Volume 24 | Issue 1 Article 5

2013

The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?

Megan O'Rourke

Follow this and additional works at: https://digitalcommons.law.villanova.edu/elj

 Part of the Environmental Law Commons

Recommended Citation

Megan O'Rourke, *The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 Vill. Envtl. L.J. 149 (2013).
Available at: https://digitalcommons.law.villanova.edu/elj/vol24/iss1/5

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

THE KEYSTONE XL PIPELINE: CHARTING THE COURSE TO ENERGY SECURITY OR ENVIRONMENTAL JEOPARDY?

I. INTRODUCTION

In 2011, the United States consumed 6.87 billion barrels of crude oil, roughly 18.83 million barrels per day.[1] In both 2010 and 2011, the United States accounted for approximately 22% of the world's crude oil consumption.[2] Domestic oil production cannot meet the country's ever-rising demand; thus, the United States relies upon imported oil.[3] Canada is the primary supplier of imported oil to the United States, and amidst geopolitical unrest and political controversy, Canada is now the most consistent and attractive source of oil.[4] In 2010, Canada produced 1.5 million barrels of crude oil per day from tar sands.[5] The Canadian government and oil industry project Canadian oil production will increase to 2.2 million barrels per day by 2015 and 3.7 million barrels per day by 2025.[6] The United States' demand for oil and its often contentious relationships with other oil exporters makes increased utilization of Canadian oil a desirable proposition, but success is dependent upon the construction of the Keystone XL Pipeline.[7]

1. *Frequently Asked Questions: How much oil does the United States consume per year?*, U.S. ENERGY INFO. ADMIN., http://205.254.135.7/tools/faqs/faq.cfm?id=33&t=6 (last visited Nov. 2, 2012) (noting U.S. oil consumption rates).

2. *Id.* (quantifying U.S. oil consumption vis-à-vis world oil consumption).

3. *See Frequently Asked Questions: How dependent Is the United States on foreign oil?*, U.S. ENERGY INFO. ADMIN., http://205.254.135.7/tools/faqs/faq.cfm?id=32&t=6 (last visited Nov. 2, 2012) (discussing U.S. reliance on foreign oil).

4. *See How dependent are we on foreign oil?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energy_in_brief/foreign_oil_dependence.cfm (last visited Nov. 2, 2012) (noting majority of U.S. oil imports come from Canada).

5. *See 2010-2025 Canadian Crude Oil Forecast and Market Outlook*, CANADIAN ASS'N OF PETROLEUM PRODUCERS (June 9, 2010), http://www.capp.ca/aboutUs/mediaCentre/NewsReleases/Pages/2010-Oil-Forecast.aspx#X0ikpQ03osWt (noting Canadian oil sands produced 1.5 million barrels per day in 2010).

6. *See* John M. Broder & Clifford Krauss, *U.S. Offers Key Support to Canadian Pipeline*, N.Y. TIMES, Aug. 26, 2011, at B1, *available at* http://www.nytimes.com/2011/08/27/business/energy-environment/us-state-department-to-allow-canadian-pipeline.html?pagewanted=all (projecting Canadian tar sand oil production for 2015 and 2025); *see also Crude Oil Forecast, Markets & Pipelines*, CANADIAN ASS'N OF PETROLEUM PRODUCERS, 3 (June 2011), http://www.capp.ca/forecast/Documents/190838-2011-2025_CAPP_Crude_Oil_Forecast__Markets_Pipeline_Report.pdf (projecting Canadian tar sands' future oil production).

7. *See generally EnSys Keystone XL Assessment – Final Report*, ENSYS ENERGY, 6-7 (Dec. 23, 2010), http://keystonepipeline-xl.state.gov/documents/organization/182421.pdf (discussing Canadian oil production and U.S. demand for friendly oil imports).

Published by Villanova University Charles Widger School of Law Digital Repository, 2013

The Keystone Pipeline is a mega-transport for oil developed from tar sands in Alberta, Canada.[8] Construction on the pipeline began in 2008 and has occurred in phases.[9] Phase three, referred to as the Keystone XL Pipeline ("Keystone XL" or "Pipeline"), will extend from Hardisty, in Alberta, to the United States, passing through Montana, South Dakota, Nebraska, Oklahoma, and Texas.[10] Keystone XL has been the point of significant controversy.[11] Despite Keystone XL's projected oil production, as well as its potential for job creation, the debate over Keystone XL has become heated and Keystone XL's future is in doubt.[12]

Part of the debate over Keystone XL is the question of whether the United States should expand its dependence on oil.[13] In addition, the pipeline's construction raises numerous environmental concerns, including oil spills, water contamination, potential damage to migratory birds and wildlife ecosystems, and increased greenhouse gas emissions.[14] There is also concern about how effectively current eminent domain laws and federal and state regulations will manage the pipeline's construction.[15]

---

8. *See Keystone XL Pipeline Project*, TRANSCANADA, http://www.transcanada.com/keystone.html (last updated July 26, 2012) (noting Keystone pipeline links Canadian oil to U.S. markets).

9. *See Tar Sands Litigation: Keystone Pipeline*, SIERRA CLUB, http://www.sierraclub.org/environmentallaw/tarsands/ (last visited Nov. 2, 2012) [hereinafter *Tar Sands Litigation*] (discussing Keystone Pipeline construction plan).

10. *See Tar Sands Litigation*, *supra* note 9 (describing Keystone XL pipeline route).

11. *See* Courtney Cherry, *The Keystone Pipeline: Environmentally Just?*, 6 ENVT'L & ENERGY L. & POL'Y J. 125, 126 (Spring 2011) (emphasizing controversy surrounding pipeline's Keystone XL phase).

12. *See generally* John M. Broder & Dan Frosch, *Politics Stamps Out Oil Pipeline, Yet It Seems Likely to Endure*, N.Y. TIMES, Dec. 23, 2011, at A12, *available at* http://www.nytimes.com/2011/12/24/us/provision-may-halt-keystone-pipeline-but-oil-is-still-likely-to-flow.html?_r=1&hp (discussing Keystone XL Pipeline debate and future construction possibilities). *See also* Brianna Lee, *Five Things You Need to Know About . . . The Keystone XL Pipeline*, PBS (Nov. 7, 2011), http://www.pbs.org/wnet/need-to-know/five-things/the-keystone-xl-pipeline/12200/ (noting pipeline's potential to create jobs).

13. *See* Frances Beinecke & Amy Myers Jaffe, *Should Washington Block the Keystone Pipeline*, WALL STREET JOURNAL (Oct. 5, 2012), http://online.wsj.com/article/SB10000872396390443995604578001901362643448.html?mod=googlenews_wsj (condemning Keystone pipeline for increasing U.S. oil dependence).

14. *See id.* (listing threats to environment posed by Keystone XL Pipeline). Environmental threats posed by the pipeline include oil spills, water contamination, and accelerated greenhouse gas emissions, among others. *Id.*

15. For a discussion of concerns over federal and state pipeline regulations see *infra* notes 200-254 and accompanying text; *see also infra* notes 137-199 and accompanying text (discussing eminent domain laws and their effect on landowners).

This Comment highlights the issues surrounding the construction and operation of the Keystone XL Pipeline, and poses potential solutions to ensure the safest route is pursued. The demand for and the benefits of the Keystone XL Pipeline are irrefutable, but these benefits will come at a high cost if the worst environmental consequences from its construction are realized.[16] Part II explains the proposed construction and course of the pipeline, as well as the current status of the third phase.[17] Part III addresses the potential environmental consequences of constructing and maintaining the Keystone XL Pipeline.[18] Part IV explores proposed alternative routes to the pipeline and evaluates their merits and weaknesses.[19] Part V discusses the eminent domain issues surrounding the pipeline and possible reforms that would provide greater protection to individual landowners.[20] Part VI focuses on the need for more regulation at both the state and federal level, specifically the need for the Pipeline and Hazardous Materials Safety Administration to better supervise the project.[21] Finally, Part VII concludes with a prediction about the future of the Keystone XL Pipeline's construction and operation within the United States.[22]

II. BACKGROUND

The Keystone Pipeline is a thirteen billion dollar project that will connect tar sand reserves in Alberta, Canada to large refineries within the United States via a crude oil pipeline thirty-six inches in diameter.[23] TransCanada, the Canadian energy company responsi-

16. *See generally* Steve Hargreaves, *Keystone oil sands pipeline construction in doubt*, CNN MONEY (Nov. 8, 2011, 5:04 PM), http://money.cnn.com/2011/11/07/news/economy/keystone_pipeline/index.htm?iidHP_River (detailing Keystone XL Pipeline's jobs creation and oil import benefits). The article notes that projections have found the pipeline will create twenty thousand construction jobs, generate as much as five billion dollars in tax revenue and produce an additional seven hundred thousand barrels of oil a day. *Id.*

17. For a description of the pipeline's construction and route, as well as the status of phase three, see *infra* notes 23-59 and accompanying text.

18. *See infra* notes 60-114 and accompanying text (explaining possible environmental consequences of Keystone XL pipeline's construction and operation).

19. For an analysis of alternative routes for the pipeline, see *infra* notes 115-136 and accompanying text.

20. For a discussion regarding eminent domain's role in Keystone XL Pipeline's construction, see *infra* notes 137-199 and accompanying text.

21. For an analysis of the need for greater state and federal regulation of the Keystone XL Pipeline, see *infra* notes 200-254 and accompanying text.

22. For a discussion of the Keystone XL Pipeline's future, see *infra* notes 255-287 and accompanying text.

23. *See* Cherry, *supra* note 11 at 125 (describing Keystone Pipeline project's costs, length, and application process).

ble for constructing the nearly two thousand mile long pipeline, planned to complete the pipeline in three phases.[24] Phase one converted natural gas pipelines to oil pipelines and brought crude oil from Canada to market hubs throughout the United States' Midwest.[25] The pipeline's second phase is currently under construction and is an extension of phase one; it picks up in Steel City, Nebraska, and continues to Cushing, Oklahoma, a center for oil refining.[26] Keystone XL, the third and most contested phase, would extend from Hardisty, in Alberta, through Montana, South Dakota, Nebraska, and Oklahoma.[27] The third phase would incorporate a portion of the pipeline's second phase and would end at delivery points in Port Arthur and Houston, Texas.[28]

A. The Path to Pipeline Approval

In 2008, TransCanada began constructing the Keystone Pipeline after the United States issued a Presidential Permit authorizing the construction, maintenance, and operation of the pipeline along the border of the United States and Canada.[29] In 2009, following the construction of phase one, TransCanada began to petition for

---

24. *See* Paula Peterson, *Surprises Rolling Down Keystone Pipeline*, ALTUS TIMES, Mar. 4, 2012, at 1, *available at* http://altustimes.com/bookmark/17742350 (outlining Keystone Pipeline project phases).

25. *See id.* (describing construction and route of Keystone Pipeline phase I). Phase I of the Keystone Pipeline began operating in 2010. *Id.* The first phase converted a natural gas pipeline to a crude oil pipeline, running from Canada through the Midwest. *Id.*

26. *See id.* (explaining progress and course of Keystone Pipeline phase II). Phase II of the pipeline began operating in February 2011 and extends from Nebraska to Oklahoma. *Id.*

27. *See id.* (explaining Keystone XL's proposed course); *see also Keystone XL Pipeline*, NAT'L WILDLIFE FED'N, http://www.nwf.org/Global-Warming/Policy-Solutions/Drilling-and-Mining/Tar-Sands/Keystone-XL-Pipeline.aspx (last visited Nov. 2, 2012) (noting six states Keystone XL will pass through).

28. *See* Cherry, *supra* note 11 at 125 (describing Keystone XL's projected route). TransCanada's proposed Keystone XL pipeline is a crude oil pipeline 36 inches in diameter, 1,661 miles long, and will extend from Hardisty, Alberta to Montana, South Dakota and Nebraska. *Id.* It would incorporate a portion of Phase II in Nebraska and Kansas, and continue through Oklahoma to delivery points in Texas. *Id.*

29. Press Release, TRANSCANADA, *Keystone Oil Pipeline receives Presidential Permit - Construction to begin in second quarter of 2008* (Mar. 14, 2008), http://www.transcanada.com/3036.html (noting commencement of construction on Keystone Pipeline phase one). TransCanada received a Presidential Permit following the Department of State's Record of Decision and National Interest Determination, which found that approving the permit would be in the national interest. *Id.* In 2007, Keystone received National Energy Board approval for regulatory applications to construct the pipeline's Canadian portion. *Id.*

an extension to construct the Keystone XL Pipeline.[30] Because the pipeline crosses the border between the United States and Canada, the State Department must grant TransCanada a permit to build.[31] Without State Department approval, TransCanada cannot build the Keystone XL Pipeline.[32] While State Department approval was pending, TransCanada secured land in Canada and the United States to build the pipeline.[33]

Canada's National Energy Board quickly approved the Keystone XL extension in 2010, but TransCanada has faced protracted difficulty securing approval for the project in the United States.[34] In addition to protests and the environmental community's mobilization against the pipeline, formal studies of the pipeline's environmental impact have been critical.[35] In early June 2010, the House Energy and Commerce Committee urged Secretary of State Hillary

30. *See* Art Hovey, *TransCanada Proposes Second Oil Pipeline*, DOWNSTREAMTODAY (June 12, 2008), http://www.downstreamtoday.com/news/article.aspx?a_id=11336&AspxAutoDetectCookieSupport=1 (describing TransCanada's initial proposal to build second pipeline).

31. *See TransCanada Pipeline Background and Resources*, BOLD NEB. (May 26, 2011), http://boldnebraska.org/pipeline-background-resources [hereinafter *TransCanada Pipeline Background*] (explaining why State Department approval is needed to build Keystone Pipeline); *see also* Exec. Order No. 13,337, 69 FED. REG. 25299 (Apr. 30, 2004) (requiring liquid pipelines crossing international borders to obtain State Department Presidential Permit).

32. *See* Broder & Frosch, *supra* note 12 (discussing Keystone XL Pipeline's future as hinging on State Department approval).

33. *See* Leslie Kaufman & Dan Frosch, *Eminent Domain Fight Has a Canadian Twist*, N.Y. TIMES, Oct. 17, 2011, at A13, *available at* http://www.nytimes.com/2011/10/18/us/transcanada-in-eminent-domain-fight-over-pipeline.html?page wanted=all (detailing TransCanada's efforts to secure land along Keystone XL Pipeline's proposed route before State Department authorized project). TransCanada has attempted to utilize the doctrine of eminent domain to gain easements on the pipeline's proposed route. *Id.* Currently, TransCanada has eminent domain actions pending against landowners in Texas, South Dakota, Oklahoma, and Nebraska. *Id.* Landowners, however, are challenging TransCanada's acquisitions of land through eminent domain, especially seeing as TransCanada has yet to receive State Department approval for the project. *Id.* Landowners argue that because "TransCanada had not sought federal approval to invoke eminent domain . . . the department ha[s] no authority on the issue and that it [i]s up to state law and the courts to determine appropriate use of eminent domain laws." *Id.*

34. *See NEB Okays Keystone XL*, DOWNSTREAM TODAY (Mar. 11, 2010), http://www.downstreamtoday.com/news/article.aspx?a_id=21604 (describing Canada's National Energy Board's authorization of Keystone XL Pipeline).

35. For a discussion of the environmental consequences of the Keystone XL Pipeline, see *infra* note 60-114 and accompanying text; *see also infra* notes 35-38 and accompanying text (discussing EPA and House Energy and Commerce Committee's criticism of Keystone XL Pipeline and State Department's environmental impact review).

Clinton to block Keystone XL.[36] Shortly thereafter, the Environmental Protection Agency, (EPA) criticized a State Department impact report on the pipeline as "unduly narrow and failing to look at oil spill response plans, safety issues and greenhouse gas concerns."[37] The State Department released an additional environmental impact report in August 2011; again, it found the pipeline's construction would not significantly impact environmental resources.[38]

Despite the State Department's repeated assurances, President Obama responded to the rising protests and postponed the decision on the Keystone XL Pipeline until 2013.[39] The State Department explained the postponement would provide the opportunity to explore alternative routes.[40] The goal of exploring other routes

36. *See* Susan Casey Lefkowitz, *House Members say proposed tar sands pipeline will undermine clean energy future*, SWITCHBOARD NATURAL RES. DEF. COUNCIL STAFF BLOG (June 23, 2010), http://switchboard.nrdc.org/blogs/sclefkowitz/house_members_say_proposed_tar_1.html (describing House Energy and Commerce Committee letter to State Department opposing pipeline approval); *see also* Letter from House Energy and Commerce Comm. to Hillary Clinton, Sec'y of State, United States Dep't of State (June 23, 2010), *available at* http://switchboard.nrdc.org/blogs/sclefkowitz/June%2023%20House%20Letter%20FINAL.pdf (requesting State Department postpone pipeline approval and continue studying pipeline's environmental impact).

37. *See* David Golstein, *Oil pipeline from Canada stirring anger in U.S. Great Plains*, MCCLATCHY (Feb. 13, 2011), http://www.mcclatchydc.com/2011/02/13/108558/canada-pipeline-deal-too-costly.html (discussing EPA's critique that State Department draft impact statement was "inadequate and should be revised"); *see also* Edward Welsch, *EPA Calls for Further Study of Keystone XL*, DOWNSTREAMTODAY (July 21, 2010), http://www.downstreamtoday.com/news/article.aspx?a_id=23434 (describing EPA letter recommending another environmental impact review of Keystone XL Pipeline); *see also* Letter from Cynthia Giles, Assistant Adm'r for the Office of Enforcement and Compliance Ins., United States Envtl. Prot. Agency, to Dr. Kerri-Ann Jones, Assistant Sec'y of Oceans and Int'l Envtl. and Scientific Affairs, United States Dep't of State, and Jose W. Fernandez, Assistant Sec'y of Econ., Energy and Bus. Affairs, United States Dep't of State, 1-2, *available at* http://www.bilateralist.com/wp-content/uploads/2011/06/keystone-xl-project-epa-comment-letter-20110125.pdf (describing Keystone Pipeline issues and need for additional environmental impact review).

38. *See* Tennille Tracy & Edward Welsch, *Keystone Poses 'No Significant Impacts' to Most Resources Along Path – US*, DOWNSTREAMTODAY (Aug. 26, 2011), http://downstreamtoday.com/news/article.aspx?a_id=27703 (discussing State Department's August 2011 environmental impact review findings that pipeline presented "'no significant impacts'" to most resources along pipeline's route).

39. *See* David Lerman & Jim Efstathiou Jr., *Obama Administration Delays Keystone Pipeline Decision to After Election*, BLOOMBERG NEWS (Nov. 10, 2011, 5:30 PM), http://www.bloomberg.com/news/2011-11-10/obama-administration-postpones-keystone-xl-pipeline-decision.html (describing State Department decision to delay Keystone XL Pipeline's approval until 2013, after alternative routes are fully investigated).

40. *See id.* (describing State Department's reasoning that delay allows full exploration of alternative routes).

is to find a path for the pipeline that will not compromise environmentally sensitive regions.[41]

Following this postponement, Congress approved a tax cut and unemployment insurance extension which contained a provision requiring the president make a final decision on the pipeline within sixty days.[42] In response, the State Department indicated it was unable to complete the environmental review of alternative routes within that timeframe, thus preventing a recommendation for pipeline approval.[43] On January 18, 2012, following State Department advice, President Obama rejected the Keystone XL Pipeline proposal.[44] In his rejection, President Obama cited the State Department's inability to adequately complete an environmental review within Congress' sixty-day timeframe.[45]

The president's decision does not, however, foreclose the Keystone XL Pipeline.[46] In fact, when announcing his denial of pipeline approval, President Obama restated his support for the Keystone XL Pipeline, albeit in an alternative form and at a later date.[47] Similarly, TransCanada announced its commitment to reapplying for a permit and building the Keystone XL Pipeline in one

41. *See id.* (explaining State Department's view that extra time allows research into alternative routes that would not disturb Sand Hills or Ogallala aquifer).

42. *See* Tom Cohen, *Keystone pipeline a tough decision for Obama*, CNN (Dec. 14, 2011), http://edition.cnn.com/2011/12/13/politics/congress-pipeline-politics/index.html (describing how Congress included pipeline approval provision within payroll tax cut bill); *see also* H.R. Res. 3537, 112th Cong. (2011) (enacted) (requiring President, through Secretary of State, to address Keystone XL pipeline approval); *see also* S. Res. 1932, 112th Cong. (2011) (enacted) (requiring Secretary of State to act on permit for Keystone XL pipeline).

43. *See* Cohen, *supra* note 42 (discussing State Department's assertion that environmental impact reviews of alternative routes could not be completed within Congressional sixty day time frame).

44. *See* Aamer Madhani & Susan Davis, *Obama rejects Keystone pipeline from Canada to Texas*, USA TODAY, http://www.usatoday.com/news/washington/story/2012-01-18/obama-rejects-keystone-pipeline/52655762/1 (last updated Jan. 18, 2012) (describing President Obama's decision to reject TransCanada's request for Keystone pipeline approval).

45. *See id.* (quoting President Obama's assurance he will not approve Keystone pipeline absent adequate vetting).

46. *See* John M. Broder & Dan Frosch, *Rejecting Pipeline Proposal, Obama Blames Congress*, N.Y. TIMES, Jan. 18, 2012, at A13, *available at* http://www.nytimes.com/2012/01/19/us/state-dept-to-put-oil-pipeline-on-hold.html?_r=1&ref=keystone pipeline (arguing President Obama's rejection of pipeline approval does not foreclose pipeline's future construction).

47. *See id.* (citing President Obama's statements that alternative Keystone XL pipeline routes may eventually be approved). President Obama expressed his anger with Republicans for hastening the decision and indicated that "he would work with the oil industry to increase domestic production and perhaps build additional pipelines within the United States." *Id.*

form or another.[48] In response to pushback over the pipeline's route and its environmental consequences, TransCanada stated that if an American route is foreclosed, they will reroute the pipeline to connect with Asian markets.[49] Additionally, Republican presidential candidates voiced their support for the Keystone XL Pipeline in its proposed form, and their intention to approve the pipeline if elected.[50] Currently, TransCanada is attempting to push ahead with the sections of the pipeline that do not cross the border, from Cushing, Oklahoma to Port Arthur, Texas.[51]

B. States Drain Pipeline Project Momentum

Most states along Keystone XL's proposed route welcomed the pipeline's construction because of the potential for job creation -

48. *See id.* (describing TransCanada's stated commitment to building Keystone XL pipeline and obtaining necessary permits). In a statement responding to the rejection of pipeline approval, a TransCanada spokesperson remarked:

> While we are disappointed, TransCanada remains fully committed to the construction of Keystone XL, . . . [p]lans are already under way on a number of fronts to largely maintain the construction schedule of the project. We will reapply for a presidential permit and expect a new application would be processed in an expedited manner to allow for an in-service date of late 2014.

Id.

49. *See* Edward Welsch, *TransCanada: Oil Sands Exports Will Go To Asia If Blocked In US*, DOWNSTREAMTODAY (June 30, 2010), http://www.downstreamtoday.com/news/article.aspx?a_id=23197 (summarizing TransCanada's plan to route pipeline to Asian markets if U.S. route falters). TransCanada executives reported that "the fate of the Keystone expansion will have 'no impact on oil sands production,' because if the U.S. blocks the flow of more oil sands south, it will just go overseas through one of the pipelines proposed to bring oil to China and other Asian markets." *Id.*

50. *See* Broder & Frosch, *supra* note 46 (describing Republican presidential candidates' criticism of President Obama's rejection of pipeline approval). Republican presidential candidate Mitt Romney criticized the decision, stating:

> President Obama's decision to reject the Keystone XL crude oil pipeline is as shocking as it is revealing, . . . If Americans want to understand why unemployment in the United States has been stuck above 8[%] for the longest stretch since the Great Depression, decisions like this one are the place to begin.

Id. Similarly, Rick Santorum challenged the idea that the pipeline posed environmental dangers, saying, "This is just, again, pandering to radical environmentalists who don't want energy production, who don't want us to burn more carbon . . . ." *Id.*

51. *See* Juliet Eilperin & Steven Mufson, *TransCanada to push ahead with part of Keystone pipeline*, WASH. POST, Feb. 27, 2012, at A03, *available at* http://www.washingtonpost.com/national/health-science/canadian-firm-to-push-ahead-with-part-of-keystone-pipeline/2012/02/27/gIQAvJFtdR_story.html (noting TransCanada's intention to commence building pipeline segment that does not require transnational border crossing approvals).

with the notable exception of Nebraska.[52] Nebraskans mobilized in opposition to the pipeline because of its impact on the state's land and waters, but also for its potentially adverse economic consequences.[53] Due largely to pressure from Nebraska, the State Department delayed approving the pipeline in order to research alternative routes that would not cross Nebraska's Sand Hills region or Ogallala aquifer.[54]

Although the project ultimately requires federal approval from the State Department, TransCanada is working with Nebraska's state government to explore alternative routes, and Nebraska secured funding for a state environmental study of other routes.[55] Nebraska's citizens argue the state should have a role in crafting routing regulations, and that Nebraska should enact emergency response plans and more protective eminent domain laws.[56] Landowners in Nebraska and other pipeline states have even gone to court to challenge TransCanada's efforts to acquire land through eminent domain.[57] Only time will tell if Nebraska and private landowners will be able to continue leveraging their influence to shape

52. *See* Alissa Skelton, *Protests against major oil pipeline test Obama's campaign promises*, USA TODAY (Nov. 9, 2011), http://www.usatodayeducate.com/staging/index.php/ccp/protests-against-major-oil-pipeline-test-obamas-campaign-promises (discussing Nebraska's opposition to Keystone XL Pipeline). Nebraska's governor opened a special legislative session to propose bills that could prevent the pipeline from being routed through Nebraska. *Id.* If the bills are successful, Nebraska would have a say over the pipeline's construction. *Id.* President Obama recognized Nebraskan's concerns, stating:

> Folks in Nebraska like all across the country aren't going to say to themselves, 'We'll take a few thousand jobs if it means our kids are potentially drinking water that would damage their health . . . we don't want, for example, aquifers to be adversely affected. Folks in Nebraska obviously would be directly impacted.

Id.

53. *See TransCanada Pipeline Background*, *supra* note 31 (noting Nebraska's concerns over Keystone XL Pipeline).

54. *See* Lerman & Efstathiou, *supra* note 39 (describing how Nebraska's objections delayed final decision on pipeline approval).

55. *See id.* (describing TransCanada's efforts to work with Nebraskans exploring alternative pipeline routes); *see also Nebraska legislates on Keystone XL*, UPI (Nov. 23, 2011), http://www.upi.com/Business_News/Energy-Resources/2011/11/23/Nebraska-legislates-on-Keystone-XL/UPI-57591322054664/ (describing Nebraska legislation providing funding for state environmental impact review of proposed routes). The two bills passed in Nebraska require "the state's Public Service Commission authority to review potential oil pipeline projects using input from the public." *Id.* The bills also require Nebraska to fund a supplemental environmental impact statement. *Id.*

56. *See TransCanada Pipeline Background*, *supra* note 31 (noting Nebraskans' concerns and requirements for beginning pipeline construction).

57. *See* Kaufman & Frosch, *supra* note 33 (describing landowners' challenges to TransCanada's use of eminent domain).

the pipeline's route.[58] Further, it is unclear what effect the rejection of pipeline approval will have on other states' efforts to lobby for their particular interests.[59]

III. ENVIRONMENTAL CONSEQUENCES

Keystone XL critics focus on its adverse environmental consequences, most of which stem from the corrosive nature of tar sands oil.[60] Tar sands oil, or diluted bitumen, is "a raw and thick form of heavy crude that is significantly more acidic and corrosive than standard oil."[61] Environmental activists are primarily concerned with the possibility of oil spills; they argue there is an increased likelihood of oil spills and leaks because of the "corrosive, acidic and . . . unstable blend" of tar sands oil.[62] Adding to the fear of spills and leaks is the potential for such events to contaminate local water supplies.[63] Water contamination fears are particularly potent because TransCanada routed the Keystone XL Pipeline through the Ogallala aquifer in Nebraska, which supplies drinking and farm water for the entire Midwest.[64]

Aside from the volatile nature of tar sands oil itself, the construction and operation of Keystone XL received criticism for its impact on wildlife ecosystems, migratory birds, and local communities.[65] Many researchers argued there was insufficient investigation

58. *See* Madeline Ostrander, *Transpartisan Politics on the Plains*, THE NATION (Jan. 31, 2011), http://www.thenation.com/article/165975/transpartisan-politics-plains (noting Nebraska must continue leveraging its influence to further impact pipeline's course); Kaufman & Frosch, *supra* note 33 (noting challenges to TransCanada's use of eminent domain are pending in courts).

59. *See* Kaufman & Frosch, *supra* note 33 (noting landowners across pipeline states are challenging Keystone XL).

60. *See* Lee, *supra* note 12 (highlighting concerns over tar sands oil's environmental impact).

61. Elizabeth McGowan, *Keystone XL Pipeline Safety Standards Not as Rigorous as They Seem*, INSIDECLIMATE NEWS (Sept. 19, 2011), http://insideclimatenews.org/news/20110919/keystone-xl-pipeline-safety-regulations-phmsa-transcanada-oil-sands-bitumen (discussing tar sands oil); *see also About Tar Sands*, 2012 OIL SHALE & TAR SANDS PROGRAMMATIC EIS INFORMATION CENTER, http://ostseis.anl.gov/guide/tarsands/index.cfm (last visited Nov. 2, 2012) (explaining tar sands components and extraction process). Tar sands are a combination of clay, sand, water, and a black viscous oil called bitumen. *Id.* Tar sands can be mined to extract the bitumen, which is refined into oil. *Id.* The bitumen cannot be pumped from the ground; instead tar sand deposits are mined. *Id.*

62. *See* Lee, *supra* note 12 (explaining tar sands oil's corrosive nature may cause increased pipeline leaks).

63. *See id.* (describing fear that oil will contaminate water supply).

64. *See id.* (portraying Keystone XL Pipeline's route through Ogallala aquifer).

65. *See generally* Anthony Swift et. al., *Tar Sands Pipeline Safety Risks*, NATURAL RES. DEF. COUNCIL, 10 (Feb. 2011), *available at* http://www.nrdc.org/energy/files/

into the effects on animals, wildlife, and people from exposure to contaminants used in chemical plants along the pipeline's route.[66] Finally, the extraction of tar sands oil produces an inordinately high level of carbon emissions.[67] This led some commentators to refer to the Keystone XL Pipeline's possible authorization as "game over" for the global climate.[68]

A. Oil Spills

The raw form of Canada's tar sands oil carries diluted bitumen (dilbit), a "highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas liquid condensate."[69] The variable nature of tar sands oil caused some to argue that there is an increased chance of oil spills and leaks due to the potentially rapid wearing away of the pipes.[70] There is a lack of independent scientific research on the potential for accidents transporting tar sands oil or on how to clean up a tar sands oil spill.[71] The sheer length of the pipeline, over two thousand miles, also may increase the potential for oil spills and leaks.[72]

TransCanada maintains, however, that tar sands oil is similar to oil imported through comparable pipelines.[73] The Canadian corporation reassured lawmakers and citizens that it will implement

tarsandssafetyrisks.pdf (cataloguing Keystone XL pipeline's risks to migratory birds and wildlife ecosystems).

66. *See* Cherry, *supra* note 11, at 130 (speculating oil refining and transport facilities along pipeline route could contribute to residents' exposure to chemical contaminants).

67. *See Canada's Tar Sands*, INT'L BOREAL CONSERVATION CAMPAIGN, http://www.calproject.org/factsheet-ibcc-tarsands.pdf (last visited Nov. 2, 2012) (explaining tar sands oil extraction produces high levels of carbon emissions).

68. *See* Elizabeth McGowan, *NASA's Hansen Explains Decision to Join Keystone Pipeline Protests*, INSIDECLIMATE NEWS (Aug. 29, 2011), http://insideclimatenews.org/news/20110826/james-hansen-nasa-climate-change-scientist-keystone-xl-oil-sands-pipeline-protests-mckibben-white-house (quoting NASA climatologist James Hansen regarding tar sands oil's impact on climate change); *see also* Lee, *supra* note 12 (discussing environmental activists' contention that tar sands oil extraction releases large amounts of greenhouse gases).

69. *See* Lee, *supra* note 12 (describing corrosive and volatile nature of tar sands oil).

70. *See id.* (explaining tar sands oil acidity increases likelihood pipes will degrade and spill oil).

71. *See id.* (noting lacking research on tar sands oil contributes to debate about its safety).

72. *See* Erik Hoffner, *How far are we willing to go for Canada's 'tar sands' oil?*, PBS (Mar. 1, 2011), http://www.pbs.org/wnet/need-to-know/environment/how-far-are-we-willing-to-go-for-canadas-tar-sands-oil/7676/ (noting increasing pipeline length increases potential for oil spills and leaks).

73. *See Keystone Pipeline Project - Pipeline Safety*, TRANSCANADA, http://www.transcanada.com/pipeline_safety.html (last updated Feb. 27, 2012) [hereinafter *Pipeline*

the newest technology and use the strongest steel to build Keystone XL, thus minimizing the risk of oil spills.[74] Despite both TransCanada's and the State Department's findings that pipelines are the safest way to transport oil, and the availability of mechanisms to minimize the pipeline's environmental risks, concerns predominate.[75] Environmental activists argue the absence of research on the importation of tar sands oil, especially across such a great distance, increases the project's risks.[76] They also point to twelve spills that occurred along the completed portions of the pipeline as evidence of the potential for more spills.[77]

B. Water Contamination

The potential for water contamination makes Keystone XL an issue even for those living far from the actual pipeline.[78] Although state leaders largely support the pipeline because of its potential for job creation, Nebraska remains at the forefront of a discussion about possible water contamination.[79] If completed as planned, the pipeline would cross the Nebraska Sand Hills region and the Ogallala aquifer.[80] The area has a shallow water table and porous sand, making it particularly susceptible to water contamination.[81] Approximately 1.5 million people and nearly 20% of the nation's irri-

---

Safety] (explaining TransCanada's contention that transporting tar sands oil is no more dangerous than transporting standard oil).

74. *See id.* (noting TransCanada's use of newest technology and strongest steel to construct safest pipeline possible).

75. For a discussion of the concerns that prevail despite the State Department's environmental impact study, see *infra* notes 35-39 and accompanying text.

76. See Hoffner, *supra* note 72 and accompanying text (explaining absence of research on tar sands oil has raised fears regarding potential pipeline spills).

77. *See* Lee, *supra* note 12 (explaining longer pipelines likely increase oil spill risk); *see also* Hoffner, *supra* note 72 (discussing likelihood that length of pipeline increases potential for oil spills and leaks).

78. *See* Lee, *supra* note 12 (discussing potential water contamination due to oil spills along pipeline's route).

79. *See* Skelton, *supra* note 52 (discussing Nebraskans' concern Keystone XL pipeline will contaminate water supply).

80. *See* Lee, *supra* note 12 (describing contested section of Keystone XL Pipeline crossing Ogallala aquifer); *see also* Mason Inman, *Will Tar Sands Pipeline Threaten Groundwater?*, NAT'L GEOGRAPHIC (Sept. 19, 2011), http://news.nationalgeographic.com/news/2011/09/110919-keystone-xl-tar-sands-pipeline-groundwater/ (explaining Nebraska's Sand Hills region is particularly vulnerable to water contamination).

81. *See* Lee, *supra* note 12 (explaining features of Ogallala aquifer and Sand Hills region making them particularly susceptible to water contamination from oil spills); *see also* Inman, *supra* note 80 and accompanying text (describing how porous sand in aquifer and Sand Hills region would allow oil to soak through).

gated farmland draw water from the Ogallala aquifer; any contamination to the aquifer could devastate the American West.[82]

TransCanada argues importing oil by pipeline is the safest option available, and if a spill occurred it would be limited to a small area.[83] And although the pipeline will likely be built in a trench to protect it from the elements, this design prevents the early detection of oil spills.[84] As evidence of the adverse consequences of an oil spill, environmentalists point to recent dilbit oil spills in Michigan's Kalamazoo River that closed the waterway to fishing and swimming for more than six months.[85] In fact, fishermen have even caught deformed fish in waters near tar sands oil mines.[86] Research of waters near and downstream from tar sands mines found higher than normal levels of toxic compounds known to cause cancer or developmental problems, including heavy metals such as mercury and thallium, as well as polycyclic aromatic hydrocarbons.[87] Partially as a result of such studies, water contamination moved to the center of the Keystone XL Pipeline discussion, with legislative action currently focused on alternative routes that would protect the Sand Hills region and Ogallala aquifer.[88]

C. Potential Damage to Migratory Birds and Wildlife Ecosystems

In addition to the Sand Hills region and Ogallala aquifer, Keystone XL Pipeline also runs through a series of animal habitats and nesting sites across several states.[89] The pipeline's current route cuts across the Deep Fork Wildlife Area in Oklahoma, a haven for bobwhite quail, turkeys, bobcats, and bald eagles.[90] In Kansas, the

82. *See* Lee, *supra* note 12 (noting Ogallala aquifer contamination would affect millions).

83. *See Pipeline Safety*, *supra* note 73 (explaining TransCanada's assertion that pipelines are safest oil transportation method and that potential oil spills can be easily contained).

84. *See* Inman, *supra* note 80 (discussing pros and cons of pipeline entrenchment).

85. *See id.* (documenting dilbit oil spill that closed Michigan's Kalamazoo River for six months).

86. *See id.* (discussing Canadian research finding fish deformities near oil mines).

87. *See id.* (describing research linking fish deformities in Western Canada's Athabasca River Basin to tar sands oil mining).

88. *See* Lerman & Efstathiou, *supra* note 39 and accompanying text (describing State Department decision to delay Keystone XL Pipeline approval until 2013, after alternative routes are fully investigated).

89. *See generally* Swift, *supra* note 65 (cataloguing Keystone XL Pipeline's risk to migratory birds and wildlife ecosystems).

90. *See id.* (documenting risk to animals in Oklahoma's Deep Fork Wildlife Area).

pipeline cuts across native prairies and will affect the habitat of the federally endangered Topeka Shiner minnow.[91] The Sand Hills region of Nebraska, which is of vital concern because of the potential for water contamination, is also the nesting site for endangered whooping cranes.[92] Similarly, the pipeline's route in South Dakota cuts through migratory bird flyways, the prairie pothole ecosystem, shortgrass prairie regions, and the habitat of the mountain plover, an animal proposed for listing as threatened under the Endangered Species Act.[93]

TransCanada is developing a Migratory Bird Conservation Plan for the Keystone XL Pipeline to aid the protection of migratory birds.[94] TransCanada is creating this plan in coordination with the United States Fish and Wildlife Service (USFWS), and USFWS approval is required before the plan's implementation.[95] TransCanada argues "the measures in the plan will benefit migratory birds protected under the Migratory Bird Treaty Act and Executive Order 13186 that are at risk and will lose their habitat during project construction."[96] Environmentalists maintain that the project compromises wildlife ecosystems and fear it will be difficult to undo damage to natural habitats.[97]

D. Additional Greenhouse Gas Emissions

The tar sands formation in Canada is the second largest known oil deposit in the world, containing an estimated 1.75 trillion barrels of recoverable oil.[98] Extracting, refining, and transporting it, however, is energy intensive, producing 15% to 80% more carbon

91. *See id.* (describing pipeline's path through Kansas and effect on Topeka shiner minnow).

92. *See id.* (explaining Nebraska's Sand Hills region also serves as nesting site for endangered whooping cranes).

93. *See id.* (describing pipeline's course through South Dakota migratory bird flyways, prairie pothole ecosystem and short grass prairie regions).

94. *See Oil and Gas Pipelines*, U.S. FISH AND WILDLIFE SERV., ECOLOGICAL SERV., http://www.fws.gov/nebraskaes/Oil%20and%20Gas%20pipelines.html (last updated May 7, 2012) (describing TransCanada's efforts to craft migratory bird preservation plans).

95. *See id.* (describing TransCanada's cooperation with United States Fish and Wildlife Services).

96. *See id.* (explaining TransCanada's argument that Migratory Bird Preservation Plan will ultimately help migratory birds).

97. *See* Swift, *supra* note 65 (describing how Keystone XL pipeline disrupts habitats).

98. *See* Broder & Frosch, *supra* note 12 (stating amount of oil recoverable from Canada's tar sands).

emissions than average petroleum products.[99] Climatologists warn that further development of tar sands oil will produce so much carbon dioxide it will be impossible to stabilize the global climate.[100]

The environmental activists who mobilized to stop the progress of Keystone XL in October and November of 2011 focused on climate change.[101] Debate over the pipeline's effect on global climate change also focused on the public policy behind investing in an energy source that increases dependence on "dirty oil" rather than alternative energy sources.[102] By following through with the pipeline, the United States not only fails to minimize its greenhouse gas emissions, but also encourages other countries to follow suit and rely on the unconventional and emissions-intensive source of energy that is tar sands oil.[103] According to many environmental activists, this represents a step backwards in reducing fossil fuel consumption and minimizing carbon dioxide emissions.[104]

E. Local Communities Impacted

The EPA has expressed concern over the effects the operation and maintenance of Keystone XL will have on local communities such as Port Arthur, Texas, where numerous industrial facilities, chemical plants, and hazardous waste incinerators are being built to refine oil from the pipeline.[105] The EPA has been clear that it will consider issues of "environmental justice" in approving proposals related to the pipeline.[106] Environmental justice is "the fair treat-

99. *See id.* (noting tar sands oil extraction is energy intensive and releases high levels of greenhouse gases).

100. *See* McGowan, *supra* note 68 (discussing impact of tar sands oil extraction on global climate change). Prominent climatologist James Hansen asserts the Keystone XL pipeline will accelerate global climate change by increasing carbon dioxide emissions. *Id.*

101. *See* Dana Nuccitelli, *What tar sands and the Keystone XL pipeline mean for climate change*, GUARDIAN ENV'T NETWORK (Aug. 23, 2011), http://www.guardian.co.uk/environment/2011/aug/23/tar-sands-keystone-xl-climate (noting protests against Keystone XL pipeline focused on pipeline's adverse impact on climate change).

102. *See Keystone XL pipeline*, FRIENDS OF THE EARTH, http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline (last visited Nov. 2, 2012) (criticizing TransCanada's Keystone XL Pipeline project for importing "dirty oil" and deepening U.S. oil dependence).

103. *See* Swift, *supra* note 65 and accompanying text (noting U.S. leads in operating and relying on oil pipelines).

104. *See id.* (explaining Keystone XL pipeline would help U.S. reduce fossil fuel consumption and greenhouse gas emissions).

105. *See* Cherry, *supra* note 11, at 130 (describing EPA's concern that communities along pipeline's path will be exposed to contaminants).

106. *See id.* at 130-31 (describing EPA commitment to pursuing environmental justice claims).

ment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies."[107]

The EPA is particularly concerned about Port Arthur, where the Keystone XL Pipeline will end.[108] Port Arthur was one of ten locations across the United States that received grants as part of the EPA's environmental justice focus.[109] About 45% of Port Arthur's population is African-American, many of whom are living near refineries, chemical plants, and a waste incinerator.[110] Carver Terrace, located one mile from Port Arthur, is another concern; there, a large waste incinerator generates over one hundred tons of criteria air pollutants per day.[111] Carver Terrace has mostly African-American residents, and, like Port Arthur, its air quality ranks in the worst percentile for hazardous air pollutants.[112] TransCanada responded to concerns that contaminants released from the oil refining process will further damage local environments by promoting the job creation that cities such as Port Arthur will experience.[113]

107. *See Environmental Justice*, U.S. ENVTL. PROT. AGENCY (Aug. 30, 2012), http://www.epa.gov/environmentaljustice/ (defining environmental justice).

108. *See* Cherry, *supra* note 11, at 131 (explaining EPA's focus on Port Arthur).

109. *See id.* (describing EPA's environmental justice concerns about Port Arthur and its surrounding community).

110. *See id.* (describing EPA's environmental justice concerns about Carver Terrace).

111. *See id.* (describing Carver Terrace's population and findings that nearby waste incinerator emits one hundred tons of air pollutants per day); *see also What Are the Six Common Air Pollutants?*, U.S. ENVTL. PROT. AGENCY (Apr. 20, 2012), http://www.epa.gov/air/urbanair/ (explaining criteria air pollutants). The Clean Air Act requires the EPA to set National Ambient Air Quality Standards for common air pollutants. *Id.* These "criteria air pollutants" are particle pollution, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead. *Id.* EPA calls these pollutants "criteria air pollutants" because it regulates them by basing permissible emission levels on human health-based and environmentally-based criteria. *Id.*

112. *See* Cherry, *supra* note 11 at 132 (documenting health risks air pollution poses to Port Arthur and Carver Terrace residents).

113. *See Keystone Pipeline Project - Economic Benefits*, TRANSCANADA, http://www.transcanada.com/docs/Key_Projects/Keystone_Benefits_US_July_2010.pdf (last visited Nov. 2, 2012) (describing Keystone XL Pipeline's potential job creation). An independent study conducted by the Perryman Group found that the project would benefit the United States economy by $20 billion. *Id.* The study also projects that states along the pipeline route are expected to receive $5.2 billion in property taxes and that the pipeline will create more than 20,000 manufacturing and construction jobs. *Id. See also* Alain Sherter, *Keystone pipeline: How many jobs really at stake?*, CBS MONEY WATCH (Jan. 19, 2012), http://www.cbsnews.com/8301-505123_162-57361212/keystone-pipeline-how-many-jobs-really-at-stake/ (contesting TransCanada's job creation projections). Although TransCanada and the United States Chamber of Commerce estimate the pipeline will create between

Whether the pipeline is ultimately approved may depend in part on the balance of interests between environmental justice and job creation.[114]

IV. AN ALTERNATIVE ROUTE TO ENERGY SECURITY?

Due largely to pressure from Nebraska's government and citizens, a great debate is occurring over alternative routes to the pipeline's current path.[115] The creation of routes minimizing pipeline length along the Ogallala aquifer and the Sand Hills region in Nebraska is a specific concern.[116] In the last three years alone, the State Department considered and rejected fourteen alternative pipeline routes.[117]

One option, which received strong support from Nebraskans, would take the pipeline east along the Canadian border through Montana and North Dakota, and then run south through eastern South Dakota and Nebraska.[118] This route, named the Keystone Corridor Alternative because it follows phase one of the current Keystone Pipeline, gained popularity because it would largely avoid the Ogallala aquifer.[119] TransCanada and the State Department, however, rejected this proposal because it would increase the cost of the project by 25%, or 1.7 billion dollars, as well as increase the pipeline's length.[120]

200,000 and 250,000 jobs, other groups have criticized those numbers. *Id.* Most notably, the State Department estimated job creation would be 5,000 or 6,000 jobs and a Cornell University study found permanent job creation would be 500 to 1,400 at most. *Id.*

114. *See* Cherry, *supra* note 11, at 136-37 (discussing potential impact environmental justice and job creation interplay may have on pipeline approval).

115. *See* John M. Broder & Dan Frosch, *U.S. Delays Decision on Pipeline Until After Election*, N.Y. TIMES, Nov. 10, 2011, at A1, *available at* http://www.nytimes.com/2011/11/11/us/politics/administration-to-delay-pipeline-decision-past-12-election.html (explaining President Obama's decision to reject Keystone XL pipeline resulted in part from Nebraska's pressure to consider route alternatives).

116. *See id.* (citing Nebraska's efforts to have alternative routes considered to avoid Sand Hills region and Ogallala aquifer).

117. *See Proposed Alternate Keystone XL Pipeline Routes*, KLIN, http://www.klin.com/Proposed-Alternate-Keystone-XL-Pipeline-Routes/11102352 (last visited Nov. 2, 2012) [hereinafter *Alternate Routes*] (noting State Department considered and rejected fourteen alternative routes).

118. *See* Matthew Brown & James Macpherson, *Nebraska Celebrates Keystone Pipeline Delay*, HUFFINGTON POST GREEN (Nov. 11, 2011), http://www.huffingtonpost.com/2011/11/11/nebraska-keystone-pipeline-delay_n_1088161.html (describing alternative route along Canadian border and through South Dakota and Nebraska).

119. *See Alternate Routes*, *supra* note 117 (noting Keystone Corridor Alternative tracks current Keystone pipeline and avoids Ogallala aquifer).

120. *See* Brown & Macpherson, *supra* note 118 (explaining Keystone Corridor Alternative was rejected due to additional cost and length).

The State Department analyzed other suggested routes that would avoid the Ogallala aquifer.[121] Two proposals, referred to as the I-90 Corridor Alternatives, parallel Interstate 90 in South Dakota and avoid the Sand Hills region altogether, but these routes were considered cost prohibitive because their construction would increase the pipeline's cost by an additional five hundred million dollars.[122] Finally, two proposed Western Alternatives, which would have been constructed through Wyoming and Colorado, were also rejected by TransCanada for being too expensive.[123]

The process of considering alternative routes illustrates the challenge of crafting the pipeline and suggests that TransCanada must invest more time, pipeline, and money to build the safest and least environmentally disruptive pipeline.[124] Although both the I-90 Corridor Alternative and Keystone Corridor Alternative would avoid the Sand Hills region, they would cross over the Northern High Plains Aquifer system and could implicate shallow groundwater.[125] Moreover, all three alternatives pose significant financial costs and engineering feasibility questions because of the additional construction required.[126] Lastly, these alternatives, while avoiding regions of great concern, require laying additional pipeline and thus inherently increase the risk of oil spills.[127]

Due to the advocacy of Nebraska residents, TransCanada's current focus is to construct a route that avoids environmentally sensitive regions and garners State Department approval.[128] The benefit of President Obama's decision to reject the current pipeline proposal is that it enables a thorough review of alternative routes and allows for further environmental impact studies within states such as Nebraska.[129] If President Obama approves an alternate route in

121. *See id.* (noting alternative routes seek to avoid Ogallala aquifer and Sand Hills region).

122. *See id.* (describing I-90 Corridor Alternative's route and additional expense).

123. *See Alternate Routes*, *supra* note 117 (explaining Western Alternative's course and rejection due to additional costs).

124. *See generally id.* (comparing alternative routes and cost, length and consequences of each).

125. *See id.* (discussing risks alternative routes pose to Northern High Plains Aquifer and shallow groundwater).

126. *See id.* (analyzing cost and feasibility of alternative pipeline routes).

127. *See id.* (explaining how alternative routes' increased pipeline length increases oil spill risk).

128. *See* Broder & Frosch, *supra* note 115 (explaining pressure from Nebraskans to construct alternative routes avoiding Ogallala aquifer and Sand Hills region).

129. *See* Kerri-Ann Jones, *Briefing on the Keystone XL Pipeline*, U.S. STATE DEP'T (Jan. 18, 2012), http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm (dis-

2013, the route will likely avoid much of the Sand Hills region and Ogallala aquifer.[130] Although the Keystone Corridor and I-90 Corridor Alternatives did not gain support, a similar corridor approach is the most likely to gain approval.[131] Several Nebraska lawmakers supported the Keystone Corridor Alternative, which would identify a one hundred mile corridor to build the pipeline within and would not overlap the Sand Hills or the Ogallala aquifer.[132] Nebraskans concede that this proposal would likely involve multiple pipelines in a narrow area and potentially force the pipeline to cross more populated parts of the state, but it would also avoid the state's most environmentally sensitive regions.[133]

In considering alternative routes, however, pipeline length will likely be routed through other states.[134] It remains to be seen whether other states will raise similar environmental concerns that may block alternatives to Keystone XL.[135] While it seems likely an alternative route to the pipeline will be approved in 2013, this pipeline will likely be longer, more expensive, and possibly impinge on environmentally sensitive regions in other states.[136]

---

cussing how pipeline's rejection affords time to completely review alternative routes).

130. *See* Brown & Macpherson, *supra* note 118 (describing necessity of having alternative route avoid Nebraska's Ogallala aquifer and Sand Hills region).

131. *See* Art Hovey, *Keystone XL critic suggests corridor alternative*, LINCOLN J. STAR, Oct. 27, 2011, at A, *available at* http://journalstar.com/news/local/article_b1c4b29e-c633-50d3-ae4f-7c4152e3da0e.html (discussing "corridor approach" alternatives).

132. *See id.* (explaining popularity of "corridor approach" with Nebraska lawmakers).

133. *See id.* (describing downsides to corridor approach).

134. *See* James Rowley & Jim Snyder, *Republicans May Tie Pipeline Approval to Payroll-Tax Cut Talks*, BLOOMBERG (Jan. 20, 2012), http://www.bloomberg.com/news/2012-01-20/republicans-look-for-alternatives-after-keystone-xl-rejected.html (discussing Republican proposals to reroute pipeline and begin construction in states other than Nebraska).

135. *See Alternate Routes*, *supra* note 117 (discussing added costs, length, and additional states implicated in alternative pipeline routes).

136. *See* Rob Gillies, *Canada disappointed over pipeline rejection*, ASSOCIATED PRESS (Jan. 18, 2012), http://www.boston.com/news/world/canada/articles/2012/01/18/canada_disappointed_over_pipeline_rejection/ (discussing TransCanada's expectation that another pipeline will be built); *see also Alternate Routes*, *supra* note 117 (discussing alternative pipeline routes and their associated costs, length and impact on other states).

V. EMINENT DOMAIN – IS RESISTING THE PIPELINE A PIPE DREAM FOR LANDOWNERS?

National debate on the merits of Keystone XL erupted in the fall of 2011.[137] Oil producers, on one side, and ardent environmentalists on the other, voiced arguments for and against the pipeline and whether tar sands oil is a viable future energy source.[138] Yet, the pipeline's future hinges not on the capability of regulating its environmental consequences, nor on the United States' desire to obtain reliable energy resources from an ally; rather, it rests in property rights.[139] At the most local level, the path of the pipeline depends upon whether landowners permit TransCanada to build.[140] A landowner's refusal forces TransCanada to utilize eminent domain, a controversial legal doctrine that has tied TransCanada up in lawsuits, and has sparked a potential movement among states to protect their landowners.[141]

In preparing to build Keystone XL, TransCanada reached easement agreements with 93% of affected landowners; these landowners control nearly 90% of the land along the pipeline route.[142] For the refusing landowners, TransCanada attempted to use eminent domain laws to condemn their private property, arguing that taking the land serves a larger public good.[143] Currently, TransCanada acknowledged they have fifty-six eminent domain actions pending in

137. *See* Jonathan Mariano, *Keystone XL Pipeline Relies on Eminent Domain for Success*, TRIPLE PUNDIT: PEOPLE, PLANET, PROFIT (Nov. 7, 2011), http://www.triplepundit.com/2011/11/keystone-xl-pipeline-dreams-true-only-eminent-domain/ (noting protests in Washington D.C. over Keystone XL pipeline).

138. *See id.* (comparing environmental arguments and interests against those favoring oil).

139. *See id.* (concluding environmentalists and non-environmentalists may cooperatively rally against TransCanada's eminent domain usage to halt pipeline construction); *see also* Terrence Corcoran, *The real Keystone issue: Property rights*, NAT'L POST, Nov. 12, 2011, at 19, *available at* http://fullcomment.nationalpost.com/2011/11/11/fp%E2%80%99s-terence-corcoran-the-real-keystone-issue-property-rights/ (discussing eminent domain's controversial nature and growing trend favoring private landowners).

140. *See* Mariano, *supra* note 137 (explaining TransCanada's need to acquire private property, either through negotiation or eminent domain, in order to build Keystone XL pipeline).

141. *See id.* (discussing TransCanada's invocation of eminent domain and resulting backlash); *see also* Kaufman & Frosch, *supra* note 33 (describing TransCanada's reliance on eminent domain and landowners' organized opposition thereto).

142. *See* Kaufman and Frosch, *supra* note 33 (explaining TransCanada has secured easement agreements with 93% of landowners along proposed pipeline route).

143. *See id.* (describing TransCanada's efforts to negotiate easements with landowners along pipeline route); *see also* Greg Pollowitz, *Thoughts on Keystone XL*, NATIONAL REVIEW ONLINE: PLANET GORE (Dec. 19, 2011), http://www.nation-

Texas and South Dakota, and they issued dozens of "Dear Owner" letters to Nebraska landowners.[144] TransCanada continues to use state eminent domain laws to obtain licenses for the pipeline, but there is debate about whether TransCanada can utilize eminent domain prior to the State Department approving the project.[145]

A. Natural Resource Development Takings: Putting Economic Development Before Property Interests

The Fifth Amendment to the United States Constitution restricts eminent domain powers by mandating that "private property [shall not] be taken for public use, without just compensation."[146] Much of eminent domain case law focuses on determining whether a public use exists to authorize a taking of private property, and if so, what compensation is required.[147] In 2005, the United States Supreme Court's decision in *Kelo v. New London* garnered national attention for holding that eminent domain allowed the transfer of land from one private owner to another in order to further economic development.[148] The property at issue in *Kelo* was privately owned and condemned for use in a private company's redevelopment plan.[149] The Court upheld New London's condemnation of the property as a public use because of the economic growth the community would experience from the proposed plan.[150] In reach-

alreview.com/planet-gore/286154/thoughts-keystone-xl-greg-pollowitz (noting TransCanada's acquisition of nearly 90% of land along pipeline route).

144. *See* Kaufman & Frosch, *supra* note 33 (describing TransCanada's current eminent domain proceedings in Texas, South Dakota, and Nebraska).

145. *See id.* (questioning TransCanada's ability to successfully use eminent domain laws). A State Department official is quoted as saying that TransCanada never gained federal approval to utilize eminent domain and "that it was up to state law and the courts to determine the appropriate use of eminent domain laws." *Id.* Another source commented that "[i]t is presumptuous for the company to take on eminent domain cases before there is any decision made [with regard to approval]." *Id.*

146. U.S. CONST. amend. V (restricting use of eminent domain).

147. *See* Amanda W. Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 179-80 (Apr. 2007) (summarizing how eminent domain litigation and commentary center around "public use" and "just compensation" determinations).

148. *See id.* at 178 (explaining why Court's holding in *Kelo v. New London* generated national attention and controversy). In *Kelo*, The Supreme Court held that private land can be taken and given to another private owner as part of an economic development plan, and this will constitute a "public use" under the Fifth Amendment. *Id.*

149. *See* Kelo v. City of New London, 545 U.S. 469, 472 (2005) (explaining property at issue was taken from private owners using eminent domain to be part of city's economic redevelopment plan).

150. *See id.* at 483-84 (citing city's justification that economic rejuvenation satisfied public use requirement). The Court held:

ing its decision, the Court relied upon earlier natural resource development cases, which granted great deference to states allowing private parties to utilize eminent domain.[151]

In many western states rich in natural resources, state statutes and constitutions liberally enabled natural resource developers to use eminent domain to advance industry.[152] State legislatures and state courts in the West delegated broad powers to private companies to further natural resource development within their state economies.[153] In the early twentieth century, the Supreme Court began hearing challenges to natural resource development takings, and responded by deferring to the state's public use determinations, especially in cases involving the mining industry.[154] In *Kelo*, the Court resurrected its broad reading of public use through its emphasis on the economic conditions within a state.[155] Considering the historic deference to natural resource development takings and the Supreme Court's deference to eminent domain takings in *Kelo*, many view TransCanada's acquisition of property by eminent domain as a foregone conclusion.[156]

> [New London's] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.

Id.

151. *See id.* at 479, 480, 484-85, 513-516 (discussing precedent upholding taking private property for mining and manufacturing development).

152. *See* Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 652 (Aug. 2008) (acknowledging Western states authorized developers to take private property to develop coal, oil and natural resource industries).

153. *See id.* at 661-62 (describing state judicial and legislative efforts to encourage economic development via eminent domain).

154. *Id.* at 667-69 (characterizing Court decisions as deferential to state public use determinations); *see also* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) (upholding New Hampshire's Mill Act authorizing mills and dams to flood private land if owners of flooded land were awarded just compensation); Clark v. Nash, 198 U.S. 361, 368-70 (1905) (accepting Utah statute allowing private landowners to condemn irrigation ditches on neighboring properties); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531-32 (1906) (upholding Utah statute allowing mining companies to condemn private property for aerial bucket lines).

155. Klass, *supra* note 152, at 669-70 (discussing Court's reliance on natural resource development takings when determining public use in *Kelo v. New London*).

156. *See* Kaufman & Frosch, *supra* note 33 (explaining historical recognition of pipelines and railroads as public needs diminishes likelihood property owners

B. *Kelo*'s Fallout Creates State Reforms and Greater Protections for Landowners

Although the *Kelo* decision was not out of line with the Supreme Court's trend of deferring to private takings and broad definition of "public use," it nonetheless generated immense outrage and ignited state legislatures to reform eminent domain laws.[157] As a result, eminent domain law is currently under reform in several states, and natural resource development takings may no longer receive the deferential treatment they received in the early twentieth century.[158] In general, states attempted, through statutes and the common law, "to balance economic development, urban expansion, traditional natural resource development, and preservation of the environment."[159] A survey of eminent domain laws in western states indicates reforms are favoring individual property rights, rather than natural resource extraction or production companies.[160]

Although reforms are making it more difficult to utilize eminent domain, states still differ widely in the protections their eminent domain laws afford landowners.[161] For instance, Montana, which offers the most protection for landowners, utilizes siting acts which require pipelines be built on public land whenever possible.[162] As a result, only 77% of the pipeline's route falls on private land in Montana.[163] By comparison, other pipeline states average 92% on private land.[164] Montana also prevented oil companies

will win taking suits against TransCanada); *see also* Lisa Song, *On Keystone XL route, states allow different risks, reap different benefits*, INSIDECLIMATE NEWS (Jan. 10, 2012), http://www.hcn.org/articles/on-keystone-xl-route-states-allow-different-risks-reap-different-benefits (discussing limited state eminent domain protections).

157. Klass, *supra* note 152, at 670-71 (discussing national outcry over *Kelo* decision and subsequent eminent domain reforms).

158. *Id.* at 676-77 (discussing state reforms re-evaluating natural resource development takings and eminent domain generally); *see also* Pollowitz, *supra* note 143 (describing western state reforms to balance property rights, economic interests, and environmental concerns).

159. Klass, *supra* note 152, at 681-82 (describing eminent domain reform in Western states).

160. Pollowitz, *supra* note 143 (explaining current eminent domain reforms are strengthening individual property rights).

161. Song, *supra* note 156 (discussing eminent domain laws in pipeline states).

162. *Id.* (discussing Montana's requirement that pipelines be built on public land where possible).

163. *Id.* (noting that Montana's laws led to increased pipeline construction on state land, as opposed to private property).

164. *Id.* (comparing how much pipeline is located on state land in pipeline-affected states).

from filing eminent domain actions before the state's Department of Environmental Quality approved the project, and refused to give TransCanada final approval until the State Department gave the project a green light.[165]

In contrast, the Oklahoma state agency tasked with pipeline regulation has not responded to landowners' requests to challenge eminent domain actions.[166] Instead, the agency insists its role is limited to remediation after oil spills.[167] In Texas, there is confusion over the state's eminent domain laws and whether it grants operators of common carrier pipelines eminent domain power.[168] During the 2012 election campaigns, candidates for the Texas legislature battled over whether TransCanada can avail itself of common carrier status, or if there should be reform to prevent this possibility.[169] In Nebraska, where opposition to Keystone XL resulted in additional environmental review and consideration of alternative routes, the legislature is considering requiring siting approval before pipeline companies may initiate eminent domain actions to acquire land.[170] Additionally, the legislature proposed sanctioning pipeline operators that commence eminent domain actions prior to gaining project approval.[171]

---

165. *Id.* (explaining Montana's eminent domain law).

166. Song, *supra* note 156 (noting Oklahoma Corporation Commission's failure to respond to eminent domain actions).

167. *Id.* (quoting Oklahoma Corporation Commission's position that it has little control over pipelines, aside from cleanup from spills).

168. *Id.* (discussing whether oil producers can invoke eminent domain under Texas state law); *see also* Rachel Weiner, *Keystone XL pipeline unites left and right*, THE WASH. POST BLOGS: THE FIX (Nov. 11, 2011, 11:00 A.M.), http://www.washingtonpost.com/blogs/the-fix/post/keystone-xl-pipeline-unites-left-and-right/2011/11/08/gIQAHw3FCN_blog.html (explaining eminent domain determinations hinge on whether oil pipelines are common carriers under Texas law).

169. Weiner, *supra* note 168 (discussing eminent domain controversy in Texas).

170. Kevin O'Hanlon, *Bills: Empower governor, limit eminent domain*, LINCOLN J. STAR, Nov. 2, 2011, *available at* http://journalstar.com/news/unicameral/article_71af68da-0ccb-5b9b-8265-e8adeb31bf0a.html (mentioning proposal requiring companies gain construction approval before commencing eminent domain actions); *see also* Provide for state participation in a federal supplemental environmental impact statement review process for oil pipelines, Neb. Legislative Bill. No. 4, 102nd Leg., 1st Spec. Sess., (Neb. 2011) (forcing pipeline operators to gain Department of Environmental Quality siting approval to build pipelines).

171. Martha Stoddard, *Eminent domain pressure targeted*, OMAHA WORLD-HERALD, Nov. 9, 2011, at 1B, *available at* http://www.omaha.com/article/20111109/NEWS01/711099922/100385 (discussing proposed legislation to penalize pipeline operators who utilize eminent domain prior to receiving project approval); *see also* Change provisions relating to eminent domain and easements for oil pipelines, Neb. Legislative Bill. No. 3, 102nd Leg., 1st Sess., (Neb. 2011) (introduced) (proposing criminal penalties for pipeline operators who begin eminent domain actions without first receiving project approval).

C. Keystone and *Kelo*: How Will the Courts Respond?

In an effort to prevent the Keystone XL's construction, several major environmental groups intend to argue against TransCanada's use of eminent domain.[172] These groups plan to focus on how TransCanada's use of eminent domain violates state rules prohibiting the invocation of eminent domain for private economic development.[173] Environmental groups will argue that TransCanada, as a private entity looking to build the pipeline for profit, does not qualify for eminent domain power in pipeline states.[174] State legislative reforms targeted at curbing eminent domain, however, vary in the protections they provide landowners.[175] Among pipeline states, eminent domain reforms range from meaningful protections to weak and ineffectual legislation.[176] As takings cases progress through the courts, state and federal judges will have an important role in the future of eminent domain.[177]

The trend among state and federal courts interpreting state eminent domain reforms is to reject *Kelo*'s approach or to limit its application.[178] Several federal and state courts rejected *Kelo*'s deferential approach to public use determinations.[179] The state supreme courts in Ohio and Oklahoma explicitly rejected the eminent domain takings authorized by *Kelo*.[180] By comparison, the

172. Jonathan H. Adler, *The Green Costs of Kelo Revisited*, THE VOLOKH CONSPIRACY BLOG (Feb. 29, 2012, 12:33 PM), http://volokh.com/2012/02/29/the-green-costs-of-kelo-revisited/ (noting environmental groups intend to challenge TransCanada's use of eminent domain).

173. *See id.* (discussing whether TransCanada's use of eminent domain violates state eminent domain laws).

174. *See id.* (arguing that as private for-profit entity, TransCanada cannot invoke eminent domain).

175. *See* Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 3 (2011) (discussing variability among state eminent domain reforms); *see also* Song, *supra* note 156 (comparing different eminent domain protections in pipeline states). For further discussion of eminent domain reform effectiveness in Keystone XL Pipeline states see *supra* notes 157-171 and accompanying text.

176. *See* Somin, *supra* note 175, at 7-12 (contrasting eminent domain laws in pipeline states).

177. *See id.* at 24 (explaining key role state and federal judges play in eminent domain reform).

178. *See id.* at 3 (stating state courts have not followed *Kelo*).

179. *See id.* at 3-4 (arguing that post-*Kelo*, state and federal courts have not deferred to state public use determinations).

180. *See id.* at 7-9 (noting Ohio and Oklahoma state supreme courts rejected *Kelo*'s allowance of economic development takings); *see also* City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding economic development cannot justify condemnation); *see also* Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 653-54 (Okla. 2006) (finding economic development does not qualify as public purpose under Oklahoma's Constitution).

South Dakota, Maryland, and Rhode Island state supreme courts imposed stricter public use standards than required by the Supreme Court in *Kelo*.[181] The judicial trend toward more rigorously scrutinizing public use determinations for eminent domain takings has one exception: the state of New York.[182] New York courts have repeatedly upheld takings to condemn property under state laws allowing for "blight takings."[183]

There have been few decisions interpreting state eminent domain reforms that followed *Kelo*.[184] It is unclear whether the decisions rejecting *Kelo* merely reflect the popular dissatisfaction with the opinion, or are part of a larger movement among states to better balance the interests of landowners against private entities.[185] In the 1980s and 1990s, before the *Kelo* decision rallied the public, state supreme courts tended to forbid economic development takings.[186] Whether state legislative reforms and state courts, which have recently defended individual property owners, will continue this trend by preventing developers from utilizing eminent domain is an open question.[187]

While the states' response to *Kelo* was overwhelming, there has been little effort to reform eminent domain at the federal level.[188] Recently, a bipartisan group in the House of Representatives at-

181. *See* Somin, *supra* note 175 at 9-12 (discussing state courts limitations on *Kelo*); *see also* Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006) (providing broader protections to landowners through South Dakota Constitution); Mayor of Balt. v. Valsamaki, 916 A.2d 324, 356 (Md. 2007) (limiting quick-take condemnations); R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 107-108 (R.I. 2006) (holding quick-take condemnations do not qualify as public purpose).

182. *See* Somin, *supra* note 175, at 15-21 (noting New York courts are following *Kelo*'s deference to eminent domain condemnations).

183. *See id.* (discussing impossibility of challenging blight condemnations in New York); *see also* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 731-32 (N.Y. 2010) (following *Kelo*'s deferential approach to public use); Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 170-71 (N.Y. 2009) (upholding major condemnation as public use).

184. Somin, *supra* note 175, at 37 (noting lack of judicial decisions on post-*Kelo* eminent domain reforms).

185. *See id.* at 21-23 (debating possible motivations behind state and federal court decisions rejecting *Kelo*).

186. *See id.* at 21 (noting that prior to *Kelo* there was trend among state supreme courts to invalidate economic development takings). Those states included Illinois, Michigan, Montana and South Carolina. *Id.*

187. *See id.* at 37 (speculating whether court decisions will protect landowners or follow *Kelo*).

188. *See* Ilya Somin, *Another Chance at Federal Eminent Domain Reform*, THE VOLOKH CONSPIRACY BLOG (Feb. 17, 2012, 5:27 PM), http://www.volokh.com/2012/02/17/another-chance-at-federal-eminent-domain-reform/ (noting lack of federal eminent domain reform).

tempted to legislatively overrule *Kelo*.[189] The bill, which passed in the House and is currently under consideration in the Senate, would prohibit federal, state, and local governments from using eminent domain to obtain land for economic development.[190] The bill, however, includes a safe harbor provision that exempts the Keystone XL Pipeline from this prohibition.[191] A similar and stronger bill failed to make it out of the Senate in the immediate aftermath of the *Kelo* decision.[192] The Supreme Court has not reconsidered the eminent domain issue posed in *Kelo* despite negative treatment of the opinion by lower courts.[193] In response to this criticism, however, Supreme Court Justice Antonin Scalia recently remarked he felt *Kelo* was one of the Court's biggest mistakes, and it was "not long for this world."[194] Legal commentators debate whether Justice Scalia's comment suggests an antipathy among the Court that may result in the decision being overturned in the near future.[195]

It is unclear whether the Supreme Court will retreat from *Kelo* or whether the decision will be legislatively overruled.[196] *Kelo*'s future and its deferential definition of public use will affect any effort to challenge TransCanada's use of eminent domain at the state or

189. *See id.* (discussing legislation aimed at overturning *Kelo*); *see also* Mike Wallace, *Anti-Eminent Domain Bill Passes House; Senate Consideration Possible*, NAT'L LEAGUE OF CITIES WEEKLY (Mar. 5, 2012), http://www.nlc.org/media-center/news-search/anti-eminent-domain-bill-passes-house-senate-consideration-possible (discussing legislation aimed at prohibiting economic development takings); Private Property Rights Protection Act of 2011, H.R. 1433, 112th Cong. (2012) (prohibiting city, state and federal governments from using eminent domain to further economic development).

190. *See* Wallace, *supra* note 189 (explaining bill aims to legislatively overrule *Kelo*).

191. *See id.* (discussing safe harbor provision exempting Keystone XL project).

192. *See id.* (discussing earlier legislation that failed to pass both Houses of Congress).

193. *See Eminent Domain: Drawing the Line on Property Rights*, KNOW WPC (Nov. 10, 2009), http://knowwpcarey.com/article.cfm?aid=189 (noting Supreme Court has not reconsidered *Kelo* or heard other eminent domain cases).

194. *See* Brad Kuhn, *Justice Scalia Predicts Kelo v. City of New London Will be Overturned?*, CALIFORNIA EMINENT DOMAIN REPORT (Oct. 21, 2011), http://www.californiaeminentdomainreport.com/2011/10/articles/court-decisions/justice-scalia-predicts-kelo-v-city-of-new-london-will-be-overturned/ (discussing Justice Scalia's comments indicating *Kelo* was may soon be overturned).

195. *See generally id.* (noting possibility of Supreme Court overruling *Kelo*).

196. *See* Somin, *supra* note 175, at 37 (speculating whether future state and federal court decisions will protect landowners or follow *Kelo*); *see also* Pollowitz, *supra* note 143 (describing reforms in western states to balance property rights, economic interests, and environmental concerns).

federal level.[197] With the rejection of the current pipeline proposal and the likelihood that an altered route will gain approval, landowners and states have additional time to craft legislation that narrows TransCanada's use of eminent domain and protects landowners.[198] Although TransCanada has gained access to the vast majority of land needed to build the pipeline, acquiring the remainder may come at the cost of extensive legal challenges and a less than deferential review of natural resource development takings by the judicial system and state and federal governments.[199]

VI. REGULATIONS – AN OIL PIPELINE NECESSITY

TransCanada's proposed Keystone XL Pipeline needs approval from the State Department in the form of a Presidential Permit before construction can begin.[200] Once in operation, however, the pipeline will have to comply with the laws and regulations of six states, the federal government, and the Canadian regulatory scheme.[201] To ensure the safest construction and operation of a pipeline nearly two thousand miles long, both the state and federal government must be prepared to vigilantly regulate Keystone XL.[202]

---

197. *See* Corcoran, *supra* note 139 (characterizing eminent domain as under attack, especially in relation to natural resources development).

198. *See* Ken Silverstein, *Keystone Pipeline Ensnared in Politics, Hypocrisy*, FORBES (Feb. 5, 2012), http://www.forbes.com/sites/kensilverstein/2012/02/05/keyston/ (suggesting initial pipeline rejection will lead to eventual compromise between pipeline operators and states).

199. *See* Corcoran, *supra* note 139 (discussing pushback against eminent domain takings to further natural resources development).

200. *See* Rachel Degenhardt, *1700 Miles of the Keystone XL Pipeline: A State, Federal and International Regulatory Concern*, THE ENHESA BLOG (Nov. 14, 2011), http://enhesa.wordpress.com/2011/11/14/1700-miles-of-the-keystone-xl-pipeline-a-state-federal-and-international-regulatory-concern/ (explaining Keystone XL construction cannot commence without Department of State Presidential Permit); *see also* Exec. Order No. 13,337, 69 FED. REG. 25,299 (Apr. 30, 2004) (requiring TransCanada to obtain State Department issued Presidential permit for transnational liquid pipelines).

201. *See* Degenhardt, *supra* note 200 (discussing various regulatory authorities for Keystone XL pipeline).

202. *See generally* Dan Frosch & Janet Roberts, *Pipeline Spills Put Safeguards Under Scrutiny*, N.Y. TIMES, Sept. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/09/10/business/energy-environment/agency-struggles-to-safeguard-pipeline-system.html?_r=1&ref=danfrosch (explaining need for regulation to ensure pipeline's safe construction and operation).

A. Federal Regulation: Telling the Pipeline Operators How to Do Better[203]

The Pipeline and Hazardous Materials Safety Administration (PHMSA), an agency within the Department of Transportation, has authority to regulate the "construction, operation, maintenance, monitoring, inspection, repair and closure of liquid pipeline systems in the United States."[204] This relatively unknown federal agency has increasingly become the focus of questions about the federal government's ability to adequately oversee Keystone XL.[205] Following recent oil spills in Montana and Michigan, investigators and environmental activists criticized the agency for lacking resources, being understaffed, underreporting oil spills, and relying largely upon pipeline operators to self-regulate.[206] This led many to question the PHMSA's ability to adequately and safely regulate the Keystone XL Pipeline.[207]

At the center of the concern over Keystone XL is PHMSA's inability to adequately regulate tar sands oil, which is more corrosive and more difficult to clean when spilled.[208] TransCanada and

203. *See id.* (quoting director of Pipeline Safety Trust's comments regarding pipeline regulation). The Pipeline Safety Trust is a nonprofit organization that advocates for safer pipelines. *Id.* Its director, Carl Weimer, commented that "[s]tarting a decade ago, we went with a system of regulations that allows the pipeline companies to decide how to best maintain their pipelines, . . . [n]ow it's become clear we need to tell them how to do it better." *Id.*

204. *See* Degenhardt, *supra* note 200 (describing prime regulatory authority granted to PHMSA); *see also Office of Pipeline Safety - About Us*, U.S. DEP'T OF TRANSP. PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., http://www.phmsa.dot.gov/pipeline/about (last visited Nov. 2, 2012) (noting PHMSA's mission).

205. *See generally* Frosch & Roberts, *supra* note 202 (recounting criticisms of PHMSA and skepticism over its ability to effectively regulate Keystone XL pipeline); *see also* Anthony Swift, *Clinton's tar sands pipeline "safety conditions" are smoke and mirrors*, SWITCHBOARD NATURAL RES. DEF. COUNCIL STAFF BLOG (Aug. 19, 2011), http://switchboard.nrdc.org/blogs/aswift/ntons_tar_sands_pipeline_safet.html (arguing State Department and PHMSA have not responsibly overseen pipeline issues).

206. *See* Frosch & Roberts, *supra* note 202 (arguing PHMSA does not adequately police U.S. pipelines); *see also* Dan Frosch, *Congress Approves Pipeline Safety Bill*, N.Y. TIMES GREEN: A BLOG ABOUT ENERGY AND THE ENVIRONMENT (Dec. 16, 2011, 10:29 A.M.), http://green.blogs.nytimes.com/2011/12/16/congress-approves-pipeline-safety-bill/?ref=danfrosch (describing Congressional attempt to remedy PHMSA's problems).

207. *See generally* Frosch & Roberts, *supra* note 202 (recounting criticism of PHMSA and skepticism over its ability to effectively regulate Keystone XL pipeline); *see also* Swift, *supra* note 205 (arguing State Department and PHMSA irresponsibly regulated pipeline issues).

208. *See* Elizabeth McGowan, *Keystone XL Pipeline Safety Standards Not as Rigorous as They Seem*, INSIDECLIMATE NEWS (Sept. 19, 2011), http://insideclimatenews.org/news/20110919/keystone-xl-pipeline-safety-regulations-phmsa-transcanada-oil-sands-bitumen (discussing additional dangers tar sands pose). Tar sands oil, or

the State Department defended the pipeline's safety by pointing to TransCanada's voluntary compliance with fifty-seven of the PHMSA's special conditions.[209] Those standards, however, contain only twelve regulations that differ from the minimum standards the PHMSA already requires.[210] Recent spills along phase one of the Keystone XL Pipeline, as well as the PHMSA's failure to clean up oil spills in other parts of the country, raise questions about the effectiveness of the standards regulating Keystone XL.[211]

In December 2011, Congress responded to these concerns with a pipeline safety bill.[212] The bill's purpose was to strengthen oil and gas pipeline safety and it included a provision doubling the maximum fines imposed on pipeline operators for safety violations.[213] These regulations, however, fall short of what is needed to comprehensively reform how the PHMSA will regulate the unique

---

diluted bitumen is "a raw and thick form of heavy crude that is significantly more acidic and corrosive than standard oil." *Id.* Although TransCanada claims tar sands oil is not unique and does not require special pipelines, safety procedures, or spill response plans, there are concerns that safety standards for tar sands oil will not be sufficient because it has not been adequately studied. *Id.* Cynthia Quarterman, the head of the PHMSA, testified to Congress that the agency had not studied the risks of tar sands pipelines, leading many environmental groups like the National Resources Defense Council, the National Wildlife Federation, and the Sierra Club to argue diluted bitumen needs further study and that unique safety standards should be created in accordance with the findings of those studies. *Id.*

209. *See id.* (describing TransCanada's voluntary agreement to additional pipeline safety standard); *see also* Swift, *supra* note 205 (noting TransCanada's compliance with fifty-seven special pipeline conditions).

210. *See* Swift, *supra* note 205 (describing additional conditions as minimum safety conditions with which TransCanada was already required to comply). Of the fifty-seven additional safety conditions proposed by TransCanada, twenty-eight are minimum safety standards already required by law. *Id.* There are twelve conditions that would ensure Keystone XL is not operating below legal safety standards. *Id.* Further, there are five conditions that are essentially recordkeeping provisions and the remaining twelve provide minor adjustments to already existing standards. *Id. See also* McGowan, *supra* note 208 (explaining special conditions would not materially affect pipeline regulation).

211. *See generally* Frosch & Roberts, *supra* note 202 (discussing recent pipeline oil spills and increasing concern over PHMSA's ability to effectively regulate); *see also* McGowan, *supra* note 208 (considering concerns over regulation of diluted bitumen and ability of PHMSA to oversee pipeline); *see also* Swift, *supra* note 205 (questioning whether State Department and PHMSA have adequately overseen pipeline planning and safety).

212. *See* Frosch, *supra* note 206 (explaining Congressional response to concerns over pipeline safety measures); *see also* Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904, (codified as amended to 49 U.S.C. in 2011) (amending law to provide more effective pipeline regulation).

213. *See* Frosch, *supra* note 206 (describing increase in potential fines for safety violations). The increase raised fines from one million to two million dollars. *Id.*

challenges and dangers posed by a tar sands oil pipeline.[214] Despite the National Transportation Safety Board and the Pipeline Safety Trust's repeated recommendations, the bill failed to require that pipeline operators install automated shut-off valves on all pipelines.[215] Although expensive to implement, this requirement would be a step toward preventing the worst risks associated with oil spills.[216] Congress also overlooked other recommendations, including creating standards for leak detection systems to ensure accidents are promptly identified and establishing clearer metrics for pipeline regulators to more easily assess whether standards are met.[217] Although the bill authorized an additional ten inspectors, the PHMSA's current understaffing and the added surveillance required by a project as large as Keystone XL suggests more inspectors will be needed.[218]

Aside from Congressional legislation, the PHMSA needs to prepare a real assessment of tar sands oil.[219] Due to the pipeline's length and the corrosive, volatile nature of tar sands oil, the Keystone XL Pipeline is unique, and the consequences of transporting tar sands oil through a pipeline are largely unknown.[220] Studies have found tar sands oil is more difficult to clean up than standard oil, and requires increased heat and pressure to move it through the pipeline.[221] The PHMSA needs to consider and address these

214. *See generally* Frosch & Roberts, *supra* note 202 (discussing recent pipeline oil spills and increasing concern over PHMSA's ability to effectively regulate); *see also* McGowan, *supra* note 208 (reviewing questions over regulation of diluted bitumen and PHMSA's ability to oversee pipeline); *see also* Swift, *supra* note 205 (questioning whether State Department and PHMSA have adequately overseen safety procedures and planning for Keystone XL pipeline).

215. *See* Frosch, *supra* note 206 (explaining legislation omitted National Transportation Safety Board's recommendation to require automated shutoff valves).

216. *See* Frosch & Roberts, *supra* note 202 (noting shutoff valves are expensive, but important, safety measures).

217. *See* Frosch, *supra* note 206 (explaining safety measures not included in recent congressional pipeline legislation).

218. *See id.* (noting legislation authorized ten additional PHMSA inspectors); *see also* Frosch & Roberts, *supra* note 202 (proposing additional inspectors are needed to supervise Keystone XL project due to its large scope).

219. *See* Frosch, *supra* note 206 (describing need to study tar sands oil); *see also* McGowan, *supra* note 208 (discussing dangers tar sands oil pose and whether tar sands oil pipelines require additional regulation).

220. *See* McGowan, *supra* note 208 (explaining environmental groups' push for additional study of tar sands oil pipeline risks). Specifically, transporting tar sands oil at a high temperature and pressure for great distances is new and "untested." *Id.*

221. *See* Frosch & Roberts, *supra* note 202 (explaining environmentalists' argument that tar sands oil is more dangerous and harder to clean up).

possibilities instead of deferring to TransCanada's self-regulation of the pipeline.[222]

Finally, TransCanada stated its intention to apply for a safety waiver once granted a Presidential Permit because they intend to comply with the fifty-seven additional conditions created by the PHMSA.[223] A safety waiver would allow Keystone XL to operate at a higher pressure than permitted by federal pipeline standards, which are based on the strength and thickness of the pipeline's steel.[224] If the waiver is granted, TransCanada can operate the pipeline at a higher pressure without altering the actual pipeline to meet higher federal standards.[225] It is incredibly risky to permit such a waiver without adequately studying tar sands oil and its transportation through pipelines.[226] Thus, the time allotted for additional environmental impact reviews should also be spent reforming and studying PHMSA's regulations and ensuring that they are comprehensive, up-to-date, and hold pipeline operators accountable.[227]

B. State Efforts to Regulate the Pipeline

Many of the states along Keystone XL's route have no regulations and no state agencies to govern oil pipelines.[228] In states such as Nebraska, environmentalists and residents argued their states need to have a role in regulating pipelines.[229] Concurrent regulation with the federal government could create issues in implementation and may result in preemption by federal regulations.[230] Nevertheless, the states situated along the pipeline route are at the forefront in responding to spills and zoning questions concerning

222. *See id.* (advocating PHMSA must responsibly regulate instead of relying on pipeline self-regulation).

223. *See* McGowan, *supra* note 208 (noting TransCanada's intends to apply for waiver).

224. *See id.* (noting safety waiver permits pipeline to operate at higher pressure).

225. *See id.* (noting waiver requires no increased safety measures to address higher operating pressure).

226. *See id.* (describing risks associated with granting waiver).

227. *See* Frosch, *supra* note 206 (speculating about Pipeline and Hazardous Materials Safety Administration's future).

228. *See* Song, *supra* note 156 (discussing lack of regulation in pipeline states).

229. *See TransCanada Pipeline Background*, *supra* note 31 (arguing Nebraska should enact state pipeline regulations).

230. *See Federal Constitutional Analysis of the Proposed Nebraska Pipeline Siting Act*, SIDLEY AUSTIN LLP, 1-12 (Oct. 28, 2011), http://www.transcanada.com/reports/sidley-legal-analysis-nebrasks-siting-legislation.pdf (arguing federal law would preempt any pipeline legislation Nebraska enacts).

the pipeline.[231] This led to varying proposals among states seeking to create state requirements for the siting and routing of pipelines, emergency response plans, and standards for determining liability for spills.[232]

Montana is the only state that utilized its state agency, the Department of Environmental Quality, to work with TransCanada to address concerns of both the state agency and the state's landowners.[233] Under the authority of an ancient siting act, Montana is working with TransCanada to route the pipeline and to create plans to redress environmental damage that may occur.[234] This act requires TransCanada to post a bond, thereby making funds available should a leak or damage occur along the pipeline.[235] By comparison, the other states along the pipeline have not asserted siting authority, instead leaving the pipeline's regulation to TransCanada and the PHMSA.[236] For example, in Oklahoma, the Oklahoma Corporation Commission is the agency tasked with pipeline regulation.[237] It has not, however, taken an active role in creating siting requirements for the pipeline; rather, it has focused on providing cleanup efforts in the event of a spill.[238]

---

231. *See* Song, *supra* note 156 (explaining how lack of state pipeline regulation impacts states and their landowners); *see also TransCanada Pipeline Background*, *supra* note 31 (arguing Nebraska should have authority to regulate pipeline because it affects Nebraska's land, water and residents).

232. *See* Song *supra* note 156 (comparing siting legislation, requirements, and proposals among pipeline states).

233. *See id.* (discussing Montana's efforts to respond to landowner concerns). Montana is the only pipeline state to exercise its full power to regulate pipeline siting. *Id.* By utilizing this process, Montana incorporated citizen concerns into efforts to compromise with TransCanada. *Id.*

234. *See id.* (describing Montana's pipeline regulations); *see also* Montana's Major Facility Siting Act, MONT. CODE ANN. § 75-20-101 (2011) (stating requirements to ensure pipeline location, operation, and construction complied with state laws).

235. *See* Song *supra* note 156 (explaining bond requirement to gain Montana approval); *see also* Montana's Major Facility Siting Act, MONT. CODE ANN. § 75-5-401 (2011) (delineating bond rules for permits).

236. *See* Song, *supra* note 156 (discussing states' failure to assert siting authority to shape pipeline route).

237. *See id.* (explaining Oklahoma's reliance on Oklahoma Corporation Commission to regulate pipelines); *see also Pipeline Safety*, OKLA. CORP. COMM'N TRANSP. DIV., http://www.occeweb.com/tr/PLSHome.htm (last visited Nov. 2, 2012) (discussing Oklahoma's intrastate pipeline regulation and its ceding of authority to PHMSA to regulate federal pipelines).

238. *See* Song, *supra* note 156 (explaining Oklahoma Corporation Commission's refusal to regulate until after spills occur).

Thus, the states affected by the pipeline drastically vary in the pipeline legislation and regulation they offer.[239] Those states, however, have the option of following Montana's lead and modeling their legislation accordingly.[240] Nebraska organized in response to concerns over the Ogallala aquifer and Sand Hills region, and there is significant debate over emergency response plans and liability for oil spills.[241] Much like Montana, Nebraska began its push toward greater state regulation with proposals to create state siting regulations for interstate pipelines.[242] This push resulted in an additional environmental impact review by Nebraska's state environmental agency and a larger role for the state in negotiations over the pipeline's rerouting and emergency response plans.[243]

Nebraska residents' activism also pressured TransCanada into offering a one hundred million dollar spill bond for the Sand Hills region, a protection not offered to any other state, but modeled after Montana's statutory requirement.[244] The bond, however, did not convince Nebraskans to abandon advocating against the pipe-

239. For a discussion regarding pipeline states' siting responsibilities, see *supra* notes 228-254 and accompanying text.

240. *See* Song, *supra* note 156 (explaining potential for other pipeline states to pass legislation regulating pipelines).

241. *See id.* (arguing Nebraska citizens followed Montana's lead by advocating for rerouting and regulation of Keystone XL pipeline); *see also* Kim Murphy, *Nebraska Legislature plans special session on Keystone XL project*, L.A. TIMES, Oct. 24, 2011, at 14, *available at* http://latimesblogs.latimes.com/nationnow/2011/10/keystone-xl-nebraska-special-session.html (describing how pipeline opponents pressured Nebraska's legislature to assert state authority over routing and regulating pipeline).

242. *See* Murphy, *supra* note 241 (describing proposed legislation authorizing Nebraska to route pipeline); *see also* Adopt the Major Oil Pipeline Siting Act and Change Eminent Domain Provisions, Neb. Legislative Bill. No. 1, 102nd Leg., 1st Spec. Sess., (Neb. 2011) (authorizing Nebraska to route and regulate pipelines).

243. *See Nebraska Sandhills Spared: TransCanada will Reroute Pipeline*, ENV'T NEWS SERV. (Nov. 15, 2011), http://ens-newswire.com/2011/11/15/nebraska-sandhills-spared-transcanada-will-reroute-pipeline/ (explaining TransCanada's agreement to supplemental Nebraska environmental impact review of alternative pipeline routes); *see also* Adopt the Major Oil Pipeline Siting Act and Change Eminent Domain Provisions, Neb. Legislative Bill. No. 1, 102nd Leg., 1st Spec. Sess., § 8 (Neb. 2011) (providing for supplemental environmental impact study of Keystone XL pipeline).

244. *See* Elizabeth McGowan, *TransCanada's $100M Oil Spill Bond: True Value Debated as Neb. Pipeline Session Nears*, INSIDECLIMATE NEWS (Oct. 28, 2011), http://insideclimatenews.org/news/20111028/transcanada-oil-spill-bond-nebraska-session-Heineman-keystone-xl-pipeline?page=show (explaining TransCanada's bond proposal aimed at persuading Nebraskans not to reroute pipeline). The bond was part of a Nebraska-specific safety package proposed by TransCanada in order to avoid rerouting of the pipeline away from the Sand Hills region and Ogallala aquifer. *Id.* Critics felt the amount was too small considering potential cleanup costs and was simply grandstanding because federal spill cleanup laws already require monetary liability caps. *Id.*

line.[245] Nebraska has instead focused on creating legislation making TransCanada liable for potential spills.[246] One bill proposed by the Nebraska state legislature would even create a strict liability standard for TransCanada, making TransCanada responsible for all accidents, regardless of fault.[247] In addition, the Nebraska legislature is currently considering legislation that would protect landowners from liability for spills, require TransCanada to post bonds for road reconstruction and repair, and create requirements for pipeline abandonment.[248] Nebraska's efforts demonstrate the effect persistent advocacy can have on pipeline regulation at the state level.[249]

The success and future of these regulations depend upon whether state legislators respond to citizen demands by passing reforms.[250] Nebraska played an active role in the rejection of pipeline approval and the consideration of alternate routes, suggesting TransCanada must work directly with Nebraska to reach compromises if they want to move forward building the pipeline.[251] Currently, the Texas legislature is debating whether it has siting authority over an interstate pipeline.[252] Thus, the delay in granting TransCanada a Presidential Permit may allow for further regulation at the state level.[253] These regulations would be a step toward re-

245. *See* Song, *supra* note 156 (explaining TransCanada only offered spill bond to Nebraska, which subsequently rejected it).

246. *See* Art Hovey, *Legislative panel shows no appetite for pipeline regulation*, LINCOLN J. STAR, March 15, 2011, at B, *available at* http://journalstar.com/news/state-and-regional/nebraska/article_c84370d9-7359-5299-a6fd-338f34f0c70b.html (describing proposed legislation focusing on spill liability); *see also* Oil Pipeline Reclamation Act, NEB. REV. STAT. § 76-3301 (2012) (holding pipeline operators strictly liable for spills).

247. *See* Hovey, *supra* note 246 (explaining strict liability would make TransCanada liable for all spills); *see also* Neb. Legislative Bill No. 629, 102nd Leg., 1st Sess. (Neb. 2011) (holding pipeline operators responsible for spills and cleanup).

248. *See* Letter from Ken Haar, Nebraska State Senator, to Sec'y Hillary Clinton, United States Sec'y of State (May 25, 2011) (citing issues Nebraska legislature must resolve if pipeline approval is delayed).

249. *See* Song, *supra* note 156 (noting effect of Nebraskans' advocacy on state's pipeline legislation).

250. *See generally id.* (predicting further reforms to state pipeline regulation depend on legislative responses to citizen advocacy).

251. *See generally* Broder & Frosch, *supra* note 12 (noting pipeline's possible future and need for alternative routes to appease Nebraska's concern about Sand Hills region and Ogallala aquifer).

252. *See* Song, *supra* note 156 (summarizing Texas debate regarding state's siting authority over pipeline).

253. *See generally* Broder & Frosch, *supra* note 12 (speculating rejection allows time to further address pipeline's environmental consequences).

quiring more cooperation between TransCanada and individual states in determining spill liability and response plans.[254]

VII. CONCLUSION: THE KEYSTONE XL PIPELINE – A LINE IN THE SAND FOR AMERICA'S ENERGY FUTURE

The future of the Keystone XL Pipeline is constantly developing.[255] Currently, both Nebraska and the State Department are conducting environmental reviews of the pipeline's impact.[256] The American Petroleum Institute, the major lobbyist for the oil industry, launched a multimillion-dollar campaign to promote and advertise Keystone XL.[257] Additionally, House Republicans held hearings to review President Obama's decision not to issue a Presidential Permit for the Keystone XL Pipeline.[258] In the future, therefore, both federal and state action will significantly impact the environment, the course of the pipeline, the oil industry, and individual landowners throughout states such as Nebraska.[259]

A. Rerouting the Pipeline and the Potential for Greater Federal and State Regulation

Largely in response to pressure from Nebraska landowners, the President denied approval of Keystone XL.[260] Currently, Nebraska is taking fifteen months to devise a new plan that will take into account its own environmental impact reviews and avoid environmentally sensitive regions.[261] Despite resistance, TransCanada remains confident the pipeline will be constructed; in fact, the company has

254. *See id.* (discussing potential legislative reforms increasing state regulation of pipeline).

255. *See id.* (noting politics and oil industry pressures fan pipeline controversy).

256. For discussion of the State Department and Nebraska's environmental impact reviews, see *supra* notes 35-41 and accompanying text.

257. *See* James M. Broder & Dan Frosch, *Rejecting Pipeline Proposal, Obama Blames Congress*, N.Y. TIMES, Jan. 18, 2012, at A13, *available at* http://www.nytimes.com/2012/01/19/us/state-dept-to-put-oil-pipeline-on-hold.html?_r=1&ref=keystonepipeline (describing oil industry's lobbying for pipeline approval).

258. *See id.* (explaining Republican efforts to move forward with pipeline construction).

259. For discussion of how pipeline regulation and eminent domain issues are evolving, see *supra* notes 137-254 and accompanying text.

260. *See generally* Broder & Frosch, *supra* note 12 (describing how Nebraska influenced decision to reject pipeline approval).

261. *See* Silverstein, *supra* note 198 (clarifying decision to reject pipeline approval was based on Nebraska needing more time to complete environmental impact studies of alternative routes).

fourteen alternate pipeline routes on hand.[262] Political pressure increased speculation that the consideration of alternative routes will be expedited and that the eventually approved route will be a compromise, which may or may not appease state and local concerns.[263] Although environmentalists and Nebraska residents lauded the rejection of Keystone XL, an alternate route may only increase pipeline length, ultimately exposing the states to increased environmental risk.[264]

The Obama administration's rejection of the current proposal may also provide an opportunity to better regulate the project.[265] Congress already proposed legislation targeting the PHMSA and increasing pipeline oversight and staff.[266] Yet, due to the slow-paced legislative process and lack of studies on tar sands oil, the potential hazards of a poorly regulated pipeline remain.[267] As a result, individual states may have a role to play and a gap to fill, especially in monitoring the pipelines, creating flood plans, and responding to leaks.[268] The cost of failing to regulate the pipeline is high, and it is uncertain whether federal regulations, state regulations, or simultaneous regulation by both can meet the infrastructure challenges of a project as large in scope as Keystone XL.[269]

B. Eminent Domain Reforms and Challenges

The rejection of pipeline approval also complicates TransCanada's pending eminent domain actions against landowners.[270] The ability of a foreign corporation to utilize the doctrine for a project

262. *See id.* (describing TransCanada's confidence pipeline will be constructed and alternative route availabilities).

263. *See id.* (predicting political pressure may accelerate pipeline approval process and result in compromises between TransCanada and pipeline states).

264. *See generally Alternate Routes*, *supra* note 117 (discussing alternative pipeline routes and their associated costs, length and impact on other states).

265. *See generally* Broder & Frosch, *supra* note 12 (speculating rejection allows time to further address pipeline's environmental consequences).

266. *See* Frosch, *supra* note 206 (explaining Congressional efforts to create pipeline safety measures); *see also* Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904 (codified as amended at 49 U.S.C. § 60101 (2011)) (amending law to increase safety and environmental protection in pipeline regulations).

267. *See* McGowan, *supra* note 208 (explaining environmental groups' call for additional study of tar sands oil risks).

268. *See generally* Song, *supra* note 156 (comparing differing regulations in pipeline states).

269. For further discussion of current state and federal regulation of oil pipelines, as well as proposed reforms, see *supra* notes 200-254 and accompanying text.

270. *See* Kaufman & Frosch, *supra* note 33 (questioning TransCanada's ability to invoke eminent domain and noting TransCanada's pending eminent domain actions).

that has yet to secure approval is a subject of controversy and may spur legislative penalties or limitations within pipeline states.[271] More importantly, the additional time given to consider alternative routes may allow for further mobilization and activism against the project by landowners affected by eminent domain.[272] The states along the pipeline's projected course have enacted varying degrees of protections for landowners.[273] The project's delay may also provide time for litigation aimed at overturning a deferential understanding of public use, which has benefited natural resource developers at the expense of individual property rights.[274]

Discussions over America's energy future often focus on the potential for wind, solar, and nuclear energy to supplement the United States' reliance upon oil.[275] The expense of investing and developing these technologies, however, can limit their attractiveness when compared to more familiar energy sources such as petroleum.[276] In addition, the high rate of oil consumption within the transportation sector, both by the United States and the rest of the world, ensures future reliance upon oil.[277] As a result, the Obama administration's recent rejection of permit approval hardly signals the death of the Keystone XL Pipeline project.[278] Rather, the decision mobilized proponents of the project, as well as Republican lawmakers, to make Keystone XL a major issue in the 2012 elections.[279] Further, the rejection primed both the oil industry and

---

271. For further discussion of eminent domain law and reforms to state eminent domain laws, see *supra* notes 137-199 and accompanying text.

272. *See* Alyssa Battistoni, *Trench Warfare Rages Over Keystone Pipeline*, SALON (Feb. 14, 2012, 1:30PM), http://www.salon.com/2012/02/14/trench_warfare_rages_over_keystone_pipeline/ (noting efforts to block TransCanada's eminent domain use).

273. *See* Song, *supra* note 156 (comparing differing regulations and reforms in pipeline states).

274. *See* Frosch, *supra* note 206 (speculating about Pipeline and Hazardous Materials Safety Administration's future).

275. *See* Charles K. Ebinger, *Web Chat: The Future of the Keystone XL Pipeline*, THE BROOKINGS INST. (Feb. 8, 2012, 12:00 AM), http://www.brookings.edu/opinions/2012/0208_keystone_pipeline_chat.aspx (noting current focus on wind, solar and nuclear energy to reduce reliance on oil).

276. *See id.* (arguing expense and time required to develop wind, solar and nuclear energy limits their attractiveness compared to oil).

277. *See id.* (explaining transportation sector's need for oil ensures future U.S. demand).

278. *See* Broder & Frosch, *supra* note 12 (stating President Obama's rejection does not kill project).

279. *See* Jennifer Steinhauer, *For G.O.P., Pipeline is Central to Agenda*, N.Y. TIMES, Feb. 2, 2012, at A17, *available at* http://www.nytimes.com/2012/02/02/us/politics/for-gop-pipeline-is-central-to-agenda.html (explaining initial rejection of pipeline approval politicized Keystone XL's ultimate approval).

many in the political arena to link the pipeline to gas prices, reliance upon foreign oil, the economy, and job creation.[280] Political pressure and the reality of America's oil dependence make the approval of Keystone XL likely; the remaining question is over the pipeline's shape and direction.[281] It is unclear how a new series of public hearings, as well as additional environmental impact reviews, will transform the project.[282] With much of the attention focused on rerouting the pipeline, any successful proposal will likely avoid the Sand Hills region and the Ogallala aquifer.[283] The additional time created by the rejection, however, may also increase state and federal regulation of the project.[284]

Additionally, the rejection further complicates TransCanada's already precarious invocation of eminent domain law, and may enable further reform to provide greater protections for private landowners.[285] In a project with potential for economic rewards and energy independence, but also serious and irreparable environmental consequences, it is unclear whether pressures will prevail to enable or limit the pipeline's construction.[286] Whatever the result, a careful balance must be struck so that there is both economic growth, and sufficient environmental regulation to protect the people, the land, and the wildlife along the pipeline's path.[287]

*Megan O'Rourke**

280. *See id.* (describing Republican efforts to link pipeline rejection to jobs, energy security and gas prices).

281. *See* Silverstein, *supra* note 198 (predicting political pressure will result in compromise between TransCanada and pipeline states, thereby enabling pipeline construction).

282. *See id.* (noting Nebraska's environmental impact statement will be completed after 2012 presidential election).

283. *See* Brown & Macpherson, *supra* note 118 (explaining alternative routes need to avoid Nebraska's Ogallala aquifer and Sand Hills region).

284. *See* Broder & Frosch, *supra* note 12 (speculating rejection allows time to further address pipeline's environmental consequences).

285. *See* Corcoran, *supra* note 139 (claiming eminent domain reforms are favoring individual property rights).

286. For further discussion of the competing interests and consequences of the Keystone XL Pipeline, see *supra* notes 23-114 and accompanying text.

287. *See id.* (discussing how pipeline impacts environment, economics, and landowners).

* J.D. Candidate, 2013, Villanova University School of Law; B.A., 2009, Rutgers University.