NRDC’s allegations. First, NRDC misstates the scope of indirect and cumulative effects required by CEQ regulations to be included in an FEIS. The Department of State was never required to evaluate in the Keystone FEIS the refining impacts alleged by NRDC, and thus there is no support for NRDC’s assertion that the Department of State violated NEPA. An agency’s NEPA analysis “is not rendered unlawful simply because the [agency] *could have* considered more impacts,” *Biodiversity Conservation Alliance v. U.S. Bureau of Land Management*, 404 F. Supp. 2d 212, 218 (D.D.C. 2005) (Leon, J.) (emphasis in original) (*citing S. Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102, 117 (D.D.C. 2004)); *see also Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 164 (D.D.C. 2005) (Leon, J.).

NRDC’s position is that the Department of State, in permitting the Keystone Pipeline cross-border facility, was required not only to examine the effects of the cross-border facility and the domestic pipeline, but also obligated to predict environmental and other effects attributable to refining Canadian crude at any domestic refinery that has the potential, now or in the future, to receive Canadian crude oil. This claim simply cannot be squared with the well-established principle of judicial deference to agency line drawing in the NEPA process. As the D.C. Circuit has explained,

[t]he NEPA process involves an almost endless series of judgment calls. Here we consider ones relating to the detail in which specific items should be discussed and the agencies’ treatment of the project’s relation to other government activities. It is of course always possible to explore a subject

more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts. The latter's 'role ... is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'

Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987) (citing *Baltimore Gas & Electric Co.*, 462 U.S. at 97-98); see also *California v. Watt*, 712 F.2d 584, 590 (D.C. Cir. 1983) (When reviewing "predictive and difficult judgmental calls" required of a federal agency under a statute, a reviewing court must be at its most deferential, subjecting them to scrutiny only to determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment).

There is a second, independent reason that NRDC's challenge comes up short: NRDC's factual assertions are premised on erroneous and unsupported inferential leaps from the hodgepodge of materials that it relies upon here but failed to provide to the Department of State during the permit application process. Even if those declarations and documents are allowed, NEPA and CEQ regulations prudently and justifiably exclude from the scope of effects for which consideration is required those effects which are sufficiently uncertain, indefinite, or speculative as to make their inclusion of little use to the decisionmaker. Yet, NRDC proposes that the Department of State's action should now be invalidated on the basis of the Department's failure to include analyses for which NRDC itself could provide no more than mere conjecture.

The Court thus should decline NRDC's invitation to second-guess the Keystone EIS impact analysis performed by Department of State.

A. By thoroughly examining those reasonably foreseeable impacts that had a sufficiently close causal connection to the construction and operation of the cross-border facility, the Keystone EIS satisfied NEPA’s requirements to address direct and indirect effects.

As defined by CEQ in its regulations implementing NEPA, “[d]irect effects ... are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a).⁵ Here, the “direct effects” to be considered by the Department of State are any significant effects caused by, and occurring at the same time and place as, the construction and operation of the cross-border facility permitted by the Department of State. It is indisputable that the Keystone FEIS assesses effects attributable to and occurring in the same time and place, not only at the cross-border facility, but also along the entire domestic Keystone Pipeline. Indeed, NRDC does not appear to have challenged in its Motion for Summary Judgment the overwhelming volume of analysis contained in the FEIS. *See generally* Pl. MSJ.

Rather, NRDC alleges that the Department of State should have examined those additional potential environmental impacts that are solely attributable to the *refining* of Canadian crude oil to be sent through the Keystone Pipeline. *See, e.g.*, Pl. MSJ at 20-30. These, NRDC asserts, are “indirect effects” under NEPA. *See, e.g., id.* at 15-16. However, such hypothetical impacts were properly excluded from the Department of State’s analysis on two independent bases – first, because such impacts lack the requisite causal and jurisdictional connection to Department of State’s “action”; and second, because such impacts were too indefinite, uncertain, and/or speculative to meet the “reasonably foreseeable” threshold.

In contrast to “direct effects,” “[i]ndirect effects ... are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Thus, the indirect effects to be examined in an EIS are those which are *both* (i)

⁵ CEQ regulations use the terms “effects” and “impacts” interchangeably. *See* 40 C.F.R. § 1508.8 (“Effects and impacts as used in these regulations are synonymous”).

“caused by the action” *and* (ii) “reasonably foreseeable.” While neither concept is expressly defined in the CEQ regulations or NEPA, courts have provided guidance as to their meaning.

First, the requisite causal connection between the potential ‘indirect effects’ and the agency action is a close one – akin to the concept of proximate causation – encompassing effects of actions within agency jurisdiction or otherwise within agency ‘control and responsibility’, or closely functionally interconnected with the agency action.

Specifically, a unanimous Supreme Court held that CEQ regulations require an agency only to consider those effects with “a reasonably close causal relationship” to the original agency action, a requirement that it described as equivalent to the “familiar doctrine of proximate cause from tort law.” *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). The Supreme Court in *Public Citizen* also rejected the assertion that an agency must examine an environmental impact for which its ‘action’ is merely a ‘but for’ cause. *Id.* at 767. Furthermore, the unanimous opinion in *Public Citizen* makes clear that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency action cannot be considered a legally relevant ‘cause’ of the effect” for the purposes of NEPA analysis. *Id.* at 770.

This holding is consistent with the longstanding principle that an agency need not assess as indirect impacts those impacts attributable to non-jurisdictional sources not closely, causally and/or functionally interconnected with the jurisdictional action at issue. Indeed, this principle is memorialized in the long-standing regulations implementing NEPA promulgated by agencies, such as the U.S. Army Corps of Engineers (“ACOE”) and the Federal Energy Regulatory Commission (“FERC”). These two federal agencies regularly process applications similar to that

submitted by Keystone to the Department of State, and their NEPA regulations can properly serve as guidance for the infrequent occasions when the Department of State must apply NEPA.

For example, ACOE regulations implementing NEPA specify that for either an Environmental Assessment (“EA”) or an EIS, *see* 33 C.F.R. § 325, App. B(7)(b) and App. B(8)(d), the ACOE will consider the environmental impacts “of the specific activity requiring a [] permit,” *i.e.*, the direct effects, “and those portions over which the [ACOE] has sufficient control and responsibility to warrant Federal review.” *Id.* ACOE regulations specify the “[t]ypical factors to be considered in determining whether sufficient ‘control and responsibility’ exists” as

- (i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (*e.g.*, a transportation or utility transmission project).
- (ii) Whether there are aspects of the [nonjurisdictional] facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
- (iii) The extent to which the entire project will be within Corps jurisdiction.
- (iv) The extent of cumulative Federal control and responsibility.

33 C.F.R. Part 325, Appendix B § 7(b). Thus, ACOE employs, as an illustration,

a 50-mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a [ACOE] permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps of Engineers. Those matters would not be included in the scope of [impact] analysis which, in this case, would address the impacts of the specific cable crossing.

33 C.F.R. § 325, App. B(7)(b)(3).

ACOE’s definition of the scope of effects to be assessed pursuant to NEPA has been sustained by numerous courts. *See, e.g., Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 326-27 (5th Cir. 1980) (rejecting claim that NEPA required ACOE to assess the environmental effects of construction and operation of “massive” manufacturing facility as part

of its environmental analysis for permitting a wastewater discharge pipe built to serve that facility); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980) (rejecting claim that, because ACOE could prevent entire transmission line project by denying permit for water crossing, ACOE was required to consider as indirect effects impacts of full project rather than solely water crossing); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1115 (9th Cir. 2000); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400-01 (9th Cir. 1989); *but cf. Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (concluding that the district court had not abused its discretion in granting a preliminary injunction pending litigation after rejecting ACOE's limitation of analysis of environmental impacts to jurisdictional waters, where those waters ran through a development property "like lines run through graph paper," such that any development to jurisdictional waters under the ACOE permits would necessarily also impact the entire parcel).

As a result of these long-standing precedents, it is possible that if the Department of State had adopted a NEPA-implementing regulation along the line of that employed by the Corps, the EIS for the Keystone border crossing might have been limited to the environmental impacts solely relating to that crossing, and the immediate environs, since that is the extent of State's jurisdiction over this project. In this regard, it is important to remember that the Congress has elected not to provide federal control over the location or construction of interstate oil pipelines, leaving those issues to the states – and sharply distinguishing the federal control over natural gas pipelines through FERC from projects such as the Keystone oil pipeline, where federal involvement is far more limited.

Like the ACOE, FERC also employs a four-factor test to determine whether to consider the environmental effects of non-jurisdictional facilities as part of its NEPA review of

jurisdictional facilities such as natural gas pipeline applications approved pursuant to the Natural Gas Act. *See* 18 C.F.R. § 380.12(c)(2)(ii). The D.C. Circuit has endorsed FERC's approach to indirect effects in, *inter alia*, its 2004 ruling in *Nat'l Cmtee. for the New River, Inc., v. Fed. Energy Regulatory Comm'n*, 373 F.3d 1323 (D.C. Cir. 2004). In that case, the D.C. Circuit reviewed the adequacy of an EIS prepared for FERC orders approving the "Patriot Project," an expansion of a natural gas pipeline in Tennessee and Virginia and the creation of a new pipeline extension into North Carolina to meet forecasted growth in demand for natural gas and to stimulate regional industrial development. *Id.* at 1324-25.

The court sustained FERC's EIS, which considered only the environmental effects attributable to construction and operation of the new and expanded pipelines. Moreover, the court rejected petitioner's assertion that FERC should have also considered the environmental impacts of constructing and operating the power plant. The court rejected the argument that because the routing and configuration of the pipeline expansion was driven by a proposed new power plant to be built at the terminus of the expansion, thereby allegedly meeting one of FERC's factors for assessing 'control and responsibility' over the power plant, this compelled the conclusion that FERC had such 'control and responsibility.' *Id.* at 1333-34. Because the construction and operation of the power plant was not within FERC's jurisdiction and because there was no federal financing for the plant, the District of Columbia Circuit deferred to FERC's conclusion that it lacked sufficient 'control and responsibility' over the plant to compel the inclusion of the plant's anticipated environmental effects in the pipeline EIS. *Id.*

Second, even where this strict causal and jurisdictional requirement is met, CEQ regulations require assessment and discussion of an "indirect" effect *only* where that effect is "reasonably foreseeable." 40 C.F.R. § 1508.8(b); *Village of Bensenville v. Fed. Aviation Admin.*,

457 F.3d 52, 71 (D.C. Cir. 2006). Conversely, an agency need not consider potential effects that are speculative or indefinite. *See Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976). As the D.C. Circuit has explained, “NEPA does not require federal agencies to examine every possible environmental consequence,” but rather, “[d]etailed analysis is required only where impacts are likely ... [s]o long as the environmental impact statement identifies areas of uncertainty, the agency has fulfilled its mission under NEPA.” *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981). As with judicial review of all agency determinations regarding impacts, “a ‘rule of reason’ is used to ascertain those effects anticipated.” *See, e.g., Carolina Env’tl. Study Group v. United States*, 510 F.2d 796, 798 (D.C. Cir. 1975).

The primary goal of NEPA is to ensure that accurate and useful information about environmental costs and benefits is available to an agency decisionmaker at the time of decision, *see, e.g., Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). At the same time, courts have indicated that if the information regarding possible effects is too indefinite, unclear, or speculative to be of use to the decisionmaker at the time of decision, then there is no need to include it in the EIS. *See, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992) (An environmental effect would be considered “too speculative” for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker) (citation omitted); *see also Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (Agency not obligated to perform an analysis if the results cannot be described “with sufficient specificity to make its consideration useful to a reasonable decision-maker”); *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 685 F.2d 459, 476 (D.C. Cir. 1982) (*rev’d* on other grounds, *Baltimore Gas & Electric Co.* 462 U.S. 87).

Consequently, even where there is a sufficiently close causal relationship between the agency action and a second, later action, the effects of that second action need not be included in an EIS if they are too indefinite, uncertain or speculative at the time the EIS is prepared for that initial action. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977) (EIS evaluating the consequences of opening up certain tracts of the outer continental shelf for oil and gas development not inadequate for failing to project hypothetical pipeline routes to transport oil and gas back to shore and associated environmental effects, where the determination of pipeline routing and amounts to be transported remained uncertain and so such hypotheticals would be of little use to decisionmaker).

1) The Department of State's role in approving the cross-border pipeline facility lacks the requisite jurisdictional or causal connection to the ultimate refining of the Keystone product to make refinery impacts fall within the range of "indirect effects" that must be included in this FEIS.

In its Motion for Summary Judgment, NRDC asserts that it is a certainty there will be foreseeable environmental effects attributed to future refining of Canadian crude. Pl. MSJ at 23-24. However, NRDC largely glosses over the question of whether such effects are sufficiently closely or causally connected to Department of State's approval of the Presidential Permit. *See id.* at 20-30. This omission is a fatal flaw because no such close, causal or jurisdictional connection exists.

It is beyond dispute that E.O. 13337 grants the Department of State no legal authority or control over refineries in the United States. In approving the Presidential Permit, the Department of State's jurisdiction was and is limited to the construction and operation of the cross-border facility. *See* 69 Fed. Reg. 25,299 (May 5, 2004). Nor can the Department of State's action in approving or denying the Presidential permit control any decision by the owner of a domestic

refinery to increase its volume of Canadian crude oil, either as replacement oil for that coming from a third country, or as additional supply intended to address current demand.

In addition, there is no evidence before this Court that the Department of State (or any other federal actor) has, is, or will finance expansion or conversion projects at domestic refineries to allow those refineries process heavy crude oil. Indeed, the Department of State has no such funding or financing role in the construction of the domestic Keystone Pipeline, which is a wholly private venture. Rather, the Department of State's sole role is to act on applications for cross-border energy facilities. *See* FEIS at 1-7 [KAR 015282].

Moreover, while the cross-border facility and the Keystone Pipeline may be seen as part of the same "corridor project," there is no similar link between the cross-border facility and any refinery expansions or conversions undertaken or planned for the future. Aside from the Wood River refinery, which is directly linked to the pipeline, no other domestic refinery will be directly connected to the new Keystone Pipeline. Rather, all refineries receiving Canadian crude oil through this proposed pipeline will do so by accepting that oil at a terminal and thereafter transporting the oil through the existing domestic transmission and transport systems by which U.S. refineries already receive Canadian crude, other heavy crude, and other forms of crude oil. *See, e.g., id.* at 1-5 to 1-6 [KAR 015280-015281]. Indeed, as the FEIS notes, several other major pipelines already supply Canadian crude to the domestic refining network and several new cross-border pipelines are planned for coming years. *See id.* at 1-5, 1-6, 3.14-2 [KAR 015280, 015281, 015887].

Indeed, at present, the only refinery for which there are committed plans for expansion to accommodate Keystone-transported Canadian crude is the Wood River refinery, which is addressed in the FEIS. NRDC can point to no other refinery owned by ConocoPhillips where

expansion plans have been submitted to the federal and state permitting agencies, nor can it identify with any degree of certainty the identity or amount of *additional* oil any other refinery will obtain from Keystone.⁶ If, instead, Keystone-transported oil is used at any other refinery as replacement oil for that now provided by other sources, the environmental impacts of refining such replacement oil are wholly speculative and may well be non-existent when measured against today's refinery impacts. What is more, the existing and planned network of crude oil pipelines also serves as an intervening factor, attenuating any causal link between Department of State's "action" and alleged environmental effects from increased Canadian crude oil processing at domestic refineries.

Clearly, it is not the Department of State's permitting authority but the state and federal air and water permitting processes for these refineries that are triggered by any application associated with a proposed refinery expansion, which will determine whether an increase in consumption of Canadian crude oil will result in changes in pollutant emissions, *see* discussion, *infra*. Indeed, even for projects at the application stage, it would be simply baseless speculation by the Department of State to attempt to evaluate impacts attributable to the ultimately permitted expansion. For example, recently, the U.S. Environmental Protection Agency's ("USEPA")

⁶ For example, NRDC's Motion for Summary Judgment purports to show, through extra-record materials, an agreement for Keystone to supply up to 25,000 bpd of Canadian Crude to CVR Energy, Inc.'s Coffeyville, Kansas, refinery and 20,000 bpd of Canadian crude to NCRA's McPherson, Kansas, refinery, *see* Pl. MSJ at 19. However, according to the U.S. Energy Information Administration ("EIA"), both refineries already received roughly on the order of 10,000 bpd of crude oil from Canada in 2007, and also received substantial crude oil from Canada in 2008, among other heavy crude oil imports. *See* http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/data/import.xls (last visited Dec. 20, 2008; imports data through Oct. 2008); http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/historical/2007/data/imp07d.xls (last visited Dec. 20, 2008; imports data for 2007). Although EIA's data does not indicate whether these Canadian crude oil imports were from the WCSB, the Canadian National Energy Board reports that heavy crude oil exports comprise the majority of exports to the relevant regions, PADD II and III (comprising the U.S. Midwest and Gulf Coast), *see* <http://www.neb.gc.ca/clf-nsi/rnrgynfntn/sttstc/crdlndptrlmpdct/2007/ttlcrdlxprtdstntn2007.xls> (last visited Dec. 20, 2008; heavy oil exports comprised roughly ¾ of all 2007 exports to PADD II and III). NRDC's extra-record materials provide no guidance as to what amount of *additional* Canadian crude will be processed as a result of the CVR and NCRA agreements, let alone what emissions might result from that refining.

Environmental Appeals Board (“EAB”) rejected the state-issued permit sought by ConocoPhillips for its expansion of the Wood River refinery. *EAB PSD Appeal 07-02* [Exh. 1]. To accommodate increased processing of Canadian crude oil, among other objectives, ConocoPhillips initiated a Coker and Refinery Expansion (“CORE”) project at Wood River, and, pursuant to regulations delegating authority to issue Prevention of Significant Deterioration (“PSD”) permits under the Clean Air Act to the states, *see* 40 C.F.R. §§ 52.21(a)(1), (u), obtained from the Illinois Environmental Protection Agency a PSD permit for the CORE project. *See EAB PSD Appeal 07-02* at pp. 9-10 [Exh. 1]. However, in June, 2008 – after the Department of State issued the Presidential Permit for the cross-border facility – the EAB found the PSD permit decision deficient and remanded to Illinois EPA. *See id.* at pp. 3, 52. Subsequently, the state revised the permit to satisfy the EAB’s concerns, but this was done long after the FEIS for Keystone had been released and the Presidential Permit obtained. *See* 2008 Wood River CORE permit (issued Aug. 5, 2008) [Exh. 2].

In short, it is the state and federal environmental regulators who have the legal authority to approve, deny, and specify the current and future levels of emissions from these refineries. Their role and the authority that they exercise are entirely distinct from that wielded by the Department of State. As noted in the Keystone FEIS, any other expansions, conversions, and actions at domestic refineries in response to the availability of Canadian crude oil through the Keystone Pipeline were unknown at the time, and moreover, are subject to a complex web of state and federal air and water legislation, regulation, and review. *See, e.g.*, FEIS at 3.12-1 to 3.12-8 [KAR 015820-015839]. Such regulatory requirements and review would be interposed on any such refinery action before any potential air or water pollutant emissions could occur.

As a result of these critical and independent intervening factors, the issuance of a Presidential Permit to construct and operate the Keystone cross-border facility is not a proximate cause of any increased or altered air or water emissions at domestic U.S. refineries. As with the relationship between pipeline projects approved by FERC and the connected construction and operation of a power plant supplied by the pipeline, as reviewed in *Nat'l Cmtee. for the New River, Inc.*, the Department of State here has no jurisdiction over refinery emissions and no role in financing or funding the refineries. *See* 373 F.3d at 1324-25, 1333-34. The agency's approval is *at most* a 'but for' cause of any effects from refining the product transported by the pipeline.

Nor is the situation here analogous to the two instances in which District Courts in this District have distinguished the Supreme Court's holding in *Dept. of Transp. v. Public Citizen*. First, in *Sierra Club v. Mainella*, the court rejected the National Park Service's ("NPS") contention that it had no NEPA obligation to consider the environmental impacts of drilling operations located 100 to 500 feet outside of the boundaries of the NPS-protected Big Thicket National Preserve, even though the directional bore holes of those operations extended to oil pockets located under the Preserve. 459 F. Supp. 2d 76 (D.D.C. 2006). Specifically, NPS argued that it was not required to examine such environmental impacts because the surface drilling operations were located outside of the Preserve, and, despite the inclusion in the National Park Service Organic Act of express authority to review such activities, NPS' own regulations enabled NPS to exempt the activities from review if the project component within protected lands would pose no significant environmental harm to those lands. *Id.* at 103-04.

The court rejected this argument and distinguished *Dept. of Transp. v. Public Citizen* on the basis that the NPS' own Organic Act mandated environmental review of activities outside of the boundaries of NPS lands, thereby imposing upon NPS the statutory obligation to review the

environmental effects of the external drilling operations. *Id.* at 103-05. Moreover, a prerequisite to invoking NPS' regulatory exemption was its review of the impact of the subsurface drilling within the protected lands, which the court found "functionally inseparable" from the surface drilling activities. *Id.*

Similarly, in *Humane Society of the United States v. Johanns*, the court rejected the United States' Department of Agriculture's ("USDA") argument that it need not conduct any NEPA environmental review of its rulemaking to create a voluntary fee-for-service arrangement for the pre-slaughter USDA inspections of horses mandated by the Federal Meat Inspection Act ("FMIA"). 520 F. Supp. 2d 8 (D.D.C. 2007). Because the relevant Appropriations Act effectively eliminated funding for the required inspections, the USDA rulemaking provided the only means for horse slaughtering facilities to obtain the inspections they required to remain in business. *Id.* at 12-13.

Although USDA did not dispute that the horse slaughter operations had a significant impact on the environment, the agency argued that its rulemaking was not a "major federal action significantly affecting the quality of the human environment," and thus not subject to NEPA's requirements, because the rule did not apply USDA control over the slaughtering operations themselves. *Id.* at 19-20. The court rejected this argument and distinguished *Dept. of Transp. v. Public Citizen* on the basis that there was "no intervening link between" the USDA rulemaking and "the horse slaughter operations and their environmental effects." *Id.* at 26. Moreover, the court noted that the rulemaking was the legally relevant cause of, and functionally inseparable from, the significant effects attributable to horse slaughter operations, as, without the rulemaking, there was no legal basis for the horse slaughtering to continue. *Id.* at 26-27.

In the instant case, the Department of State possesses no statutory (or other legal) authority or control over refinery operations or emissions. Its actions and jurisdiction do not authorize such emissions. Any such refinery emissions are not “functionally interdependent” with the construction and operation of the cross-border facility that is subject to the Department of State’s jurisdiction, and several intervening factors interrupt the causal NEPA chain.

NRDC’s contention that NEPA required the Department of State to evaluate the environmental impacts of refining relies, in significant part, upon the out-of-circuit opinion in *Mid-States Coal’n For Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), *see* Pl. MSJ at 29-30, 33, 35. This reliance is misplaced. There, the question was the adequacy of an EIS prepared by the Surface Transportation Board in conjunction with its approval for the construction of a rail line expansion to Wyoming’s Powder River Basin to carry coal to the Midwest. *Id.* at 548. In its opinion, the Eighth Circuit did not explicitly address whether the likelihood of increased consumption of low-sulfur coal shipped over the rail line bore the requisite close causal and jurisdictional relationship to the agency’s approval of that line – as such arguments were not raised by the parties. *See id.* at 549. Instead, the court framed its holding on the basis that such impacts were “reasonably foreseeable,” *see id.* at 548-50.

The rationale of *Mid-States* does not survive the subsequent Supreme Court decision in *Public Citizen*. Indeed, a recent Eighth Circuit decision has distinguished the *Mid-States* holding as turning on the fact that the *agency* explicitly had “stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so.” *Arkansas Wildlife Fed’n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005). Thus, the EIS adopted by the STB failed to implement an agency commitment. The Department of State has made no similar commitment. And, as shown earlier, NRDC cannot demonstrate the causal

and jurisdictional connection between the effects it alleges that the Department of State should have considered and the Department of State's "action" in approving the Presidential Permit, as required in light of the Supreme Court's holding in *Public Citizen*, 541 U.S. 752, as well as precedent in this Circuit, *see, e.g., Nat'l Cmtee. for the New River*, 373 F.3d 1323. For all these reasons, NRDC's reliance upon this one "outlier" decision is not persuasive.

2) The alleged localized environmental impacts from refining Keystone Pipeline product were not "reasonably foreseeable" and thus not "indirect effects" requiring evaluation under NEPA.

Even assuming for the sake of argument that NRDC could establish a sufficient causal or jurisdictional link between the Department of State's issuance of the Presidential Permit for the cross-border facility and significant increases in pollutant emissions attributable to increased refining of Canadian Crude oil at domestic refineries – rather than impacts of simply substituting Keystone Canadian Crude for other oil presently refined – the parameters of such effects were speculative and indefinite at the time of the Department of States' ROD/NID and issuance of the Presidential Permit, and remain so today.

As explained in the FEIS, the domestic Keystone Pipeline terminates at three pre-existing crude oil terminals – the Patoka and Wood River terminals in Illinois and the Cushing terminal in Oklahoma. *See, e.g.,* FEIS at 2-5, 2-12 [KAR 015302, 015309]. These oil terminals at Patoka and Cushing are already major crude oil transshipment points to a variety of refineries and further crude oil pipeline systems. Cushing, in particular, is one of the largest and highest volume crude oil terminals in the world.⁷ In the petroleum world, Cushing is the equivalent of Chicago's O'Hare Airport, for just as adding new flight into O'Hare can take passengers anywhere in the world, a new pipeline extending to Cushing can allow a shipper to move oil

⁷ Indeed, the New York Mercantile Exchange identifies the Cushing terminal as the price settlement point for national light sweet crude oil futures, *see* http://www.nymex.com/CL_spec.aspx (last accessed Dec. 11, 2008).

from Canada throughout the United States. Consequently, via these terminals, Keystone Pipeline product will be available to virtually any refineries with preexisting capability to refine heavy crude oil or with plans to expand or convert to create such capability. Indeed, the FEIS reports that Keystone planned to make at least 95,000 barrels per day (“bpd”) of Keystone Pipeline product available to domestic shippers on a monthly spot basis. FEIS at 2-19 [KAR 015316].

In its Motion for Summary Judgment, NRDC alleges that six “existing U.S. refineries ... had been identified publicly as either certain or reasonably likely to refine Western Canadian heavy crude oil from the Keystone pipeline” by the time the Department of State finalized the FEIS.⁸ Here, Keystone notes that NRDC failed to make this contention to the Department of State in its comments on the DEIS, and therefore this entire argument should be disregarded. *See* Keystone’s Memorandum in Opposition to Plaintiff’s Motion for Leave to Submit Extra-Record Evidence. Nevertheless, NRDC contends that the Department of State should have analyzed in the Keystone FEIS the effect of air and water emissions attributable to those refineries processing Canadian crude. *See* Pl. MSJ at 20-25.

In support of its assertions, NRDC urges the Court to make a variety of inferential leaps from materials which were appended as exhibits to its Motion for Summary Judgment but never raised by NRDC to the Department of State during its consideration of the Keystone application. NRDC purports through those documents to show that, prior to the issuance of the ROD/NID and Presidential Permit, (i) a handful of U.S. refineries either planned to expand their ability to process Canadian crude oil or were studying the possibility of expansion; (ii) ConocoPhillips was entering into a Joint Venture with the EnCana corporation under which that corporation would supply Canadian crude to Borger and Wood River refineries; (iii) various ConocoPhillips

⁸ Pl. MSJ at 16. These six refineries are identified as ConocoPhillips’/WRB’s Borger, Wood River, and Ponca City refineries; Marathon’s Robinson, Illinois refinery; CVR’s Coffeyville, Kansas refinery; and NCRA’s McPherson, Kansas refinery. *See id.* at 16-19.

and other refineries were capable of receiving Canadian crude oil; and (iv) TransCanada had contracts with shippers to deliver up to 495,000 bpd of Canadian crude through the Keystone Pipeline, including contracts for up to 25,000 bpd with CVR Energy, Inc., and 20,000 bpd with NCRA. *See* Pl. MSJ at 16-19.

Even if these allegations are accurate – which we do not know because the Department of State has had no opportunity to test them and this should not be the place for a battle of competing declarations – these facts do not establish the “reasonably foreseeable” effects NRDC alleges. To begin with, refinery studies, or even announced intentions to expand heavy crude oil processing capability, without more, do not establish a link to a likely delivery of any particular quantity of Keystone Pipeline product. With the price of crude oil continuing its roller coaster run, anything short of a formal application for federal, state, and local permits for new refinery capacity is an expression of uncertainty, an event not reasonably foreseeable.

In addition, NRDC cannot dispute that today’s domestic refineries already receive heavy crude oil, and specifically Canadian crude oil, through a variety of pipeline systems. As the FEIS explains, three existing pipeline systems – including the Kinder Morgan Express, Enbridge, and Kinder Morgan Trans Mountain – already supply domestic refineries with nearly 2 million bpd of Canadian crude oil from Alberta. *See* FEIS at 1-5 to 1-6 [KAR 015280-015281]. Moreover, in addition to the Keystone Pipeline, the FEIS describes several additional major cross-border pipeline projects anticipated to come on line in the next couple of years – including three new Enbridge pipelines, as well as expansions of existing pipelines – providing a large increase in capacity for shipping Canadian crude to domestic refineries. *See, e.g., id.* at 3.14-2 [KAR 015887]. Keystone, like these other existing and planned Canadian Crude pipelines,

connects to terminals which enable cross-shipment via combinations of other crude oil pipelines and other transport methods within the domestic United States.

Indeed, the specific refineries identified by NRDC – ConocoPhillips’/WRB’s Borger, Wood River, and Ponca City refineries; Marathon’s Robinson, Illinois refinery; CVR’s Coffeyville, Kansas refinery; and NCRA’s McPherson, Kansas refinery – are already connected, directly or indirectly, to pipeline systems which supply them with Canadian crude and/or other heavy crude oil.⁹ All will be capable of receiving Canadian crude via other pipeline projects anticipated to come on line in the next few years. Indeed, the six refineries cited by NRDC are among numerous refineries in the Midwestern and Gulf Coast U.S. which have already received Canadian crude oil for processing in recent years, among other sources of heavy crude oil.¹⁰

Conversely, these six specific refineries are only a fraction of the total number of U.S. refineries that already have the capability to refine heavy crude oil, or could add that capacity in the coming years. NEPA provides no basis for NRDC to convert its unsupported inferences that these six refineries were the likely destinations for a given quantity of Keystone Pipeline product into a legal obligation for the Department of State to study emissions at those facilities. The simple ability to have the present capacity to refine Canadian crude oil or an announced intention to some day obtain that capacity does not warrant NEPA analysis in a pipeline EIS of the effects of such refining.

Similarly, TransCanada’s announcement of contracts with domestic shippers does not resolve the uncertainty regarding the amount and destination of Keystone Pipeline product, *see*

⁹ For example, the EIA data referenced in note 6, *supra*, shows that each of these locations already received crude oil from Canada in 2007 – although, as noted above, the EIA data does not specify what proportion came from the WCSB.

¹⁰ For example, data provided by EIA, *see supra* note 6, suggests that Canadian crude oil was received by processors at more than forty separate locations in the U.S. Midwest, Gulf Coast, and Plains states in 2007, not counting shipment quantities for which recipients were unknown to EIA – although, as noted above, the EIA data does not specify what proportion of this oil came from the WCSB.

Pl. MSJ at 19. Department of State could not have known the particulars of these contracts – including any designations as to where the product to be delivered to the shipper might end up, what flexibility the shipper had as to point of delivery and/or resale of some or all of the quantities under contract, among other details – as such contractual details are confidential, as per the standard practice in the industry. Consequently, the mere fact that these contracts existed provided Department of State with no basis, beyond pure conjecture, for predicting where and in what quantities the Keystone product would be refined.

It may be that in other situations, a primary reason for adopting an expansive definition of “indirect effects” is that if not studied in an EIS, these impacts will be ignored. But that is simply not the case here. Indeed, there is probably no activity more closely scrutinized than federal and state permitting under the Clean Air Act and Clean Water Act for new or expanded refinery operations.¹¹ As the FEIS notes, the requirements potentially applicable to refinery operations and/or operation of the pipeline, based on the Clean Air Act alone, include regulatory requirements related to New Source Review, Prevention of Significant Deterioration (“PSD”), Air Quality Control Regions, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, Chemical Accident Prevention Provisions, state-based Title V Operating Permits, and the General Conformity Rule. *See* FEIS at 3.12-4 to 3.12-8 [KAR 015823-015827].

The experience of ConocoPhillips at Wood River is instructive. Wood River is described in the FEIS because the expansion there was viewed by the Department of State as a “connected action” in light of its CORE project, *id.* at 2-18 to 2-19 [KAR 015315-015316]. The FEIS notes that Wood River’s refining and any increased emissions associated with the refining is subject to

¹¹ Indeed, the level of federal scrutiny over new refineries is so great that none have been built in almost thirty years.

a host of state and/or federal air and water regulatory requirements and approvals, among them Clean Air Act PSD permitting, Clean Water Act NPDES permitting, and state of Illinois Major Stationary Sources Construction and Modifications permitting, *id.*

Illinois EPA's issuance of a Clean Air Act PSD permit covering the Wood River CORE project required ConocoPhillips to offset by a factor of 1.15 any increases in regulated air emissions attributable to the CORE project. *See* 2007 Wood River CORE permit at 8 [Exh. 3]. Nevertheless, the Clean Air Act permit was challenged subsequent to the issuance of the Department of State's Presidential Permit, remanded by USEPA's Environmental Appeals Board, *EAB PSD Appeal 07-02* [Exh. 1], and subsequently reissued in August of this year, *see* 2008 Wood River CORE permit [Exh. 2]. Consequently, the environmental impacts associated with anticipated processing of increased Canadian crude oil under the Wood River CORE project – an analysis of which was included in the Keystone EIS, *see* FEIS at 3.3-19 to 3.3-20 (water) [KAR 015408-015409], 3.12-11 to 3.12-12 (air) [KAR 015830-015831], was given a level of scrutiny by permitting agencies far greater than anything the Department of State could provide in its FEIS. This is an appropriate allocation of responsibility.

This allocation of responsibility is in no way undermined by *Am. Bird Conservancy, Inc. v. Fed. Communications Comm'n*, 516 F.3d 1027 (D.C. Cir. 2008) and *Humane Soc'y v. Dept. of Commerce*, 432 F. Supp. 2d 4 (D.D.C. 2006), cited by NRDC for the proposition that uncertainty about effects “underscores [Department of State's] obligation to” discuss them in the FEIS, *see* Pl. MSJ at 24-25. The D.C. Circuit's opinion in *Am. Bird Conservancy, Inc.*, is easily distinguishable, as in that case, the Federal Communication Commission's (“FCC”) rejected a petition to require the preparation of an EA for approval of communication towers, stating that although the petition provided scientific evidence that such towers result in significant

environmental impacts in the form of bird kills, there was some scientific dispute on that subject. 516 F.3d at 1033-34. The D.C. Circuit held that the FCC's stated rationale for the rejection violated FCC's own regulations concerning such petitions and imposed a "precondition of certainty" before initiating environmental review, which was far too stringent. *Id.* Neither the FCC regulations at issue in *Am. Bird Conservancy, Inc.* nor FCC's "precondition" of scientific certainty are applicable to the Department of State's treatment of the highly speculative refining effects analysis sought by NRDC.

Nor is the case at hand analogous to the agency action addressed in *Humane Soc'y v. Dept. of Commerce* – where the court found agency analysis insufficiently reasoned to support its conclusion that there were no significant direct environmental effects to a threatened and endangered sea lion population from proposed research studies on that population. 432 F. Supp. 2d 4, 20-21 (D.D.C. 2006). In particular, the court cited the Department of Commerce's numerous, sharply contradictory statements about whether there was certainty or uncertainty as to the impacts of such research programs on the sea lion population, the agency's failure to address evidence of such effects and complete failure to discuss mitigation measures, among other deficiencies, in its holding that the analysis did not meet the "hard look" standard. *Id.*

In short, neither opinion alters the requirement under the CEQ regulations to discuss only those 'indirect' effects which are "reasonably foreseeable." 40 C.F.R. § 1508.8(b); *see also Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) ("Detailed analysis is required only where impacts are likely...[s]o long as the environmental impact statement identifies areas of uncertainty, the agency has fulfilled its mission under NEPA."). Moreover, as part of its response to comments document appended to the Keystone FEIS, the Department of

State explained why it had not collected that information, *see* FEIS, App. A, at Table 2, pp. 18-20 [KAR 015993-015995], as required by CEQ regulations, 40 C.F.R. § 1503.4(a).

B. The Department of State’s assessment of cumulative impacts satisfied NEPA.

Among the significant impacts of the “action” in question that CEQ regulations require the agency to examine are “cumulative” impacts, 40 C.F.R. § 1508.25(c), which are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

Because cumulative impacts are those which *add to* the impacts of the “action” in the same geographic area, resulting in a cumulatively significant impact on that area and its interests, the baseline for cumulative effects is the geographic context of the effects of the underlying agency “action.” This principle is reflected in the D.C. Circuit jurisprudence. For example, the D.C. Circuit in *Grand Canyon Trust v. Fed. Aviation Admin* endorsed the Fifth Circuit’s formulation of the contours of cumulative impact analysis as:

a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected *in that area* from the proposed project; (3) other actions--past, present, and proposed, and reasonably foreseeable--that have had or are expected to have impacts *in the same area*; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

290 F.3d 339, 345-46 (2002) (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1245 (5th Cir. 1985)) (remaining citations omitted) (emphasis added); *see also Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (repeating same holding and citing *Grand Canyon Trust*, 290 F.3d at 346). Further, the Supreme Court has clarified that the “identification

of the geographic area within which [cumulative effects] may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).

Consistent with these parameters, the Keystone FEIS assessed cumulative impacts "by combining the potential environmental impacts of the proposed action with the impacts of projects that have occurred in the past, are currently occurring, or are proposed in the future within the pipeline corridor or in the vicinity of the pipeline [right of way]." FEIS at 3.14-1 [KAR 015886]. These projects including existing and proposed pipelines and pipeline expansion, as well as a proposed ethanol plant and proposed coal-fired power plant in the vicinity of the pipeline right of way. *See id.* at 3.14-1 to 3.14-9 [KAR 015886-015894]. Moreover, as discussed *infra*, the Keystone FEIS addressed the potential globally cumulative impacts attributable to the greenhouse gas emissions associated with project. *Id.* at 3.14-9 to 3.14-10 [KAR 015894-015895]. NEPA does not require more.

In response, NRDC alleges that this analysis was deficient because it did not consider "refining pollution in the context of other pollution that may already pose serious threats [to] human health and the natural environment around refineries likely to process Keystone oil." Pl. MSJ at 33-36. However, this argument merely repeats the flawed premise of NRDC's argument that the effects of refining Keystone Pipeline product are "indirect effects" that must be considered under NEPA, *see discussion supra*. Because localized impacts at refineries were neither closely, causally linked to the agency action or reasonably foreseeable, Department of State was not required to consider other local emissions impacts as "cumulative" with those refining impacts.

Nor are the refining impacts themselves “cumulative” with the effects of the cross-border facility or construction and operation of the pipeline. Because “[t]he ‘cumulative’ impacts to which the [CEQ] regulation refers ... measure[s] [] the effect of the current project along with any other past, present, or likely future actions *in the same geographic area*,” *Taxpayers of Michigan Against Casinos*, 433 F.3d at 864 (emphasis added), the Department of State need not consider the impacts of other actions, such as refining, that are geographically distant from the cross-border facility, and, in many cases, even geographically distant from the domestic portions of Keystone Pipeline to be constructed.¹² Moreover, as discussed *supra*, the issuance of the Presidential Permit to construct and operate the Keystone cross-border facility did not render “reasonably foreseeable” any future air and water emissions associated with increased refining of Canadian crude oil. This is an independent basis for the Court to reject NRDC’s allegation that the Keystone FEIS’s treatment of cumulative effects was in any way deficient.

C. The Department of State’s treatment of greenhouse gas emissions satisfied NEPA’s requirements.

The Keystone FEIS explicitly discusses potential environmental impacts, including the potential cumulative and incremental effects, of greenhouse gas emissions attributable to the construction and operation of the Keystone Pipeline. FEIS at 3.14-9 to 3.14-10 [KAR 015894-015895]. The FEIS also addresses the potential for increased greenhouse gas emissions from supplying Keystone Pipeline product to the US market – but reasonably notes that the construction and operation of the Keystone Pipeline would not create demand for petroleum products in and of themselves. *Id.* In addition, the FEIS explains that an attempt to assess the

¹² Nor is this conclusion altered in any way by NRDC’s citation to *Mid-States Coal’n For Progress*, see Pl. MSJ at 35. To the extent that the holding by the Eighth Circuit has any bearing on this suit, see discussion *supra* Section I.A.1., that holding explicitly addressed the adequacy of the EIS with respect to the indirect effects of the consumption of coal to be shipped on the proposed rail line, not cumulative effects. See *Mid-States Coal’n For Progress*, 345 F.3d at 548-50.

effects attributable to greenhouse gas emissions associated with the operation and construction of the Keystone Pipeline – or even whether such effects cross the significance threshold – is hampered by the absence of any regulatory or legislative thresholds for such determinations. *Id.* The FEIS concludes that construction and operation of the Keystone pipeline likely would result in increased emissions of greenhouse gases, but because the operation of pipeline is not anticipated to impact market demand for petroleum products, that this incremental increase would be offset by a reduction in the use of other, more energy and carbon-intensive methods of transporting crude oil, such as delivery by oil tanker. *Id.* at 3.14-10 [KAR 015895].

In response, NRDC asserts that this analysis did not go far enough, and that the Department of State had an obligation under NEPA to examine the effects of potential increases in greenhouse gas emissions due to *refining* Canadian crude oil which will be transported by the Keystone Pipeline. *See* Pl. MSJ at 30-33. Again, NRDC completely blurs the distinction between potential refinery impacts that might arise in substituting Keystone-transported oil for oil from other sources, with impacts relating to refinery expansion and use of additional Canadian crude. Moreover, as NRDC implicitly concedes, the amount of greenhouse gas emissions attributable to refining Keystone product depends upon a variety of factors specific to the equipment and processing method utilized at the refinery in question, *see id.* at 33. Given the substantial uncertainty and temporal variability regarding where and in what quantities Keystone Pipeline product will be refined, *see* discussion, *supra*, such analysis would be highly speculative.

Further, the Keystone FEIS's discussion of the effects of greenhouse gas emissions recognizes the more fundamental uncertainty regarding the nature and extent of the environmental and other impacts of such emissions. *See* FEIS at 3.14-9 to 3.14-10 [KAR

015894-015895]. Notwithstanding NRDC's citation to *dicta* in *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1297-98 (D.C. Cir. 1984), *vacated on other grounds*, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 760 F.2d 1320 (D.C. Cir. 1985), for the proposition that impacts which may be significant must be assessed, Pl. MSJ at 31, NEPA does not oblige agencies to include analyses which are speculative and too uncertain or indefinite to be of use to a decisionmaker. *See, e.g., Dubois*, 102 F.3d at 1286 (Agency not obligated to perform an analysis if the results cannot be described "with sufficient specificity to make its consideration useful to a reasonable decision-maker"); *Sierra Club v. Marsh*, 976 F.2d at 768 (An environmental effect would be considered "too speculative" for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker) (citation omitted); *see also Izaak Walton League of Am.*, 655 F.2d at 377 ("So long as the environmental impact statement identifies areas of uncertainty, the agency has fulfilled its mission under NEPA").¹³

The Department of State's treatment of the potential effects of greenhouse gas emissions was fully transparent and, particularly given the tremendous underlying uncertainty of the effects of such emissions, complied with NEPA and CEQ regulations.

D. The Keystone EIS contained an adequate and thorough discussion of measures to mitigate these environmental impacts.

CEQ regulations require, as part of the discussion of environmental consequences of the selected action and alternatives considered, to include a discussion of "[m]eans to mitigate adverse environmental impacts..." 40 C.F.R. §§ 1502.14(f), 1502.16(h); *see also Robertsen v.*

¹³ Nor does the Supreme Court's rejection, in *Massachusetts v. U.S. Env'tl. Protection Agency*, 127 S. Ct. 1438, 1457-58 (2007), of USEPA's arguments that the State of Massachusetts lacked standing to challenge USEPA's failure to regulate greenhouse gas emissions under the Clean Air Act have any bearing on the question of how Department of State should approach assessing the nature and extent of environmental effects from greenhouse gas emissions of refining Keystone Pipeline product, refining which is itself causally attenuated from the underlying agency approval of a cross-border energy facility.

Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989). Consistent with this mandate, the Keystone EIS discusses mitigation measures for, *inter alia*, each and every direct, indirect, and cumulative environmental impact discussed above. Descriptions of mitigation measures are included in the relevant portion of the FEIS pertaining to the impact at issue. *See generally* FEIS at 3.0-1 to 3.13-46 [KAR 015338-015885]. These measures are also summarized in Table ES-5, *id.* at ES-12 to ES-21 [KAR 015251-015260].

NRDC's Motion for Summary Judgment does not dispute that these mitigation measures are adequate with respect to mitigation of effects from the construction and operation of the cross-border facility or domestic Keystone Pipeline. Rather, NRDC alleges a general deficiency on the basis of Department of State's failure to discuss the alleged localized and cumulative impacts associated with refining Keystone Pipeline product. *See* Pl. MSJ at 36-37. Because the latter assertions are without merit, NRDC can point to no deficiency in the Keystone FEIS's discussion of mitigation relative to the direct, indirect, and cumulative effects properly considered by the Department of State.

II. NRDC IS NOT ENTITLED TO ANY INJUNCTIVE RELIEF.

Beyond its allegations that the Department of State has violated NEPA and the APA, NRDC also argues in its summary judgment motion that it is entitled to declaratory and injunctive relief, including an order vacating Keystone's permit and enjoining pipeline construction. Pl. MSJ at 37-40. Because NRDC has addressed the question of remedy at this point rather than deferring that issue until after a ruling on the merits, Keystone now turns to NRDC's demand for relief and demonstrates that this aspect of its case is equally unpersuasive.¹⁴

¹⁴ Because this is clearly no run-of-the-mill NEPA case, the Court may wish to defer the entire issue of what remedy may be appropriate in the context of a national interest determination by the Secretary of State. NRDC's demand for injunctive relief would seem to require detailed, careful weighing of the equities and a clear

A. NRDC’s criteria for injunctive relief has been repudiated repeatedly.

The standard for granting permanent injunctive relief is comprised of a four-factor test, requiring the Court to balance equities and the public interest, *see, e.g., eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982)). Moreover, the equitable balancing of harms is necessarily a particularized, fact specific inquiry. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). NRDC cannot meet this burden, nor does it attempt to do so. Instead, it offers conclusory allegations that effectively translate into an automatic entitlement to injunctive relief for any NEPA violation. Here, NRDC offers only sweeping rhetoric that a balancing of equities test “is easily satisfied,” that the environmental and procedural injury it alleges surely constitutes irreparable harm, and that any harm to Keystone will be “far outweighed” by those environmental and procedural injuries. *See* Pl. MSJ at 37-40.

NRDC embraces *dicta* in *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987), that the balance of harms “usually” favors an injunction to protect the environment. Pl. MSJ. at 38. Of course, NRDC’s reliance on this language does not extend to the actual holding by the Supreme Court in that case. In *Amoco Prod. Co.*, the Court *rejected* the Ninth Circuit’s conclusion that “[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.” 480 U.S. at 544-45. The Court held that such a presumption would contravene the traditional balancing of equities. *See id.* Moreover, as the Supreme Court recently indicated in *Winter v. Natural Resources Defense Council*, a prerequisite for injunctive relief is the showing of *likely* irreparable injury – not mere *possibility* of such harm – even when environmental or procedural harms are alleged under NEPA, 129 S. Ct. 365, 375-76

identification of the extent of authority that the Federal Defendant has over ongoing pipeline construction beyond that segment crossing the international border.

(2008). That opinion also articulated a robust weighing of equities and the public interest, where NEPA is concerned, and found that the national security interests at stake there clearly trumped the environmental and procedural harms alleged. *Id.* at 376-78. When measured against the correct criteria for injunctive relief, NRDC's claims cannot survive.

B. NRDC has failed to demonstrate truly irreparable injury.

Injunctive relief is inappropriate here because the harms alleged by NRDC are inherently speculative, temporally distant, and by no means irreparable or injurious. NRDC asserts "that the refining of Keystone oil will result in substantial air and water pollution – including greenhouse gas pollution – wherever it occurs." Pl. MSJ at 39. This sweeping claim has numerous defects. First, the environmental impacts associated with alleged increased refining of Canadian crude to be sent through the Keystone Pipeline will only occur after the Pipeline is completed, and even then, can only occur to the extent that such Canadian crude adds to, rather than replaces, existing heavy crude refining – an outcome which is pure speculation at this point. That point is years away, yet NRDC would impose injunctive relief, including a halt to construction, long before any "injury" could occur. Second, NRDC is wrong to assert that such emissions, if and when they do occur, somehow equate to irreparable injury. After all, any increase in refining capacity to use Keystone oil, as in the case of the Wood River refinery, requires an extensive, detailed permitting process under both the Clean Air Act and the Clean Water Act, which may freeze emissions levels and/or require offsetting. Emissions authorized as a result of any permit issued to the refinery hardly translate into irreparable injury since those emissions would be lawful. Consequently, any environmental harm attributable to emissions is far from certain.

Second, NRDC's alleged procedural injuries can be addressed through declaratory relief. Again, claims of procedural injury do not by themselves translate into either irreparable injury

or an entitlement to injunctive relief, *see, e.g., Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (“the procedural injury caused by defendants' failure to comply with NEPA ... cannot stand alone as the basis for a finding of irreparable harm...”) (citing *Fund For Animals v. Espy*, 814 F. Supp. 142, 151 n. 10 (D.D.C. 1993)). NRDC’s procedural claims of injury fall far short of satisfying the requisite balancing of the equities and assessment of the public interest. Should this Court find that the Department of State improperly excluded any impacts as part of its FEIS, such a violation can be remedied through declaratory relief with an order directing the Department of State to issue supplemental environmental analysis to address such impacts, *see, e.g., Winter*, 129 S. Ct. at 381-82 (an appropriate remedy for a procedural violation of NEPA may be declaratory relief, under which agency must satisfy its NEPA obligations, rather than enjoining the agency action); *Romero-Barcelo*, 456 U.S. at 313-16 (injunctive relief need not be imposed where it is not the only means of ensuring compliance with applicable law, unless there is clear Congressional intent to remove the equitable discretion of the courts in granting such relief). Nor is injunctive relief or vacatur of the agency’s approval always warranted with respect to violations of the APA, *see, e.g., Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (court retains discretion as to whether to order vacatur in response to violations of the APA, or to remand to the agency without vacating the agency action).

C. Keystone would suffer irreparable injury from an injunction halting construction.

If it becomes necessary to address this subject, Keystone would appreciate the opportunity to provide this Court with detailed declarations regarding the specific harms it would suffer if forced to halt construction of the pipeline. As indicated at note 14, *supra*, it seems more appropriate and efficient to address those issues at a later juncture in this litigation, and only if it

becomes necessary to do so. Nevertheless, it is clear from the record now before this Court that the construction of a pipeline of this length is a complicated, expensive undertaking. In reliance upon its Presidential Permit, Keystone has committed to transporting at least 340 thousand barrels per day of Canadian crude to the Wood River refinery and to oil distribution terminals in Illinois and Oklahoma. FEIS at ES-4 [KAR 015243]. In reliance on those contracts, shippers are making arrangements to replace crude oil previously obtained from other sources with Keystone-transported product. Any disruption of delivery schedules would cause irreparable harm to Keystone and to those with whom it has contracted for the delivery of this oil.

D. The public interest strongly favors the absence of injunctive relief in order to avoid impairing a national interest project.

The final factor requires this Court to include in its balancing analysis the Secretary of State's determination that it is in the national interest to issue this Presidential Permit to Keystone. Recently, the Supreme Court in *Winter* afforded substantial deference to military judgments with respect to the harm to national security and the balancing of the public interest when considering injunctive relief for an alleged violation of NEPA and other environmental statutes, 129 S. Ct. at 377-78. The Secretary of State's National Interest Determination here is similarly worthy of deference in the balancing of equities and public interest. When contrasted with the speculative nature of the harm NRDC alleges it will suffer, this factor alone is sufficient to tilt any equitable balancing under *Romero-Barcelo* in favor of an outcome that supports the defendants.

CONCLUSION

For the foregoing reasons, Keystone respectfully requests that this Court grant Keystone's request for summary judgment as to all claims asserted by NRDC in this suit and deny NRDC's request for summary judgment.

Dated: December 22, 2008

Respectfully submitted,

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