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THE KEYSTONE XL PIPELINE AND THE DORMANT COMMERCE CLAUSE: WOULD ACTION BY CONGRESS PRECLUDE ADEQUATE ENVIRONMENTAL REGULATION AT THE STATE LEVEL?

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The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.[1]

INTRODUCTION

In May 2012, Canadian energy company TransCanada Corporation filed the most recent of several applications with the United States Department of State (State Department) to construct a cross-border crude oil pipeline from western Canada to the oil refineries situated along the Gulf of Mexico.[2] If approved, the Keystone XL pipeline would transport Canadian crude oil nearly seventeen hundred miles from facilities north of Hardisty, Alberta to refineries in Texas, passing through Montana, South Dakota, and Nebraska before joining an existing TransCanada pipeline just north of Kansas's border with Nebraska.[3] If completed, the Keystone XL pipeline would have the largest capacity of any cross-border pipeline between Canada and the United States.[4] However, the State Department has yet to approve the permits necessary for TransCanada to begin construction of Keystone—a move some

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[1] Maine v. Taylor, 477 U.S. 131, 151 (1986) (internal quotation marks omitted) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

[2] PAUL W. PARFOMAK ET AL., CONG. RESEARCH SERV., R41668, KEYSTONE XL PIPELINE PROJECT: KEY ISSUES 2–3 (2013), *available at* http://www.fas.org/sgp/crs/misc/R41668.pdf, *archived at* http://perma.cc/4B3Y-JWFY.

[3] *See id.* at 2–4.

[4] *See* JONATHAN L. RAMSEUR ET AL., CONG. RESEARCH SERV., R42611, OIL SANDS AND THE KEYSTONE XL PIPELINE: BACKGROUND AND SELECTED ENVIRONMENTAL ISSUES 22 tbl. 3 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42611.pdf, *archived at* http://perma.cc/3XP9-XKD4.

lawmakers perceive as an attempt by the Obama Administration to block the project's construction.[5]

In response to this perceived inaction, the United States House of Representatives, led by House Republicans, voted to approve a bill that would authorize construction of the Keystone XL pipeline without State Department approval in May 2013.[6] The genesis of the bill flowed primarily from congressional frustration over the perceived lack of action by the Obama Administration, which had failed to either approve or outright deny any of TransCanada's many construction permit applications during the previous five years for a pipeline project many see as essential to America's energy future.[7]

But because the House bill approving Keystone XL is unlikely to pass the Senate and has no chance of being signed into law by President Obama,[8] it is likely dead on arrival and is best viewed as a message bill with the primary purpose of expressing the House's discontent with the President's handling of the Keystone XL pipeline.[9] Nevertheless, the very fact the Bill was proposed and passed by the House raises unique questions specific to the cross-border pipeline permitting process. Specifically, because Congress has authority under the Commerce Clause to permit the Keystone XL pipeline,[10] bypassing any "obstruction" on the part of the Obama

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[5] *See* Andrew Restuccia, *House Passes Bill Approving Keystone Pipeline*, POLITICO (May 22, 2013, 8:15 PM), http://www.politico.com/story/2013/05/house-passes-keystone-pipeline-bill-91792.html, *archived at* http://perma.cc/UX3G-QEYQ.

[6] *Id.*

[7] *See id.*

[8] *See* Stephen Dinan, *Obama Administration Threatens Keystone Veto*, WASH. TIMES INSIDE POL. BLOG (May 21, 2013, 2:37 PM), http://www.washingtontimes.com/blog/inside-politics/2013/may/21/obama-administration-threatens-keystone-veto/, *archived at* http://perma.cc/J3QS-JDDE.

[9] *See* Restuccia, *supra* note 5.

[10] This Note proceeds under the assumption that Congress retains authority under the Commerce Clause to regulate cross-border projects that would substantially affect foreign commerce, such as the Keystone XL pipeline project. *See* Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933) (noting that when Congress acts in matters of "international relations and with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power"). Whether the President's authority to regulate foreign affairs conflicts with Congress's authority to regulate foreign commerce under the Commerce Clause is beyond the scope of this Note. However, several justices have acknowledged Congress's authority to act without limitation pursuant to its Commerce Clause authority should it choose to do so, effectively recognizing that Congress may remove the Executive's ability to act unilaterally in approving cross-border commerce projects like Keystone XL. *See* United States v. Lopez, 514 U.S. 549, 609 (1995) (Souter, J., dissenting) (describing Congress's authority to act pursuant to the Commerce Clause as "plenary"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). Accordingly, if Congress were to act to remove the State Department's current

Administration, would the so-called dormant Commerce Clause preclude or substantially limit the ability of individual states to impose environmental regulations that would affect the Keystone XL pipeline project?

This Note explores this issue and concludes that state environmental regulation of the Keystone pipeline would likely pass judicial scrutiny so long as those regulations were passed pursuant to a legitimate state interest. Part I explores the history of the Keystone XL pipeline project and focuses on the current environmental analysis of the project. Part II discusses the dormant Commerce Clause's background, how it has been applied in the context of state environmental regulations, and how its application might affect future environmental regulations. Finally, Part III looks at the proposed project through the lens of the dormant Commerce Clause. It concludes that states concerned about the Keystone XL pipeline's ramifications can enact constitutional legislation to preserve their environments even if doing so would burden interstate commerce.

I. THE KEYSTONE XL PIPELINE PROJECT

A. History of the Project

The Keystone XL pipeline proposal is not so much an original project as it is a sizeable addition to an already extensive network of pipelines between TransCanada's Alberta-based crude oil extraction facilities and a larger heavily used pipeline that runs through the heart of the American Midwest.[11] Notably, a large portion of the network, of which Keystone XL would be part, already exists in the form of a pipeline that runs east from Alberta to Saskatchewan; then drops south across the international border; and finally runs through Montana, North and South Dakota, Nebraska, Kansas, and Oklahoma.[12] However, the proposed Keystone XL extensions would shortcut the current pipeline route and allow a more direct link between the crude resource in Canada and the refinery capabilities of the U.S. Gulf

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ability to approve cross-border pipelines like the Keystone XL project, it is likely the Court would find such an action to be a constitutional exercise of Congress's authority under the Commerce Clause. *See* Sierra Club v. Clinton, 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010) (acknowledging Presidential authority to issue cross-border pipeline permits as constitutional because "Congress has not attempted to exercise any exclusive authority over the permitting process"); Sisseton-Wahpeton Oyate v. U.S. Dep't of State, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009) (noting that the President retains power to issue permits for cross-border pipeline projects because "Congress has failed to create a federal regulatory scheme for the construction of oil pipelines"); Ryan Harrigan, *Transcanada's Keystone XL Pipeline: Politics, Environmental Harm, & Eminent Domain Abuse*, 1 U. BALT. J. LAND & DEV. 207, 218 (2012) (noting the proposed Keystone XL pipeline "falls directly within Congress' delegated power").

[11] PARFOMAK ET AL., *supra* note 2, at 4 fig.2. For an excellent overview of the proposed project, see Kurt Gasser, Note, *The TransCanada Keystone XL Pipeline: The Good, the Bad, and the Ugly Debate*, 32 UTAH ENVTL. L. REV. 489 (2012).

[12] PARFOMAK ET AL., *supra* note 2, at 4 fig. 2.

Coast.[13] If approved, these new sections would result in construction of approximately fourteen hundred miles of new thirty-six-inch diameter pipe in the United States at a cost of nearly seven billion dollars.[14]

While TransCanada envisions the pipeline would initially carry approximately seven hundred thousand barrels of crude oil per day,[15] the pipeline would be capable of transporting as much as eight hundred and thirty thousand barrels per day if changes in market conditions led to greater demand.[16] Additionally, the Keystone XL pipeline route would be designed to carry approximately one hundred thousand barrels per day from oil resources located in Montana and North Dakota, as well as one hundred and fifty thousand barrels of oil per day from Oklahoma's oil fields.[17] All told, the project would represent a major expansion of North America's crude-oil-transportation capabilities, keeping pace with the Gulf Coast region's expanding refining capabilities at a time when international crude imports are falling.[18]

Proponents of the pipeline, such as Speaker of the House John Boehner, claim Keystone XL's construction "will create tens of thousands of American jobs and pump nearly a million barrels of oil to U.S. refineries each day, helping to lower gas prices, boost economic growth, enhance our energy security, and revitalize manufacturing."[19] Opponents argue the Keystone XL pipeline application was inadequately reviewed for detrimental environmental impacts.[20] They argue that if approved the Keystone XL pipeline will greatly contribute to climate change[21] and

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[13] BUREAU OF OCEANS & INT'L ENVTL. & SCI. AFFAIRS, U.S. DEP'T OF STATE, EXECUTIVE SUMMARY: FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT ES-1 to ES-4 (2011), *available at* http://keystonepipeline-xl.state.gov/documents/organization/182010.pdf, *archived at* http://perma.cc/83L6-BTBT [hereinafter U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT].

[14] *Id.* at ES-2.

[15] *Id.* at ES-1. A barrel of crude oil is equivalent to 42 gallons. *Frequently Asked Questions*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/tools/faqs/faq.cfm?id=24&t=10, *archived at* http://perma.cc/C44L-DT8W (last visited Aug. 27, 2014).

[16] U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT, *supra* note 13, at ES-2.

[17] *Id.* at ES-3.

[18] *Id.* at ES-5 to ES-6. The region's refining capability is projected to expand by approximately 500,000 barrels per day over the next six years. *Id.* at ES-6. This is on par with Keystone's existing contracts to carry 535,000 barrels per day of Canadian and U.S. crude oil should the project be completed. *See id.* at ES-5.

[19] Press Release, Speaker Boehner's Press Office, House Votes to Approve Keystone Pipeline, Create Tens of Thousands of Jobs & Increase Energy Security (May 22, 2013), *available at* http://www.speaker.gov/press-release/house-votes-approve-keystone-pipeline-create-tens-thousands-jobs-increase-energy, *archived at* http://perma.cc/4FXL-TAQS.

[20] *See* John H Cushman, Jr., *EPA Deems U.S. State Department Keystone Review 'Insufficient,'* GUARDIAN ENV'T NETWORK (Apr. 23, 2013, 10:49 AM), http://www.guardian.co.uk/environment/2013/apr/23/epa-keystone-green-groups, *archived at* http://perma.cc/JEH2-HCHP.

[21] Lucia Graves, *State Department's Keystone Analysis Ignores True Climate Impact: Report*, HUFFINGTON POST (Apr. 16, 2013, 2:16 PM), http://www.huffingtonpost.com/2013

increase the risk of oil spills in the United States and Canada.[22] Both sides seem to agree, however, that the debates over the costs and benefits of the Keystone XL pipeline are not likely to end when the project is approved. And in particular, questions over the environmental impacts of the pipeline are likely to be at issue well into the foreseeable future.

B. Current Environmental Analysis of the Keystone XL Pipeline

If construction of Keystone XL goes forward, it will only be after the appropriate "hard look" the National Environmental Policy Act (NEPA) requires of all projects that involve action by a federal agency and that might "significantly affect[] the quality of the human environment."[23] Under NEPA, whenever a federal agency takes an action that might significantly affect the human environment, the federal agency must carefully consider the impact such actions will have on the environment and inform the public as to the results of those findings.[24]

Consideration of environmental impacts under NEPA takes place in two general phases: the preparation of a draft Environmental Impact Statement (EIS) and preparation of a final EIS.[25] First, when an agency completes a draft EIS, it must make the EIS available for public comment and input from any "[c]ooperating agency . . . which has jurisdiction by law or special expertise with respect to any environmental impact" associated with the project.[26] Then the "lead agency" in charge of preparing the draft EIS reviews and often responds to comments from the public and any cooperating agencies to aid in the completion of a final EIS.[27]

In the case of the Keystone project, the "lead agency" has thus far been the State Department, as permitting authority currently rests with the President.[28] Accordingly, once the State Department assembled the draft EIS for the project, it released the draft to the public and submitted it to the Environmental Protection

/04/16/state-department-keystone-report_n_3092865.html, *archived at* http://perma.cc/X4PD-48H7.

[22] *Keystone XL Pipeline*, FRIENDS OF THE EARTH, http://www.foe.org/projects/climate-and-energy/tar-sands/keystone-xl-pipeline, *archived at* http://perma.cc/C3FF-QZGT (last visited June 14, 2014).

[23] 42 U.S.C. § 4332(C) (2012).

[24] PARFOMAK ET AL., *supra* note 2, at 7–8. In addition, NEPA requires the federal agency in charge of approving any project that might significantly affect the human environment to consult with additional agencies—like the U.S. Fish and Wildlife Service, the U.S. National Park Service, and the U.S. Army Corps of Engineers—depending on the area that will be affected by the agency's action and the jurisdictions of those agencies. *Id.* at 14–15.

[25] *Id.* at 7.

[26] 40 C.F.R. § 1508.5 (2014).

[27] *See id.*§ 1508.16.

[28] PARFOMAK ET AL., *supra* note 2, at 7.

Agency (EPA), one of the cooperating agencies for the Keystone project as implicated by NEPA.[29]

After careful review of the State Department's draft EIS, the EPA rated the draft EIS as "[i]nadequate," noting "potentially significant impacts were not evaluated, that more information and analysis was needed, and [that] the draft EIS would need revision and again be made available for public review."[30] Thereafter, the State Department issued a supplemental draft opinion that addressed the concerns of the EPA, other federal agencies, and the public.[31]

However, the EPA was skeptical of the supplemental draft; it acknowledged that the State Department had "worked diligently" in addressing the shortcomings of the original draft EIS, but the EPA found the supplemental draft contained "[i]nsufficient [i]nformation."[32] To address these shortcomings, the EPA recommended the State Department more fully address the following:

> potential oil spill risks, including additional analysis of other reasonable alternatives to the proposed pipeline route; provide additional analysis of potential oil spill impacts, health impacts, and environmental justice concerns to communities along the pipeline route and adjacent refineries; and improve its characterization of lifecycle greenhouse gas emissions associated with Canadian oil sands crude.[33]

Whether the State Department carefully considered the EPA's admonitions is unclear.[34]

However, regardless of whether the State Department fully considered the EPA's suggestions, the State Department released a final EIS for the Keystone XL pipeline in August of 2011.[35] Members of Congress immediately resisted the final EIS.[36] Specifically, fourteen members of Congress wrote letters to the State Department questioning its handling of the EIS preparations.[37] These representatives were prompted to question the State Department, at least in part, by new reports indicating the EIS had been prepared by an outside agency, which was at the time in contact with the pipeline's developer, TransCanada.[38] Likely as a result of these contentions, the Inspector General's Office initiated a probe into whether the State Department had violated its duty as an unbiased decision maker when

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[29] *Id.* at 8–9.
[30] *Id.* at 10 tbl.1.
[31] *Id.* at 35–36.
[32] *Id.* at 35.
[33] *Id.* at 36.
[34] *See id.*
[35] *Id.* at 8.
[36] *Id.* at 36.
[37] *Id.*
[38] *Id.*

preparing the draft and final EISs.[39] And while the Inspector General's Office eventually found the State Department "did not violate its role as an unbiased oversight agency,"[40] this was only the first of many questions concerning the adequacy of the final EIS.[41]

Specifically, after the final EIS was completed, it was submitted for public comment. During the public comment phase, the final EIS received substantial comments regarding concerns over whether the Keystone XL pipeline would be a significant environmental hazard.[42] Among other worries, citizens voiced concerns that the pipeline would be routed through environmentally sensitive areas in Nebraska and the rest of the Ogallala Aquifer, which provides a significant quantity of the Midwest's water.[43] Concerned about the comments it received, the State Department delayed approval of the pipeline until it could further address the concerns raised by the EPA and other federal agencies and those concerns expressed during the public comment period.[44]

This time, the State Department's decision was challenged by members of Congress who were concerned that the Department's delay was a reaction to pressure from environmental groups and not a product of careful review of EIS findings.[45] Thus, in December 2011, Congress passed legislation requiring the State Department to approve or deny the pipeline within sixty days.[46] In January 2012, the State Department, with the consent of President Obama, announced it would deny a permit to TransCanada for the construction of the pipeline pending further evaluation of the project.[47]

This denial leaves the pipeline in a precarious position. At this point, well over three years have passed since the State Department denied TransCanada a permit; therefore, any further actions to approve the project may first need to be evaluated through preparation of new EIS.[48] With the average EIS taking well over three years to prepare,[49] any such requirement may in and of itself be the "kiss of death" for the project.[50]And importantly, further environmental impact studies might function to stall construction of the pipeline even if Congress acts to directly approve the project

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 36–38.

[42] *Id.*

[43] *See id.* at 37.

[44] *Id.* at 37–38.

[45] *See Keystone XL: #TimeToBuild*, ENERGY & COMMERCE COMM.: U.S. HOUSE OF REPRESENTATIVES, http://energycommerce.house.gov/content/keystone-xl, *archived at* http://perma.cc/RLH3-AMQG (last visited Aug. 17, 2014).

[46] Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289 (2011).

[47] PARFOMAK ET AL., *supra* note 2, at 38.

[48] *Id.*

[49] Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 ENVTL. PRAC. 164, 164 (2008).

[50] Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990).

pursuant to its Commerce Clause authority, thus bypassing the State Department's current control over the pipeline's future.[51]

However, while the Keystone XL pipeline has already undergone significant environmental study, it is unclear whether the studies are complete or if further research will be conducted. While the Obama Administration seems to believe further environmental study is needed,[52] a recent House Resolution authorizing construction of the project unequivocally states that the current environmental regulation and evaluation is sufficient to allow the project to progress.[53]

Going forward, further environmental regulation or analysis of the proposed pipeline may need to take place at the state level—not the national level. The constitutionality of such regulation and analysis is the subject of the following sections of this Note.

II. THE DORMANT COMMERCE CLAUSE

The United States Constitution provides Congress with exclusive authority "[t]o regulate Commerce with foreign Nations."[54] Over the course of the nation's history, this clause has been the source of wide-sweeping congressional action, debate, and judicial scrutiny.[55] Nevertheless, the Commerce Clause still "represents one of the broadest bases for the exercise of congressional authority" and continues to play an important part in congressional legislation.[56] Indeed, should Congress act

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[51] Notably, the recent resolution passed by the U.S. House of Representatives explicitly provides that the current State Department's final EIS meets the statutory requirements of NEPA. H.R. Res. 3, 113th Cong. (2013). However, whether this pronouncement by one part of Congress is sufficient to actually ensure the EIS is in compliance with NEPA remains an unanswered question.

[52] *See* PARFOMAK ET AL., *supra* note 2, at 38.

[53] H.R. Res. 3, 113th Cong. (2013) ("The final environmental impact statement issued by the Secretary of State on August 26, 2011, coupled with the Final Evaluation Report described in the previous sentence, shall be considered to satisfy all requirements of [NEPA] . . . .").

[54] U.S. CONST. art. I, § 8, cl. 3.

[55] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 29 (2005) (holding Congress may regulate a purely intrastate activity if such activity affects interstate commerce in any way because the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail"); Wickard v. Filburn, 317 U.S. 111, 131 (1942) (upholding the right of Congress to pass an agricultural law that prohibited farmers from growing wheat crops). *But see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (holding that while Congress enjoys broad power pursuant to the Commerce Clause, it does not have the power under the Clause to compel market participation); United States v. Lopez, 514 U.S. 549, 562 (1995) (noting that while Congress enjoys broad power under the Commerce Clause, there must still be some "nexus" between the legislation passed pursuant to the Clause and the activity the legislation seeks to regulate).

[56] ADAM VANN ET AL., CONG. RESEARCH SERV., R42124, PROPOSED KEYSTONE XL PIPELINE: LEGAL ISSUES 13 (2012).

to wrestle the authority to permit the Keystone XL pipeline away from the President, it would almost certainly be pursuant to its own authority to regulate commerce with the "foreign nation" of Canada.

In addition to providing Congress with the authority to regulate commerce, according to the United States Supreme Court, the Commerce Clause mandates that individual states are required to do the opposite in the face of congressional legislation.[57] If a state passes a law that affects the flow of interstate commerce, that law will be struck down if it "clearly discriminates against interstate commerce . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[58]

In modern application, the dormant Commerce Clause analysis takes two forms, depending on whether a law overtly regulates out-of-state commercial interests and is thus discriminatory "on its face." First, if a challenged state statute is "facially discriminatory"—if it discriminates between in-state commerce and out-of-state commerce—the law will almost always be struck down as violating the dormant Commerce Clause.[59] Second, if a law does not facially discriminate but nevertheless has a discriminatory impact on interstate commerce, a court will carefully evaluate the law to determine whether the law serves a legitimate state interest, such as public health, safety, or environmental concerns.[60] If the statute serves a legitimate state interest, the law will usually stand even if it incidentally burdens commerce.[61]

The Supreme Court's jurisprudence is replete with examples of laws ruled unconstitutional under the dormant Commerce Clause.[62] These cases seem to support a conclusion that any state regulation affecting interstate commerce will be struck down as invalid per se under the dormant Commerce Clause if the law discriminates against out-of-state economic interests to the benefit of in-state interests.[63] However, one case stands out as an exception to this general rule and represents the type of precedent states might rely on to pass environmental regulation if they are dissatisfied with the obviously disputed environmental findings

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[57] *See id.*

[58] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

[59] VANN ET AL., *supra* note 56, at 13.

[60] *Id.* at 13–14.

[61] *See id.*

[62] *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 581–82 (1986) (holding New York state law that regulated only out-of-state liquor transaction a violation of the Commerce Clause); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977) (holding that a North Carolina law prohibiting the display of out-of-state apple grade was unconstitutional under the Commerce Clause because the law amounted to economic protectionism); Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (holding a local zoning ordinance that regulated location of dairies unconstitutional under the Commerce Clause when those ordinances presented a substantial burden to interstate commerce).

[63] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994) (recognizing that a state law that places a discriminatory restriction on commerce will almost always be found per se invalid).

in the current Keystone project EIS.

This case, *Maine v. Taylor*,[64] represents a rare exception in the Court's otherwise uniform unwillingness to permit state laws that discriminate against out-of-state economic interests. In *Taylor*, the Supreme Court considered a Maine law that prohibited importation of baitfish for use in commercial fishing.[65] Taylor was arrested in Maine for violating the law and later indicted as having violated a portion of the federal Lacey Act, which provides criminal penalties should a person "import . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."[66] Taylor demurred, alleging Maine's law discriminated against out-of-state interests at the expense of Maine's in-state economic interest and was, therefore, unconstitutionally burdensome to interstate commerce.[67]

Maine subsequently intervened, arguing that the "ban legitimately protects . . . [Maine] fisheries from parasites and nonnative species that might be included in shipments of live [out-of-state] baitfish."[68] A federal district court agreed with Maine, holding the law passed constitutional scrutiny, but the First Circuit reversed, "agreeing with Taylor that the underlying state statute impermissibly restricts interstate trade."[69] On appeal, the Supreme Court first noted the Commerce Clause acts as a grant of congressional power to legislate and "that it . . . limits the power of the States to erect barriers against interstate trade."[70] Accordingly, if a state statute "affirmatively discriminate[s]" against out-of-state commerce, the law will fall.[71]

The law in question in *Taylor* explicitly targeted only those shipments of bait originating from *outside* Maine, and thus the law facially discriminated between in-state and out-of-state interests. But the Supreme Court nevertheless held that because "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible," it could not read "constitutional principles underlying the commerce clause . . . as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . ."[72] Ultimately, the Court upheld the constitutionality of Maine's law prohibiting the import of baitfish despite the fact that it burdened out-of-state commerce because Maine had a legitimate interest in preserving its "unique and unusually fragile" fisheries.[73]

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[64] 477 U.S. 131 (1986).

[65] *Id.* at 132–33.

[66] *Id.* (quoting 16 U.S.C. § 3372(a)(2)(A) (1981)).

[67] *Id.* at 133.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 137 (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980)).

[71] *See id.* at 138 (noting that in determining whether a statute violates the Commerce Clause, the proper inquiry is whether the law only "incidentally" burdens commerce as opposed to "affirmatively" discriminating against out-of-state economic transactions).

[72] *Id.* at 148.

[73] *Id.* at 150–51. Importantly, *Taylor* represents one of the few cases in which the Court found that a law aimed directly at out-of-state activity did not impermissibly infringe on

For several reasons, *Taylor* is an important milestone case for states who seek to enact regulations to protect their environmental interests, even though such regulations may burden interstate commerce. First, because the Court upheld Maine's law despite recognizing it discriminated against out-of-state commerce, other states may be able to rely on *Taylor* in passing laws to protect their own environmental interests regardless of the burden on interstate commerce.[74] Next, because the Court upheld Maine's law even though there were "impediments to complete success," other states might find their own environmental regulations that provide only partial environmental protection withstand judicial scrutiny.[75] Finally, *Taylor* stands for the proposition that although science may not agree on one particular course of action, a state need not "sit idly by" while the scientific community decides upon a particular solution, and may instead take affirmative steps to protect its environment.[76]

Taken together, these protective measures may prove particularly useful for states concerned about the environmental impact the Keystone XL pipeline might have on their state's environments. Furthermore, going forward state legislation addressing pipeline regulation may be necessary for states to ensure adequate environmental protections should Congress approve the Keystone project.

III. THE DORMANT COMMERCE CLAUSE AND THE KEYSTONE XL PIPELINE PROJECT

If Congress approves the Keystone XL pipeline in its current form, Congress would likely attempt to meet the environmental requirements mandated by NEPA by first accepting the State Department's current "final" EIS.[77] For many states along the Keystone XL pipeline's proposed path, however, such a determination may do little to alleviate fears concerning the environmental detriments that could

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Congress's Commerce Clause authority, thus withstanding the "strictest scrutiny" announced in prior decisions concerning constitutionality of state environmental statutes in the context of the Commerce Clause. *Id.* at 144 (quoting Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)). Thus, while strict scrutiny is generally fatal to facially discriminatory laws, *Taylor* stands for the important proposition that laws aimed at legitimate environmental concerns may withstand applications of even the strictest scrutiny, so long as those laws do not represent pretextual or "arbitrary discrimination." *Taylor*, 477 U.S. at 151–52.

[74] It should be noted, however, that a state likely cannot enact a discriminatory regulation to protect its environment if there are adequate nondiscriminatory measures that can be taken to effect the same protections. *See* Hughes v. Oklahoma, 441 U.S. 322, 338 (1979) (holding Oklahoma statute that banned the export of local fish was unconstitutional because it was effectively the "choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively").

[75] *Taylor*, 477 U.S. at 151.

[76] *Id.* at 148.

[77] *See* H.R. Res. 3, 113th Cong. (2013) (finding State Department's final Keystone EIS meets the procedural requirements of NEPA).

flow from the construction and operation of the pipeline. For example, as noted in Part I, concerns over fragile environments along the proposed route of the pipeline and over Midwest water supplies found in large aquifers underlying the pipeline's route might spur states to enact environmental protection laws based on the potential effects of the Keystone XL pipeline.[78] If they do, these laws are likely to place environmental restrictions on the pipeline that the federal government has yet to enact. Accordingly, these laws may be the types of "facially" discriminatory laws that are "virtually per se" invalid under the dormant Commerce Clause.[79]

However, if states along the route of the proposed pipeline pass environmental regulations in furtherance of legitimate state interests, these laws might stand as constitutional because they would be instances of states protecting "against imperfectly understood environmental risks," even if those risks "ultimately prove to be negligible."[80] Part III explores how far a state might go in enacting such legislation. Subpart A explores three cases—*City of Philadelphia v. New Jersey*,[81] *Hughes v. Oklahoma*,[82] and *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*[83]—that provide insight into the types of environmental regulations that may be permissible under the dormant Commerce Clause. Subpart B then moves on to suggest several strategies for states wishing to pass legislation to protect against the possible negative environmental ramifications of the Keystone XL pipeline.

A. Economic Protectionism vs. Environmental Protection: Lessons from City of Philadelphia, Hughes, *and* Oregon Waste Systems, Inc.

States seeking to protect their environments and natural resources from Keystone's potential negative impacts have multiple options at their disposal. However, before states along the proposed route of the Keystone XL pipeline enact environmental legislation, they should understand three cases that deal specifically with environmental regulations that were not constitutional.

In *City of Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey law that prohibited out-of-state waste disposal in New Jersey landfills.[84] The Court held that because waste is an article of commerce, New Jersey's ban on importation violated the dormant Commerce Clause.[85] Writing for the majority, Justice Stewart repeated the now-familiar rule that state regulations intended strictly

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[78] PARFOMAK ET AL., *supra* note 2, at 36–37.

[79] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding state laws enacted for purely protectionist reasons are generally always invalid); *accord* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981).

[80] *Taylor*, 477 U.S. at 148.

[81] 437 U.S. 617 (1978).

[82] 441 U.S. 322 (1979).

[83] 511 U.S. 93 (1994).

[84] 437 U.S. 617, 629 (1978).

[85] *Id.* at 628.

for economic protectionism are per se invalid.[86] He was also careful to note, however, that a state is free to pass laws to "safeguard the health and safety of its people" even if those laws impose an incidental burden on interstate commerce.[87] Thus, if a law or regulation advances a legitimate public interest, that interest must be weighed against the incidental burden that might be imposed on interstate commerce.[88]

A state law cannot do what New Jersey did in *City of Philadelphia*—ban an import from another state simply to protect a state's economic interests while claiming the law exclusively to be environmental regulation.[89] Two important lessons, therefore, emerge from *City of Philadelphia*. First, state environmental regulations are permissible, even if they might incidentally burden interstate commerce.[90] But second, if a state passes an environmental regulation to protect its environment, the regulation must legitimately be for environmental protection and not a ruse to halt an unpopular form of commerce.[91] In short, unless an environmental regulation "can fairly be viewed as a law directed to legitimate local concerns," the regulation risks being struck down as an unconstitutional "protectionist measure" under the principles laid out in *City of Philadelphia*.[92]

Decided a year after *City of Philadelphia*, *Hughes v. Oklahoma* laid out a more specific three-prong test that is still applied today in determining whether a state or local regulation impermissibly infringes on commerce.[93] In *Hughes*, the Court considered an Oklahoma statute that proscribed importation of foreign baitfish.[94] Appellant Hughes was indicted when he imported a shipment of baitfish procured in Oklahoma into Texas in violation of the statute and subsequently appealed contending the law unconstitutionally violated the commerce clause.[95] In reviewing the lower court's reliance on prior precedent that generally permitted states broad discretion in enacting laws affecting wildlife within their borders, the Court overruled this precedent and held that the statute could not survive a commerce clause attack.[96]

Citing to its decision in *Pike v. Bruce Church, Inc.*,[97] the Court noted the correct

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[86] *Id.* at 623–24.

[87] *Id.*

[88] *See id.*; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding "[i]f a legitimate local purpose is found, then the question becomes one of degree" and that "the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities").

[89] *City of Philadelphia*, 437 U.S. at 625–26.

[90] *See id.* at 623–24.

[91] *See id.* at 625–26.

[92] *Id.* at 624.

[93] 441 U.S. 322, 336 (1979).

[94] *See id.* at 323.

[95] *Id.* at 324.

[96] *Id.* at 324–25.

[97] 397 U.S. 137 (1970).

inquiry into whether a statute impermissibly interferes with Congress's power under the Commerce Clause requires the court to determine:

> (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[98]

In applying the three-prong test derived from its decision in *Pike*, the Court first noted that the statute at issue was designed to "overtly block[] the flow of interstate commerce at [the] State's borders"[99] and accordingly was facially discriminatory such that the first prong of the test "by itself may be a fatal defect" to the law at issue.[100] Nevertheless, the court moved on to find that—in addition to failing the test's first prong—the statute additionally failed to further a legitimate state interest via the least-discriminatory means possible and was thus "repugnant to the Commerce Clause."[101] Accordingly, the Court's holding in *Hughes* is both an application and clarification of *Pike*, making clear that any state statute that burdens interstate commerce must clear three high hurdles to be constitutionally permissible.[102]

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[98] *Hughes*, 441 U.S. at 336 (internal quotation marks omitted). Although the three-prong test announced in *Hughes* represented the first time the Court had announced a specific means of inquiring as to the constitutionality of a statute as it relates to the Commerce Clause, the test is essentially a distillation of the Court's historical dormant Commerce Clause inquiries. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) ("Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . ."); S. Pac. Co. v. Arizona, 325 U.S. 761, 766 (1945) ("Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested . . . .").

[99] *Hughes*, 441 U.S. at 337 (second alteration in original) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

[100] *Id.*

[101] *Id.* at 337–38.

[102] Arguably of greatest importance for any state that wishes to pass legislation to mitigate the possible detrimental effects of the Keystone XL pipeline is the Court's announcement in *Hughes* that any facially discriminatory law "[a]t a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 441 U.S. at 322. Thus, in addition to ensuring any future state law would pass *Hughes*'s three-part test, a state should also consider whether any facially discriminatory regulation would stand up under the extraordinarily heavy burden of

Finally, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, the Supreme Court considered a case similar to *City of Philadelphia* and struck down an Oregon law that imposed a surcharge on out-of-state solid waste.[103] The law at issue imposed a $2.25 per ton charge on the importation of waste from outside the state.[104] Oregon insisted the surcharge was necessary to help the state recoup costs of disposing of out-of-state waste that it would otherwise have collected in the form of taxes or municipal fees.[105] However, the Supreme Court disagreed, noting that because the fee applied only to imported waste, it could not stand unless Oregon could show it advanced a local interest that could not be advanced in a non-discriminatory alternative manner.[106] Because Oregon was unable to show this was the case, the Supreme Court struck down the surcharge as unconstitutional under the dormant Commerce Clause.[107]

Like the Court's prior decision in *City of Philadelphia* and *Hughes*, *Oregon Waste Systems* also provides a valuable lesson for states wishing to pass legislation to protect their environment from the possible negative impacts of the Keystone XL pipeline. Namely, if a state wishes to pass environmental regulations that burden interstate commerce, it must ensure that no alternative methods are available that would lessen that burden.[108] As explained below, states along the route of the Keystone XL pipeline should apply the lessons from all three of these cases to ensure they can pass laws that provide adequate environmental protections and that will not risk being struck down as unconstitutional under the dormant Commerce Clause.

B. Guidelines for Future State Environmental Laws

If states along Keystone XL's proposed route believe they must act to protect their environments, they must do so carefully to avoid having their laws struck down as unconstitutional. With careful planning, however, states like Montana, South Dakota, and Nebraska can ensure their laws provide heightened protection against possible negative environmental impacts from the pipeline. There are several effective and constitutional ways for states to ensure the survival of their laws.

First, states concerned about their citizens' welfare should work to ensure future environmental studies are based on objective science and well-accepted health and safety criteria.[109] By using unbiased application of objective criteria in assessing

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strict scrutiny.

[103] *See* 511 U.S. 93, 95–98 (1994).

[104] *Id.* at 99.

[105] *See id.* at 100.

[106] *Id.* at 100–01.

[107] *Id.* at 108.

[108] *Id.* at 100–01. Importantly, because the Court has indicated the "health and safety" of a state's citizenry are legitimate interests, if a state can show the regulation is necessary to advance either of these interests, the regulation may have an increased chance of passing constitutional muster under the Commerce Clause. *See id.*

[109] *See* Justin M. Nesbit, Note, *Commerce Clause Implications of Massachusetts' Attempt to Limit the Importation of "Dirty" Power in the Looming Competitive Retail Market*

environmental impacts, a state law has a better chance of applying equally to in-state and out-of-state market participants and avoiding the types of facially discriminatory regulations that will almost always doom a law to failure. Thus, in the case of the Keystone XL pipeline, laws that are premised on objective criteria, but that also happen to incidentally burden interstate commerce to a greater extent than local projects, would be less likely to be found unconstitutional.

Along these same lines, passing laws that apply generally to all petroleum pipelines may permit a state to regulate Keystone XL specifically while avoiding the types of facially discriminatory laws that would be found unconstitutional.[110] As the Supreme Court said, "[i]t is not necessary to look beyond the text of [the] statute to determine that it discriminates against interstate commerce."[111] Thus, any law that expressly distinguishes between in-state and out-of-state pipelines would almost certainly be suspected of creating the type of "economic isolationism" the Court's dormant Commerce Clause jurisprudence has repeatedly held unconstitutional.[112] Conversely, laws that apply equally to both intra- and inter-state pipelines avoid the "virtually per se rule of invalidity" reserved for facially discriminatory legislation, even though the law may disproportionately impact foreign commerce.[113]

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for Electricity Generation, 38 B.C. L. REV. 811, 848–49 (1997) (suggesting laws passed pursuant to objective health and safety data are more likely to pass constitutional muster, even if they incidentally place greater burdens on foreign commerce); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (noting a regulation that promoted legitimate state interests in "conservation of energy and other natural resources" was not a violation of the Commerce Clause when studies showed the regulation was the least discriminatory means to bring about the desired environmental effects).

[110] *See* Stephen M. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 143 (1990).

[111] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575–76 (1997).

[112] *Id.* at 578–79.

[113] *Id.* at 596 (Scalia, J., dissenting). Importantly, a court examining these laws through the lens of the dormant Commerce Clause would likely find such regulations do not rise to the level of unconstitutionality so long as they advance a legitimate environmental interest. Thus, a state's decision to incentivize or discourage industry activity by enacting pipeline regulation that disproportionately affects the Keystone XL pipeline would not automatically violate the dormant Commerce Clause. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1089 (9th Cir. 2013) ("[A] regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally."). Instead, a state regulation that disproportionately affects the Keystone XL pipeline would likely stand so long as the regulation did not force the owners of the pipeline to enact a particular regulatory standard and only incentivized industry practices equally applicable to all market participants. *See id.* at 1101–04 (finding a California law did not regulate "extraterritorial conduct" when it incentivized the use of certain in-state fuels over out-of-state fuels because the law did not mandate that out of state participants adopt a particular regulatory standard). Further, in the interim the administrative and legal burdens imposed by fighting the constitutionality of a state law might prove to be so detrimental to TransCanada's business interests that it chooses to comply with stricter environmental regulations for the sake of avoiding costly construction delays. *C.f.* VANN ET AL., *supra* note 56, at 16 (discussing the potential impact of legal and

Nevertheless, if the enacted regulation was purported to apply to both in-state and out-of-state oil pipelines, but instead affected *only* the Keystone XL pipeline, a court could find the burdens outweigh the benefits and strike the regulation down.[114] Thus, if a state does decide to use this strategy to pass a law, the putative local benefits of the regulation, such as health and safety, would still need to outweigh any burdens on interstate commerce the regulation would impose and be unachievable through alternative nondiscriminatory means.[115] Such a high bar may make passage of any law regulating the Keystone XL pipeline easier to propose than to pass.

Finally, and perhaps most importantly, while a state may not be able to pass a regulation that interferes with interstate commerce, Congress has no authority to force a state to enter the marketplace to advance commerce.[116] This may prove to be a big bargaining chip for a state like Montana, which stands to gain substantially if it can route billions of barrels of Montana crude oil through the Keystone XL pipeline.[117] For example, if Montana was overly concerned about Keystone XL's environmental impact on Montana, it could abstain from allowing oil leases on its state lands, thereby limiting the flow of oil to the Keystone project.[118] In doing so, it could effectively force TransCanada to accept environmental regulation or run the risk of having substantially less oil in its pipeline.[119]

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administrative burdens on the expense and viability of the Keystone XL pipeline).

[114] Nevertheless, the fact that a regulation discriminates only against out of state commerce is insufficient in and of itself to establish a violation of the dormant Commerce Clause. *See Rocky Mountain Farmers Union*, 730 F.3d at 1089–90. Instead, a regulation that discriminated against the Keystone XL pipeline would be found to violate the Commerce Clause only if a state failed to show such discrimination was only incidental to the regulation in question and served a legitimate purpose that was not achievable through other non-discriminatory means. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[115] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). It should be noted that the Supreme Court has not held that nondiscriminatory means are present simply when a *nonregulatory* alternative is available. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 603 n.3 (1997). Instead, a state could choose either to enact an environmental regulation or to subsidize in-state production to essentially price foreign commerce out of the market. *Id.* Thus, under the Court's historic dormant Commerce Clause jurisprudence, a state appears to have discretion to enact either a market-based or regulatory-based incentive (or, presumably, a combination of the two). *Id.*

[116] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586–91 (2012).

[117] *See* U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT, *supra* note 13, at ES-3 (noting that the Keystone XL project linking to Montana would allow transport of 100,000 barrels per day of crude oil).

[118] *C.f.* City of Philadelphia v. New Jersey, 437 U.S. 617, 627 n.6 (1978) (noting that the Court expresses "no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources").

[119] TransCanada's current proposal anticipates significant inputs of up to two hundred and fifty thousand barrels of U.S. crude oil per day from projects in Montana, North Dakota, and Oklahoma. *See* U.S. DEP'T OF STATE, ENVIRONMENTAL IMPACT STATEMENT, *supra* note

CONCLUSION

Presently, the Keystone XL pipeline—and its potential impacts on the environment—is in limbo. President Obama, the State Department, and the EPA all believe more study is needed on the potential environmental impacts of the pipeline before it can be approved. On the other hand, many in the House of Representatives, business, and industry believe the boost Keystone XL would provide to the U.S's economy, job creation, and energy independence eclipses any residual benefits further environmental study might yield.

While it appears unlikely Congress will be able to approve the pipeline pursuant to its authority to regulate foreign commerce under the Commerce Clause anytime soon, if it could do so in the future, states concerned about the possible environmental ramifications of the project might be forced to take action at the state level in order to protect their environments. To do this, states must be sure to not discriminate against interstate or foreign commerce in order to avoid violating the dormant Commerce Clause.

But while the dormant Commerce Clause presents obstacles to state environmental regulation, it need not block effective state regulation of environmental quality. Through objective assessment, nondiscriminatory legislation, careful planning for the use of state resources, and adherence to prior dormant Commerce Clause precedent, states concerned about the Keystone XL pipeline can ensure adequate environmental protection, even if the Federal Government fails to do so.

13, at ES-3.