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Available at: https://digitalcommons.law.buffalo.edu/belj/vol20/iss1/1
A NEW AND IMPROVED ENERGY REALITY—IT'S NO PIPEDREAM: STREAMLINING PERMITTING PROCEDURES FOR CERTAIN CLASSES OF NATURAL RESOURCE PROJECTS: THE CANADA-UNITED STATES KEYSTONE XL PIPELINE

Daniel Hare

In this paper, I propose an original policy solution to the complicated issue of permitting and regulatory review for cross-border natural resource projects to allow for a smoother, quicker approval process for certain types of projects. I have specifically designed this new procedure so as to focus on political compromise and minimize political partisanship, while instead concentrating on achieving results. By modifying the current regulatory standard to a more streamlined model, deserving cross-border natural resource projects can swiftly gain approval, yet environmental, economic, foreign policy, national security, and other significant concerns will still receive the attention and thorough evaluation they require.

The paper suggests two main changes to the current cross-border natural resource project permitting system. First, my modified standard would use a hybrid permitting scheme, incorporating elements from the Department of State’s cross-border oil pipeline permitting process and the Department of Energy’s less complex cross-border power transmission line model. Second, three valid methods would be available for gaining approval for a permit: (1) permit issued based on a favorable decision of Executive or Secretary of State; (2) permit issued after earning a minimum two-thirds vote in both the House of Representatives and Senate; or (3) permit issued on a state-by-state basis, unless the federal government department responsible for permitting can prove that the project, as a whole, is against the national interest. However, the scope of this modified standard would be limited in that it would only be available for natural resource projects coming from a country with equivalent or superior (stricter) environmental and natural resource laws. The paper concludes with a short case study that applies the new and improved permitting scheme to the Keystone XL Pipeline project.
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"The price of oil [is] set by the global market. And that means every time there’s tensions that rise in the Middle East— which is what’s happening right now—so will the price of gas. [. . .] Now, that’s not the future that we want. We don’t want to be vulnerable to something that’s happening on the other side of the world somehow affecting our economy, or hurting a lot of folks who have to drive to get to work. That’s not the future I want for America. That’s not the future I want for our kids. I want us to control our own energy destiny.”—Barack Obama, President of the United States

"The United States currently imports more than half of the oil it consumes, often from countries hostile to United States interests or with political and economic instability that compromises supply security. [. . .] Continued development of North American energy resources, including Canadian oil, increases domestic refiners’ access to stable and reliable sources of crude and improves certainty of fuel supply. . . .”

—United States House of Representatives Bill

INTRODUCTION

For as much partisan bickering as it seems goes on in Washington, D.C. these days, the basic premise that American energy security is desirable and an important policy objective cuts across party lines to garner support from all sides. Yet, while the ends represent an area of agreement and common ground, as with so

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1Barack Obama, President of the United States, Energy Speech in Cushing, Oklahoma (Mar. 22, 2012), http://www.realclearpolitics.com/articles/2012/03/22/obamas_energy_speech_in_cushing__oklahoma_113597.html. The President is a Democrat.

many issues, it is the means of reaching those ends that cause dispute and sow discord. For a vivid (and on-going) example, one need look no further than the Keystone XL debate that has exploded over the past couple of years—should the pipeline be granted a permit to proceed or not? This paper advocates solving that admittedly complicated problem with a multifaceted approach that develops a fast-tracked regulatory scheme for specific classes of natural resource projects. It proposes that in certain types of cases, the permitting procedures for cross-border oil pipelines should be modified (eased) from their current standard to a new, streamlined standard so as to offer a smoother path to approval for deserving projects. First, the improved, streamlined standard would use a hybrid permitting scheme, incorporating elements from the Department of State’s cross-border oil pipeline permitting process and the Department of Energy’s less complex cross-border power transmission lines model. Second, three valid methods would be available for gaining approval of a permit: (1) a permit would be issued based on decision of the Executive or the Secretary of State; (2) a permit would be issued after earning a minimum two-thirds vote in both the House of Representatives and the Senate; or (3) a permit would be issued on a state-by-state basis, unless the federal government department in charge of permitting could prove that the project, as a whole, was against the national interest. However, the scope of this modified standard would be limited in that it would only be available for natural resource projects coming from countries with equivalent or superior (stricter) environmental and natural resource laws.

This paper will be divided into three main parts. Part II will overview the current regulatory landscape and permitting procedures for cross-border oil (liquid) pipelines under the Department of State. Part III will present the proposed new, streamlined permitting standard in detail. Finally, Part IV will examine the Keystone XL pipeline as a case study and apply my new permitting standard in

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the Keystone XL context. This will encompass a comparative study of American and Canadian environmental and natural resources laws, with a focus on the National Environmental Policy Act of 1969 (NEPA)\(^4\) and the Canadian Environmental Assessment Act (CEAA)\(^3\).

I. THE CURRENT REGULATORY LANDSCAPE (PERMITTING STANDARD & PROCEDURES) FOR CROSS-BORDER (LIQUID) OIL PIPELINES

The responsibility for granting or denying permits for natural resource- and energy-related facilities that cross one of the United States’ international borders generally falls to one of three different government entities. Liquid resource pipelines, such as oil pipelines, are handled by the Department of State’s Office of International Energy and Commodity Policy.\(^6\) Natural gas pipelines are governed by the Federal Energy Regulatory Commission (FERC).\(^7\) Still another agency, the Department of Energy, is in charge of cross-border power transmission line permitting.\(^8\) Each of the above regulators enforces a separate set of permitting procedures and criteria with which permit-seekers must comply.

\(^7\) Industries > Natural Gas > Commission’s Responsibilities, FERC, Apr. 13, 2012, http://www.ferc.gov/industries/gas.asp (Among other responsibilities, FERC is responsible for “oversight of the construction and operation of pipeline facilities at U.S. points of entry for the import or export of natural gas.”)
\(^8\) E.O. No. 8202 (1939), amended by E.O. No. 10485 (1953) and E.O. No. 12038 (1978). The idea that one single entity, such as FERC (under the Department of Energy rather than the Department of State), should take the lead in regulation of permitting for all cross-border energy and natural resource facilities is a valid point with powerful arguments standing behind it. However, it is another problem in and of itself and, therefore, beyond the scope of this paper.
The Office of International Energy and Commodity Policy, on behalf of the Secretary of State and President of the United States, “receive[s] all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (i) pipelines... and similar facilities for the exportation or importation of petroleum [and] petroleum products... to or from a foreign country.”9 Once the Secretary of State receives a completed application, he/she has the power to “request additional information needed from the applicant, as appropriate.”10 Executive Order 13337, issued under the George W. Bush administration, then instructs the Secretary of State to consult with the Secretaries of Defense, Interior, Commerce, Transportation, Energy, Homeland Security, the Attorney General, and the Administrator of the Environmental Protection Agency,11 with the option—though not the obligation—to confer with other federal government departments or agencies12 as well as “State, tribal, and local government officials and foreign governments as the Secretary deems appropriate. . . .”13

After reviewing the views of the other officials listed above, the Secretary of State is finally directed to consider, “in light of any statutory or other requirements or other considerations” any “additional information... needed in order to evaluate the application.”14 The Secretary then makes an overall decision revolving around the ultimate question of whether “the issuance of a

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9 E.O. No. 13337, supra note 6, at § 1(a). E.O. No. 11423’s language added on a qualifier of deference to the Congress: the “construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products... to or from a foreign country, to the extent that congressional authorization is not required.” E.O. No. 11423, supra note 6, at § 1(a).
10 E.O. No. 13337, supra note 6, at § 1(b)(i).
11 Id. at § 1(b)(ii).
12 Id. at § 1(b)(iii).
13 Id. at § 1(c).
14 Id. at § 1(f), (g), (h) (emphasis added). The Department of State will also invite public comment on the permit being reviewed and “consider[ ] all views expressed, including public comment, before making a decision on a permit.” BUREAU OF WESTERN HEMISPHERE AFFAIRS—DEPARTMENT OF STATE, FACT SHEET: APPLYING FOR PRESIDENTIAL PERMITS FOR BORDER CROSSING FACILITIES (CANADA) (Jan. 21, 2009), http://www.state.gov/p/wha/rls/fs/2009/114990.htm.
permit . . . would serve the national interest.” The national interest determination “involves the consideration of many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.” Logically enough, if a permit would serve the national interest, the Department of State will grant it; if a permit would not serve the national interest, it is denied. The Secretary of State is also empowered to attach specific conditions to any approved permits “as the national interest may in the Secretary’s judgment require.”

The contents of an application for a cross-border oil pipeline permit are, as one might expect for any large-scale multinational project, quite wide-ranging. The main components of a complete application package—this list is specifically focused on United States-Canada permits—include: identifying information; a description of the facility to be constructed; an explanation of how the proposed project will advance the national interest; identification of already-existing similar facilities; information on the project’s impact on traffic flow (likely inapplicable to most oil pipeline projects); a

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15 Id. at § 1(g), (h), (i) (emphasis added). In the event that there is a dissenting voice from one of the officials listed in note 11 & accompanying text supra, the final permitting decision goes to the President.


17 E.O. No. 13337, supra note 6, at § 1(g), (h).

18 Id. at § 1(g).

19 Applying for Presidential Permits for Border Crossing Facilities (Canada), supra note 14. (This includes precise information that identifies the party applying for a permit and which will be responsible for the facility’s operation.)

20 Id. (The applicant must provide the proposed project’s “location, design, the safety standards to be applied, access routes, and details of the proposed construction methods” as well maps and photographs of the site).

21 Id. (The applicant should support its national interest assertion with documentation “indicating the desirability and feasibility of the proposed facility”).

22 Id.

23 Id.
detailed construction plan;\textsuperscript{24} financing information;\textsuperscript{25} “a description of all steps that have been or will be taken to secure the approval of local, provincial, and federal officials in Canada;”\textsuperscript{26} information about “foreseeable environmental impacts of the proposed facility pursuant to NEPA;”\textsuperscript{27} information on other approvals being sought in the United States;\textsuperscript{28} effects the project might have on preserved historic properties;\textsuperscript{29} and environmental justice compliance.\textsuperscript{30}

Generally, the most time- and effort-intensive component of these application materials is the comprehensive environmental review, as per NEPA, which must be undertaken before any permits are issued.\textsuperscript{31} The environmental review stage also ends up being a frequent stumbling block and point of contention for projects seeking permit approval (see, e.g., Keystone XL). While State Department NEPA regulations, which adhere closely to the Council on

\textsuperscript{24} Id. This includes not only a construction plan, but an approximate schedule for the project’s progress and a list of anticipated problems that might be faced during construction.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id. See National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2006). The Act requires consideration of “the effects of the proposed facility on . . . properties [that are or could potentially be classified in the National Register of Historic Properties] and seek comment from the Advisory Council on Historic Preservation, an independent federal agency established under the [Act].”; Applying for Presidential Permits for Border Crossing Facilities (Canada), supra note 14.

\textsuperscript{30} Applying for Presidential Permits for Border Crossing Facilities (Canada), supra note 14. See E.O. No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (requiring federal government agency oversight to address the “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States”). This concept is often referred to as “environmental justice.”

\textsuperscript{31} To that point, CEQ’s NEPA regulations suggest that final EIS’s normally be limited to 150 pages, but for “proposals of unusual scope or complexity” EIS’s should normally be less than 300 pages. 40 C.F.R. § 1502.7 (2012). The Keystone XL Pipeline’s final EIS is not available online, but a total of three drafts were produced over a period of nearly three years. Executive Summary: Keystone XL EIS, supra note 16, at ES-1.
Environmental Quality’s (CEQ) NEPA regulations, do not identify any particular federal actions that by their very nature trigger the requirement for an environmental impact statement (EIS). Oil pipelines are specifically listed as an action “normally requiring environmental assessments [EA].” These more preliminary-level EA’s, in turn, are key indicators in determining the necessity for a full-scale EIS. Where “the environmental assessment demonstrates that the environmental effects of the action with the United States may be ‘significant,’” the Department of State must perform an EIS. Simply because of their large scale, many cross-border oil pipelines will, more likely than not, be judged to have potentially significant effects on environment, thereby triggering the EIS.

An EIS is an extensive report that guarantees federal government actions and policies comply with both the spirit and the letter of NEPA. In a sentence, NEPA is the United States’ “basic national charter for protection of the environment . . . establish[ing] policy, set[ting] goals . . . and provid[ing] means . . . for carrying out the policy.” On the most fundamental level, it requires “Federal agencies to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources,” responsibilities which are largely achieved through carrying out EIS’s. EIS’s “provides full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” In general, a draft EIS should be first prepared to

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33 A federal action might take the form of issuance or denial of permits prior to commencement of work on natural resource projects, for example.
34 22 C.F.R. § 161.7(a) (2012).
35 22 C.F.R. § 161.7(c), (c)(1) (2012).
36 Id.
37 22 C.F.R. § 161.8(d).
38 40 C.F.R. § 1500.1(a) (2012).
best fulfill the obligations under NEPA Section 102(C).\textsuperscript{41} Then, the public is given a period to submit comments,\textsuperscript{42} after which a revised, final EIS is prepared, taking into account the public comments.\textsuperscript{43} During the ultimate evaluation, officials will use the finalized EIS as a major factor to help guide their “national interest” determination for permit approval or denial.\textsuperscript{44}

II. The Proposed, Streamlined Permitting Standard for Cross-Border Oil Pipeline Projects and Its Advantages

As introduced in Part I, the new, streamlined standard comprises three main categories of revisions that distinguish it from the current standard and minimize the obstacles slowing or blocking a deserving project’s path to obtaining a permit. One category deals with easing actual substantive regulations; the second category involves expanding permitting authority beyond the Executive branch; and the final category limits the first two to only certain classes of cross-border oil pipeline projects.

A. Modification #1: Creating an Eased, Hybrid Regulatory Scheme for Cross-Border Oil Pipeline Permitting by Borrowing Selected Provisions from the Department of Energy’s Power Transmission Line Permitting Standard

To lower substantive regulatory hurdles, two principal aspects of the current oil pipeline permitting scheme should be

\textsuperscript{41} 40 C.F.R. § 1502.9(a) (2012). Meeting NEPA §102(C)’s obligations means that the EIS must analyze, in detail: “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332 (2006).

\textsuperscript{42} 40 C.F.R. § 1503.1 (2012).

\textsuperscript{43} 40 C.F.R. § 1502.9(b) (2012).

\textsuperscript{44} See, e.g., Executive Summary: Keystone XL EIS, supra note 16, at ES-1; supra note 16 & accompanying text.
replaced by alternatives from the cross-border power transmission line permitting procedure. First, the Department of Energy’s simpler, “consistent with the public interest” standard should replace the current “national interest” standard as the ultimate question around which a project’s approval/denial revolves. Implicated in, and intertwined with these two “tests” are required consultations that the both Secretary of Energy and Secretary of State must make before approving or denying cross-border projects under their respective departments’ regulatory frameworks. The second major change—employing the Department of Energy’s cross-border power transmission line consultation approach—will diminish the excessive number of consultations the Department of State must currently undertake before approving a cross-border oil pipeline.

Like the Department of State with cross-border oil pipelines, the Department of Energy is in charge of the permitting process for cross-border power transmission lines. Accordingly, as per Executive Order 10485, after receipt of an application, the Secretary of Energy shall grant a presidential permit, “[u]pon finding [its] issuance . . . to be consistent with the public interest.” This is in contrast to the test applied in oil pipeline permitting regulations, where the seminal question is whether the issuance of a permit will “serve the national interest.” Both Secretaries may attach conditions to a permit, such “as the public interest may in [the Secretary’s] judgment require.”

The most important reason for changing the determinative test from “serves the national interest” to “consistent with the public interest” is the lesser number of factors the “public interest” test weighs as opposed to its counterpart. Thus, the more

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47 Supra note 15 & accompanying text.
48 See E.O. No. 10485, supra note 46, at § 1(a)(3). Compare with E.O. No. 13337; supra note 18 & accompanying text (Secretary of State can impose conditions on permits “as the national interest may in the Secretary’s judgment require”).
straightforward “public interest” test somewhat restraints the Secretary’s discretion, while still insisting that the cross-border project qualify as advantageous to the public at large. For example, under the “public interest” test, the Department of Energy must weigh only “the potential environmental impacts” of the cross-border power transmission connection and “the project’s impact on electric reliability,” but gives the Secretary the ability, if needed, to consider any other factors that [the Department of Energy] may find relevant to the public interest.” Additionally, Executive Order 10485 demands only that the Secretary of Energy consult with the most essential agencies—the Secretaries of State and Defense—as these reflect the most serious public interest concerns.

On the contrary, cross-border oil pipeline permitting regulations direct the Department of State to analyze a myriad of elements when deciding whether to grant a permit—among the non-exclusive list of factors are “energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.” Moreover, Executive Order 13337 compels the Secretary of State to confer with a surprisingly large group of federal agencies—Secretaries of Defense, Interior, Commerce, Transportation, Energy, and Homeland Security, the Attorney General, and the Administrator of the Environmental Protection Agency. Because so much discretion is left in the hands of the Secretary, negative feedback on any of the numerous factors considered, or disagreement from any of the eight other agency heads, could unnecessarily—or even illegitimately—lengthen the permitting process, mire a proposal in regulatory limbo, and/or force an otherwise-worthy proposal to a grinding halt.

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49 In the cross-border liquid oil pipeline context, this criterion could be referred to as “energy security.”
51 E.O. No. 10485, supra note 46, at § 1(a)(3).
52 Supra note 16 & accompanying text.
53 Supra note 11 & accompanying text.
54 Some people, particularly proponents of the Keystone XL pipeline, argue that this is what happened with the Keystone XL proposal. See, e.g., Lee Ross & William
This understandably leads to numerous questions. Since both power transmission lines and liquid oil pipelines are facilities that transport energy across international borders, why does such a significant regulatory disparity exist for permitting? Does the cross-border power transmission line standard not address the most fundamental concerns that an oil pipeline proposal might generate as well, without imposing any superfluous conditions? What additional cultural, economic, or foreign policy implications that affect international oil pipelines are absent from power transmission line connections? What purpose does obligatory consultation with the Secretaries of the Interior, Commerce, Transportation, and Homeland Security, the Attorney General, and EPA Administrator serve for a cross-border oil pipeline that is not implicated in a cross-border power line transmission project?

Indeed, the efficient Department of Energy permitting scheme already tackles the most critical issues facing potential cross-border power transmission lines and oil pipelines—namely (1) conducting effective, ex-ante environmental reviews, (2) verifying reliability/energy security, and (3) ensuring consistency with the public interest. Therefore, the relevant parts of the Department of Energy regulations should be used as a model to implement a hybrid permitting blueprint, where the “public interest” test replaces the “national interest” test and inter-departmental consultation is only required between the Departments of Defense, Energy, and State.

B. Modification #2: Expansion to Allow Alternate Government Bodies to Issue Cross-Border Oil Pipeline Permits

Although the hybrid Department of State-Department of Energy regulatory language is an important element of this proposed revamp of the current oil pipeline permitting scheme,

LaJeunesse, TransCanada submits new Keystone XL pipeline plan, FOXNEWS.COM (April 18, 2012) http://www.foxnews.com/politics/2012/04/18/exclusive-transcanada-submits-new-keystone-xl-pipeline-plan/ (noting that “State Department officials told members of Congress that a 2013 approval decision is still feasible, [because] the reason for the original denial was ‘not based on the merits of the project’”).

Supra note 50.
the central component of the new, streamlined standard is granting permitting authority to other branches and levels of government. In this modified approach, the power to approve or deny permits will extend beyond the Executive branch to both the Legislative branch and state governments, thus allowing projects to receive approval through one of three means.

1. Legislative (Congressional) Approval through Two-Thirds Majority in Both Houses

Before setting out the Congressional approval option, it is important to remember that cross-border oil pipeline proponents will still be able to obtain a permit to commence work through the Executive branch, as they do today. In fact, the Executive branch will remain the regulator of “first resort” to whom proposed projects are initially submitted. However, a revised procedure will take effect if the Executive branch, whether the Secretary of State or the President, denies a permit. Under the new, streamlined permitting model, if both the House of Representatives and the Senate vote by two-thirds majority to grant the permit in question, Congress will be able to override the Executive branch’s denial, or “veto.”

The justification behind granting, or re-granting as it were (see infra at 4), the legislature power to make such permitting decisions is compelling, wide-ranging, and possesses roots that reach back to the United States Constitution itself. Article I, Section 8 empowers Congress, and not the Executive, to “regulate Commerce with foreign Nations.” This clear and explicit declaration in the chief legal document of the United States openly indicates that Congressional

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56 For an excellent, in-depth discussion on legislative and executive roles in regulating and permitting cross-border facilities and how the two branches interact and balance their legal responsibilities in this area, see Adam Vann, Kristina Alexander, Vanessa Burrows & Kenneth Thomas, Congressional Research Service, Proposed Keystone XL Pipeline: Legal Issues 4–12 (2012).

57 This precise number was selected purposefully, as it is identical to the vote needed to override a presidential veto of legislation. U.S. Const. art. I, § 7.

“authority in this field is preeminent.” The Congressional Research Service (CRS) has noted Robert J. Delahunt’s observation that:

the power to regulate foreign commerce at the national level was to be vested in Congress. [...] The debate at the Philadelphia Convention over whether a bare majority or a supermajority of each House was required to enact foreign commerce regulations demonstrates that the Framers intended such regulation to be made by a legislative body, rather than an executive or judicial one.

The Executive branch, on the other hand, relies on the “President’s recognized authority in the area of foreign affairs” as well as the Executive Orders discussed in Part II. Importantly, throughout most of its history, the Executive branch has recognized the Legislative branch’s superiority in this field. As the CRS report demonstrates, a fairly long line of presidential actions on cross-border facility permitting have shown a substantial degree of deference to Congress’s inherent power in this area. Nevertheless, a trend seems to have emerged over the years whereby the president’s power has slowly grown through the inaction of Congress, the body upon which the power to regulate foreign commerce had originally been conferred. As late as 1968, when the Johnson administration issued

59 VANN ET AL., supra note 56, at 6.
60 Former Special Counsel of the Justice Department’s Office of Legal Counsel, an executive department.
62 Id. at 4. See also U.S. CONST. art. II, §§ 2, 3 (stating that the President, with the consent of the Senate, has the power to make [international] treaties, appoint ambassadors [to foreign countries], and receive ambassadors from other countries).
63 See VANN ET AL., supra note 56, at 7–10. For example, in 1869, President Grant evinced his deference to the legislature by acquiescing not to oppose a French company’s submarine cable, “unless Congress otherwise direct[ed].” Id. at 7; citing 22 Op. Att’y Gen. 13 (1898) (citing Senate Doc. 122, at 70)). Later, in 1897, President
Executive Order 11423, assigning power to the Executive branch to issue cross-border oil pipeline permits (and permits for other cross-border natural resource facilities), the traditional superiority of Congress in the permitting context was acknowledged. That document “designate[s]” and “empower[s]” the Secretary of State to handle permits for cross-border natural resource facilities, among other things, “to the extent that congressional authorization is not required.”64 However, by 2004, when Executive Order 13337 was promulgated, this language had quietly disappeared.65

Decisions from the United States federal judiciary also support Congress’s ability to regulate all foreign commerce—which, by definition, certainly includes cross-border oil pipelines—by broadly construing the Legislative branch’s Commerce Clause66 authority. In the famous 1824 Supreme Court case of Gibbons v. Ogden, Chief Justice Marshall, writing for the Court, ruled that the Commerce Clause “comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which

McKinley refused to consider the same French company’s application for a permit to land an additional undersea cable, because he “did ‘not regard himself as clothed, in the absence of legislative enactment, with the requisite authority to take any action upon the application.’” Id., citing 22 Op. Att’y Gen. 13 (1898) (reciting from a May 11, 1897 letter from the State Department). Another Attorney General opinion, this time from 1898, maintained that “the President could impose conditions upon foreign cables, in absence of congressional legislation, and either prevent or permit the landing of such cables. . .” Id. at 8. By 1913, the evolution had reached a point where the Attorney General was implying that “both the President and Congress have authority to regulate. . . international commercial transactions,” and absent any contrary Congressional action, the President was free to proceed. Id. at 9 (emphasis added).

64 E.O. No. 11423, supra note 6, at § 1(a) (emphasis added).
65 E.O. No. 13337, supra note 6, at § 1(a). See also VaNN et AL., supra note 56, at 9–10 (noting that “Executive Order 13337 omitted the qualification ‘to the extent that congressional authorization is not required,’ when amending the section in Executive Order 11423 that empowered the Secretary to receive all such applications”).
66 U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”).
this power does not extend." Even in United States v. Bailey, where the Fifth Circuit interpreted the scope of the Commerce Clause more narrowly, it still held that "Congress may regulate only commercial intercourse, so its power is confined to the regulation of trade, business transactions, and economic activity." Like most cross-border natural resource projects, a liquid oil pipeline undoubtedly meets even this tighter definition of commerce, because, as a commodity (or good) being transported for later distribution and sale, it is a quintessential example of international trade and economic activity. It follows, therefore, that the Commerce Clause sanctions Congress to legislate on the issuance of oil pipeline permits.

In a case more specifically focused on oil pipeline permitting, the federal district court in Sisseton-Wahpeton Oyate v. U.S. Department of State concluded that, for cross-border pipelines:

Under the federal Constitution, then, the authority to regulate such a project vests in either the legislative or executive branch of government. Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs.

Critically, the court accepts that the Legislative branch shares oil pipeline permitting power with the Executive branch and clarifies that, by default, the President may exercise exclusive jurisdiction, but only because Congress did not act in the field. With the unambiguous delegations of authority that the Constitution

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68 The Fifth Circuit explained that despite the breadth of the Supreme Court’s definition as per Gibbons v. Ogden, "the Commerce Clause does not grant the Congress carte blanche." U.S. v. Bailey, 115 F.3d 1222, 1235 (5th Cir. 1997).
69 Id. (emphasis in original).
provides to Congress, the historical pattern of Executive deference to Congress with regard to cross-border connections, and favorable federal judicial precedent on its side, Congress seems more than justified in involving itself in the issuance of cross-border oil pipeline permits. Thus, an appeal to the Legislative branch for a two-thirds vote to override Executive branch denial of a permit is a viable part of the streamlined cross-border oil pipeline regulatory scheme.

2. State-by-State Approval, Unless the Federal Regulatory Authority Can Affirmatively Prove That the Overall Proposed Project Is Against the National Interest

Under the new, streamlined permitting procedure, the third and final alternative for gaining project approval is to obtain permits from each state individually, unless the Department of State—the federal regulator responsible for issuing cross-border permits—can prove that the proposed project, as a whole, is against the national interest. Such a diminution of federal administrative permitting power and shift in the burden of proof makes sense. After all, the sole reason that cross-border oil pipelines must receive federal endorsement is because the project traverses an international border. Yet, in comparison, an identical pipeline that begins in the northern reaches of Montana and extends to the Gulf Coast of Texas does not require a federal permit. The difference in federal oversight and the difficulty/complexity in obtaining a permit for an international pipeline as opposed to a domestic pipeline is stark. It also begs the question why pipelines that extend only a few miles farther, into Canada or Mexico, should be subjected to more rigorous levels of scrutiny than their counterparts that stop just inside the border.\footnote{In Canada’s case, especially, it is difficult to legitimize this discrepancy in level of scrutiny. As the CRS highlights: “Canada has long been the United States’ most important energy partner. Canada is the single largest foreign supplier of petroleum products, natural gas, and electric power to the United States—and the United States is the dominant consumer of Canada’s energy exports. Canada is also the primary recipient of American energy exports. The value of the energy trade between the two countries totaled nearly $100 billion in 2010...” Companies from America...}
interstate oil pipeline siting is not regulated by the federal government whatsoever, should not siting for international pipelines operate in the same fashion, only with a final federal verification to ensure that the proposed projects are not against the national interest?

To be sure, federal legislation has been promulgated which governs, to various degrees, oil pipeline safety as well as ratemaking, but federal rules and regulations do not control issuance of permits for domestic location and siting. Instead, the states themselves generally make permitting decisions for major natural resource and energy projects like oil pipelines, if they even exercise this authority at all. Without federal government regulation over oil pipeline siting, “state laws establish the primary authority for oil pipelines, including interstate oil pipelines.” Given that state law controls in all pipeline projects, except those that cross international borders, the streamlined approach will re-emphasize state authority

and Canada “have become integrated in the development, production, transportation, and marketing of petroleum and natural gas. Joint ventures between American and Canadian companies on petroleum and natural gas projects are common. These close connections, and geographic proximity, have led the American and Canadian energy markets to be viewed as one.” PAUL W. PARFOMAK & MICHAEL RATNER, CONGRESSIONAL RESEARCH SERVICE, THE U.S.-CANADA ENERGY RELATIONSHIP: JOINED AT THE WELL 1, 3 (June 17, 2011).


FERC has regulatory authority over the rates interstate oil pipeline operators set.

Id. at 5 (stating plainly that “[t]he federal government does not have siting authority for oil pipelines, even interstate pipelines”). Compare this lack of siting authority for oil pipelines with the clear responsibility assigned to FERC via the Natural Gas Act, 15 U.S.C. § 717f(c) where “parties seeking to construct, acquire or operate gas pipelines ... i.e. interstate pipelines, must obtain a ‘certificate of public convenience and necessity’ from FERC.” Id.

See id. (noting that “[i]n the absence of federal government siting authority, state laws establish the primary siting authority for oil pipelines, including interstate oil pipelines”). The CRS report also underlines how some states, such as Nebraska, “do not appear to [have] any permitting requirements that apply specifically to the construction and operation of oil pipelines.” Id.

Id.
even on cross-border projects by reversing the existing burdens of proof. If a proposed oil pipeline project complies with all state regulations, successfully passes the NEPA evaluation, and satisfies all other relevant state and federal regulations, a \textit{prima facie}, rebuttable presumption of permit approval will form. This rebuttable presumption can only be overcome if the State Department, as the federal regulator, affirmatively proves that granting the permit would be against the national interest on the whole. Consequently, if the State Department cannot prove that the project cuts against the national interest, then its proponents can carry on by seeking individual permits from each of the states through which the cross-border pipeline will pass.

Suppose, for instance, that an application for a cross-border pipeline entering Montana from Saskatchewan, Canada had been denied by the presidential administration and failed to garner the two-thirds “override” in both houses of Congress. While pipeline proponents would still have to fulfill their environmental review obligations under NEPA and obey all pertinent state and federal regulations, the pipeline builders could apply to the Montana state regulatory authorities to seek a permit to construct the portion of the pipeline that ran through Montana. Thus, if the Montana Public Service Commission found a project to be in the best interest of Montanans and chose to issue a permit, then a permit would indeed

77 For example, the requirement that design and construction standards will meet all of the criteria imposed by, \textit{inter alia}, the Hazardous Liquid Pipeline Act of 1979 and Pipeline Safety Improvement Act of 2002. \textit{Supra} note 72 and accompanying text.

78 \textit{See} MONT. CODE ANN. \S\ 75-20-102(4) (“The legislature finds that the construction of additional . . . pipeline facilities [and other natural resources/energy facilities] may be necessary to meet the increasing need for electricity, energy, and other products. Therefore, it is necessary to ensure that the location, construction, and operation [of] . . . pipeline facilities . . . are in compliance with state law and that a[ ] . . . pipeline facility . . . may not be constructed or operated within this state without a certificate of compliance acquired pursuant to this chapter.”)

79 \textit{Id.} at \S\ 75-20-102(1)-(3) (describing the purposes and legislative findings for the Major Facility Siting Act—factors likely to be weighed when making a permitting decision, such as “maintain[ing] and improv[ing] a clean and healthful environment for present and future generations,” “preven[t]ing unreasonable depletion and degradation of natural resources,” and balancing Montanans constitutional rights “to pursue life’s basic necessities, to enjoy and defend life and liberty, to acquire,
be granted and the project could proceed, unless the Department of State’s Office of International Energy and Commodity Policy could demonstrate that the proposed project, as a whole, went against the national interest. The Montana Major Facility Siting Act and Title 69 (“Public Utilities and Carriers”), Chapter 13 (“Pipeline Carriers”), of the Montana Code Annotated would likely act as primary guidance in the Montana Public Service Commission’s determination on whether to issue a permit.

The advantages of this state-based, third alternative are largely obvious. A third method of seeking permitting makes it more likely that worthy project proposals that have satisfied all state and federal requirements would actually receive the permits they deserve. The excessively open-ended discretion that enables the Executive branch to issue or deny cross-border oil pipeline permits for arbitrary and irrational reasons would end. Combined with the suggested Legislative branch alternative, it also reduces the threat of the über-politicization of a decision, since the parties that previously had exclusive control over granting or blocking a permit would now know that a proposed project would have multiple opportunities to gain approval. If a pipeline’s proponents have complied with all state and federal permitting regulations and successfully met the NEPA requirements, regulators would understand that their decision to reject an application would need to be founded on solid evidence and a well-reasoned argument; a nebulous or poorly-supported decision would not withstand multiple rounds of review. Accordingly, the assessment procedure and decision would refocus more on the actual merits for and against the project, rather than insignificant issues and political games.

possess, and protect property, and to seek safety, health, and happiness in all lawful ways”).

82 Until superior sources of energy are discovered, policy analysts agree that increased oil importation from Mexico, and particularly Canada, in lieu of importation from less stable and even outright hostile foreign regimes, is preferable for American interests (e.g., energy security). See, e.g., Parfomak & Ratner, supra note 71 at 1 (noting that “[i]ncreased energy trade between the United States and Canada—a stable, friendly neighbor—is viewed by many as a major contributor to U.S. energy security”).
C. Modification #3: Limit the Streamlined Standard Presented Supra Parts III.A–B to Projects That Enter the United States from Countries with Equivalent or Superior (Stricter) Regulations in the Fields of Environmental and Natural Resources Law

The new, streamlined permitting standard has one major restriction, which would effectively limit the number of cross-border natural resources projects that could be eligible for fast-tracked approval. It would demand that, to qualify for fast-tracked approval, the proposed cross-border oil pipeline project must enter United States territory from a nation with equivalent (reasonably comparable) or superior (stricter) natural resources and environmental regulations. This article defines “superior” or “stricter” regulations as those which exceed their American counterparts, in the sense that the foreign regulations are more protective of the environment, promote more sustainable natural resource management, demand more exacting before-the-fact environmental analyses, impose more stringent conditions for habitat restoration, et cetera. In other words, “equivalent or superior regulations” means that the country from which the proposed project will enter the United States has a permitting scheme and associated regulations that are on par with, or compare favorably to, the corresponding American regulatory landscape. If the foreign nation from which the proposed project originates is judged to have equivalent or superior natural resources and environmental laws, the streamlined standard should be applied for permitting for the American sector of the project; if not, then the current permitting scheme should govern.

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83 While this section pertains only to oil pipelines, it seems reasonable that a similar blueprint could be expanded to other cross-border natural resources and energy projects as well.

84 As it stands today, geographical and technological constraints dictate that this standard mostly applies to America’s northern and southern land neighbors, Canada and Mexico. However, future advancements in technology could also affect cross-border facilities and connections with other, more distant countries.
III. A HYPOTHETICAL CASE STUDY ATTEMPTING TO APPLY THE NEW, STREAMLINED PERMITTING STANDARD: THE KEYSTONE XL PIPELINE

The Keystone XL pipeline is a proposed oil pipeline project, sponsored by TransCanada, which is designed to begin near Hardisty, Alberta, Canada and transport Western Canadian Sedimentary Basin crude oil from the Athabasca oil sands to Port Arthur, Texas on the Gulf Coast. Keystone XL’s capacity would allow it to transport 700,000 barrels of crude oil each day to “delivery points” in both Oklahoma and on the Texas Gulf Coast. The 36-inch diameter pipeline, mostly buried underground, would run approximately 1,711 miles through Alberta, Saskatchewan, Montana, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. TransCanada applied for a presidential permit in September 2008, prepared multiple EIS’s (with the final version released on August 26, 2011), and agreed to comply with 57 more stringent “Project-specific Special Conditions for design, construction, and operation of the Project.” These “Special Conditions,” designed by the Department of State in conjunction with the Pipeline and Hazardous Materials Safety Administration (PHMSA), would be instituted as a supplement to “the existing PHMSA regulatory requirements.” Nonetheless, Keystone XL has been controversial from its inception, and its critics raised concerns about the potential for serious negative environmental consequences—in particular, the prospect of the pipeline passing through the Sand Hills region of Nebraska and over the Ogallala Aquifer, an important water source for the Great Plains region and western United States. After evaluation by the

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86 Id. at ES-1. The daily capacity could be increased to 830,000 “by increasing pumping capacity at the proposed pump stations.” Id. at ES-2.
87 Id. at ES-2, ES-4–ES-5. Approximately 327 miles of pipeline would be located in Canada, whereas the other 1,384 would be in the United States. Id. at ES-2.
88 Id. at ES-6.
89 Id.
Department of State, the Obama administration followed the State Department’s recommendation and denied the permit as not serving the national interest.  

Admittedly, any attempt to analyze whether Keystone XL would have been awarded a permit via the new, streamlined standard’s Legislative branch “override” alternative or through its state-by-state permitting option can be little more than speculation. Nevertheless, a preliminary investigation into whether Canada has equivalent or superior environmental regulations and natural resource project permitting procedures can offer a strong indication as to whether the streamlined standard might apply in the Keystone XL pipeline’s case. By far the most essential aspect of the permitting process in assessing the overall environmental viability and impact a large-scale natural resource venture like Keystone XL is the NEPA analysis. Also important are the general and technical information disclosures which are mandatory part of the application package for any proposed oil pipeline project. Accordingly, if it can be proven that Canada possesses equivalent or superior corresponding rules and regulations in these areas, then the Keystone XL pipeline likely deserves to benefit from the streamlined permitting standard.

A. Similarity in Purposes of the Legislation: NEPA and CEAA

In Canada, the equivalent of the American NEPA is the Canadian Environmental Assessment Act (“CEAA”), assented to in 1992. The similarities NEPA and CEAA share are striking and broad-based. Starting at their most elementary levels, the purposes of NEPA and CEAA are near mirror images of each other.

NEPA, “the Magna Carta of environmental laws” compels American government entities to “undertake an assessment of the environmental effects of their proposed actions prior to making

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91 Id.
92 Due to space constraints, I do not intend for this to be a full-scale, in-depth comparative study at this point.
93 Obviously, in the Keystone XL instance, Canada is the country from where the cross-border pipeline would enter the United States.
94 Supra text accompanying notes 31–44.
95 Supra text accompanying notes 19–30.
decisions” and identify feasible alternatives so that the agencies are “informed of the environmental consequences” of the choices they make.\footnote{Council on Environmental Quality, A Citizen’s Guide to NEPA 2, 5 (2007).} To achieve that end, NEPA forces Federal agencies to weigh the “impacts on social, cultural, and economic resources, as well as natural resources,” among other factors.\footnote{Id. at 1.} The Congressional purpose of NEPA declares the law as “a national policy which will encourage productive and enjoyable harmony between man and his environment . . . [and] promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man.”\footnote{42 U.S.C. § 4321 (2006).} To accomplish this ambitious goal, NEPA directs the government to “use all practicable means” in order to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences” and “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities.”\footnote{42 U.S.C. § 4331(a) (2006).} Furthermore, NEPA highly values and encourages public comment from both organizations and private citizens during the environmental review and evaluation.\footnote{40 C.F.R. § 1500.2(d) (2012) (“Federal agencies shall to the fullest extent possible [. . .] Encourage and facilitate public involvement in decisions which affect the quality of the human environment”); Council on Environmental Quality, supra note 95, at 2 (observing that one of the two major purposes of environmental review is “citizen involvement”).} 

CEAA emphasizes the same sort of informed decision-making as NEPA, where the parties are fully aware of potential environmental consequences before they make their decision, and thus, can devise measures to limit any negative impacts. One of the central objectives of CEAA is to use environmental assessments so as to “minimize or avoid adverse environmental effects before they occur; and incorporate environmental factors into decision making.”\footnote{Canadian Environmental Assessment Agency, Canadian Environmental Assessment Act: An Overview [§ 1.1] 3 (updated ed. 2011) (2003).} Environmental assessments are described as “a process
to predict the environmental effects of proposed initiatives before they are carried out," recommend ways to "mitigate [possible] adverse effects." and ascertain if significant, negative environmental effects will occur "even after the mitigation is implemented."102 Meanwhile, much like NEPA, the statutory language itself stresses "sustainable development"—the need to strike a balance between humankind’s interests and environmental preservation.103 It describes CEAA as a means "through which the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality."104 The environmental assessments imposed by CEAA help attain these objectives by providing "an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development."105 Finally, like NEPA, public participation and comment is a key aspect of the environmental assessment process.106

B. NEPA’s and CEAA’s Scope, “Qualifying Projects,” and Core Components

Given their overlapping purposes, it is not surprising that compliance with NEPA and CEAA is necessary for many of the same types of projects undertaken in the United States and Canada. In the United States, any “legislation and other major Federal actions

102 Id. See also R.S.C. 1992 S.C., c. 37, § 4(a) (Can.) (setting out the purposes of CEAA, such as "ensur[ing] that projects are considered in a careful a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects").
103 See R.S.C. 1992 c. 37, § 4 (Can.) (current as to Mar. 6, 2012) (describing another key aim of CEAA as "encourage[ing] responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy.").
104 1992 S.C., c. 37, Preamble (Can.) (current as to Mar. 6, 2012).
105 Id.
106 Id. at § 4(1)(d) (listing one objective of CEAA as "to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process").
significantly affecting the quality of the human environment” must comply with NEPA. 107 As discussed in Part II supra, oil pipeline projects (like Keystone XL), by their sheer size, scale, and the geographic area covered, will likely need to prepare a full-scale EIS, with a much more detailed environmental analysis, and not merely a shorter, basic EA. 108 Likewise in Canada, some projects require a comprehensive study before work can begin or a permit can be issued, whereas a simpler screening report will suffice for others. A comprehensive study is the Canadian equivalent of an EIS, and in taking more elements into account for its environmental analysis, it is more all-encompassing and intensive than a screening report, which is Canada’s parallel to an EA. 109 In any event, there is no guesswork involved in determining the level of review that should be applied to the Canadian sector of the Keystone XL pipeline, because in Canada, certain classes of projects, including the “proposed construction of an oil and gas pipeline more than 75 km in length on a new right of way,” always require that a comprehensive study be completed. 110

With regard to content and substance, most of the legal obligations and directives at the heart of NEPA are also shared with, and can be found in, CEAA. NEPA outlines five major points, with

108 See supra notes 32–37 & accompanying text. As per 22 C.F.R. § 161.7(c)(1) (2012), EA’s are presumptively required for international pipelines, where the Department of State has regulatory jurisdiction, to “provide the basis of the determination whether an [EIS]” must also be completed. See also 40 C.F.R. §§ 1501.3–1501.4 (2012) (providing, in the model NEPA regulations drafted by the Council on Environmental Quality, whether an [EA] and/or an [EIS] should be prepared); 40 C.F.R. § 1508.9, § 1508.11 (2012) (defining “environmental assessment” and “environmental impact statement”).
110 Comprehensive Study List Regulations (Canadian Environmental Assessment Act) SOR/94-638, § 4(14)(a) (Can.) (current as to Mar. 6, 2012). For a more general description of the sweeping, NEPA-like jurisdiction of CEAA and what types of projects and actions are covered, see R.S.C. 1992 S.C., c. 37, § 5 (Can.) (current as to Mar. 6, 2012) (prescribing that “[a]n environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project . . .”) and then listing criteria).
a very broad scope, that must be explored in a “detailed statement by the responsible official” for ventures requiring NEPA compliance:

(a) the environmental impact of the proposed action,
(b) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(c) alternatives to the proposed action,
(d) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
(e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\footnote{42 U.S.C. § 4332(C) (2006).}

For its part, Canada’s CEAA also places very sweeping, analogous responsibilities on parties completing screening reports and comprehensive study reports, mandating information on:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
(b) the significance of the effects referred to in paragraph (a); [ . . . ]
(c) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
(d) any other matter relevant . . . such as the need for the project and alternatives to the project, that the responsible authority . . . may require to be considered.\footnote{R.S.C. 1992 c. 37, § 16(1) (Can.).}

In addition, CEAA provides that the following supplementary factors must be weighed in a comprehensive study analysis:
(a) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
(b) the need for, and the requirements of, any follow-up [clean-up or restoration] program in respect of the project; and
(c) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.113

Without embarking on an overly simplistic sentence-by-sentence comparison within this article, a side-by-side reading of these NEPA and CEAA measures reveals the extent to which these two laws share legal content. Although the actual language employed is not entirely identical, the intention of the two laws is highly compatible and most core CEAA components cited above can easily be matched up with their NEPA relatives. In short, the commonalities in the purposes of the two laws and in the classes of projects to which they apply plainly carry over into the core substantive statutory language found in NEPA and CEAA, both of which force government agencies to “take a ‘hard look’ at environmental consequences” of a proposed project before making any decisions.114 Accordingly, because this preliminary study has clearly demonstrated that Canada’s environmental and natural resources laws are equivalent or superior to corresponding laws in the United States, the Keystone XL pipeline likely would qualify for fast-tracked permitting under the modified, streamlined standard.115

113 Id. at § 16(2).
115 However, proposed changes to Canada’s Budget 2012 could have an effect on this conclusion, since the current method of conducting environmental reviews is due to be “limited [and] simplified.” See, e.g., Jason Fekete, Budget: Environmental Reviews to be limited, simplified, CALGARY HERALD (Mar. 29, 2012), http://www.calgaryherald.com/business/Environmental-reviews+limited+simplified/6380913/story.html.
CONCLUSION

Natural resource project permitting, and particularly oil pipeline permitting, is probably as complex a topic as it is important, especially as the United States’, and indeed the world’s, demand for energy increases through the 21st century. Many policy analysts have pointed to the advantages of shifting the United States’ energy policy dynamics by increasing trade with, and imports from, neighbors like Mexico, and especially Canada. With that in mind, the United States should modify its current cross-border oil pipeline permitting scheme and adopt a new, streamlined standard that makes for a smoother permitting experience for worthy cross-border oil pipeline (and other natural resource) projects. Again however, only those projects that enter the United States from a country that already possesses equivalent or superior environmental statutes and natural resource permitting regulations will be eligible for consideration for the fast-tracked approval program. Three key changes to the current cross-border oil pipeline permitting scheme would reduce the immense discretion currently held by the Executive branch, lessen the over-politicization of decisions that occurs today, and force regulators to justify with solid and substantial evidence why a permit goes against the national interest. The first modification will replace certain unwieldy provisions from the current system with alternate language from the Department of Energy’s efficient cross-border power transmission line permitting model. The second major alteration allows cross-border oil pipeline proponents who have been denied a presidential permit to seek a Congressional “override” of the Executive branch’s rejection. In the event that the proposed oil pipeline does not receive a presidential permit and fails to gain an “override” from both houses of Congress, proponents can also seek permits from individual states on a case-by-case basis, 

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116 Supra Part III.C.
117 Supra Part II.
118 Supra Part III.C.
119 Supra Part III.B.2.
120 Supra Part III.A.
121 Supra Part III.B.1.
provided that the Department of State cannot affirmatively prove that the pipeline, on the whole, is against the national interest.\textsuperscript{122} Even with this revised cross-border oil pipeline permitting scheme, it is still impossible to know for certain whether the Keystone XL project would have been granted a permit. Hypothetically however, it seems quite possible that with this more efficient regulatory structure, Keystone XL could have at least progressed partially, on a state-by-state basis, perhaps with on-going negotiations regarding the siting around the Sand Hills region of Nebraska. Such action would push the United States toward improved energy security, while simultaneously protecting America’s valuable natural resources and important environmental interests through the continued requirement of rigorous NEPA review—certainly a compromise that could benefit all sides.

\textsuperscript{122} Supra Part III.B.2.