BORDER PETROL: U.S. CHALLENGES TO CANADIAN TAR SANDS DEVELOPMENT

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INTRODUCTION

In 1999, Canadian oil became the United States' largest source of petroleum, surpassing Saudi Arabian and Mexican oil.[1] Today, the bulk of Canada's oil exports are processed from Alberta's bituminous sands ("oil sands" or "tar sands").[2] While for a long time developing the oil sands remained uneconomical, the United States' thirst for oil and consequent increases in global oil prices have now made development profitable.[3] As a result, Canada and investors have ramped up investment in oil sands development projects and infrastructure. With this increased importance in the marketplace has come increased scrutiny of the environmental effects of oil sands processing, largely damning. Not only does extracting oil from oil sands usually involve razing boreal forest, open pit mining, and massive water consumption and

[1] *See* Press Release, Washington Canadian Embassy, Canada Largest Supplier of Oil to the U.S.: Canada Leads Saudi Arabia and Mexico (Mar. 28, 2005).

[2] I use the terms interchangeably in this paper to avoid any potential political implications of the choice of term. *See generally* CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, UPSTREAM DIALOGUE: THE FACTS ON OIL SANDS 13-15 (2011), *available at* http://www.capp.ca/getdoc.aspx?DocId =191939&DT=NTV.

[3] *See* ENERGY POLICY RESEARCH FOUND., A PRIMER ON THE CANADIAN OIL SANDS 5 (2010), *available at* http://eprinc.org/pdf/oilsandsprimer.pdf; TOM BOWER, OIL: MONEY, POLITICS, AND POWER IN THE 21ST CENTURY 221 (2010) ("On October 12 [2001], oil hit $36 a barrel, sufficient to persuade Shell that extracting oil from the Athabasca tar sands in Canada would be profitable."). *See generally* Daniel Schorn, *The Oil Sands of Alberta*, CBS NEWS (Feb. 11, 2011), http://www.cbsnews.com/stories/2006/01/20/60minutes/main1225184.shtml (reporting on the development of oil sands in Alberta).

pollution,[4] the amount of energy required for this extraction results in one of, if not the highest level of greenhouse gas emissions of any fuel production method in existence.[5]

This combination of ills might make the oil sands issue uniquely suited to reunite multiple strains of environmentalism: the new generation of environmentalists, concerned with climate change and large-scale science-based policy making, may find common ground with the movement of the 1970s, concerned with nature conservation and local pollution. And indeed there is already a broad and growing public advocacy, legal, and policy campaign being waged against the oil sands.[6] "Before and after" photos of the scarred Athabasca Plains grace environmental groups' pamphlets.[7] James Hansen, one of the world's leading climate scientists, has written that:

> The tar sands of Canada constitute one of our planet's greatest threats. They are a double-barreled threat. First, producing oil from tar sands emits two to three times the global warming pollution of conventional oil. But the process also diminishes one of the best carbon reduction tools on the planet– Canada's Boreal Forest.[8]

Yet despite the increasing public attention, there has been no academic literature directly addressing legal challenges to the oil sands.

Canada has been roundly criticized for seizing on its new source of wealth (Canada now has the third largest proven oil reserves, behind only Saudi Arabia and Venezuela[9]) and seeming to care little for the environmental consequences.[10] Some may

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[4] *See* DAN WOYNILLOWICZ ET AL., PEMBINA INST., OIL SANDS FEVER: THE ENVIRONMENTAL IMPLICATIONS OF CANADA'S OIL SANDS RUSH 30–41 (2005).

[5] *See infra* notes 279, 300 and accompanying text.

[6] *See infra* notes 376-377 and accompanying text.

[7] *See, e.g.*, CORPORATE ETHICS INT'L ET AL., TAR SANDS INVASION: HOW DIRTY AND EXPENSIVE OIL FROM CANADA THREATENS AMERICA'S NEW ENERGY ECONOMY ii (2010).

[8] James Hansen, *Obama's Tar Sands Trap*, GUARDIAN (Feb. 18, 2009), http://www.guardian.co.uk/commentisfree/cifamerica/2009/feb/17/barack-obama-canada-climate-change.

[9] U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, OIL–PROVED RESERVES (2011), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2178rank.html (2011).

[10] *See, e.g.*, WOYNILLOWICZ, *supra* note 4, at 32; BRUNO ET AL., *supra* note 7, at 12, 13, 29. *See generally Switchboard: Natural Resources Defense Council Staff Blog*, NRDC SWITCHBOARD , http://switchboard.nrdc.org/cgi-bin/mt/mt-

view the environmental issues as Canada's fault and Canada's problem, but in fact the United States is not only deeply implicated in the continued development of the tar sands – it is arguably the decisive driving force. Canada and the United States have deeply integrated energy systems; Canada supplies nearly a quarter of the U.S.'s petroleum[11] (the U.S. imports sixty percent of its requirements in total[12]) and the two countries operate an integrated electricity grid.[13] Pipelines connect Alberta to refineries in the American mid-west, with new plans for pipelines to connect with refineries on the gulf coast.[14]

There is little question that U.S. demand is driving the rapid development of the Canadian oil sands. With this in mind, this paper asks the question: What legal levers exist for Americans who are against oil sands development to challenge it?[15] While in the past it would have been laughable to some to suggest that the U.S. might demand higher environmental standards from a country like Canada, this no longer seems to be the case. Canada's international reputation as a leader in environmentalism has been tarnished by its unapologetic repudiation of its commitments under the Kyoto Protocol[16] and by Canadian federal government support for oil

search.cgi?tag=% 20oilsands&limit=20 (last visited Nov. 11, 2011).

[11] *Canadian Oil Sands and U.S. Energy Supply: Hearing on "The Effects of Middle East Events on U.S. Energy Markets" Before the Energy & Commerce Comm., and Subcomm. On Energy and Power*, 112th Cong. 1 (2011) (written statement of Gary Mar, Alberta Representative in Washington, D.C.) [hereinafter Mar statement].

[12] Int'l Energy Transactions Comm., Energy Bar Ass'n, *Report of the International Energy Transactions Committee*, 30 ENERGY L.J. 207, 208 (2009)

[13] Dianne Anderson & Mark Shanahan, *The Common Cause Agenda in the Great Lakes–The Intersection of Canada-United States Trade, Energy, Environment and Society in the Great Lakes Basin* 34 CAN.-U.S. L.J. 347, 354 (2010). Canadian uranium also plays a significant role in the US nuclear industry. *Id.*

[14] *See TransCanada Keystone Pipeline Project Information*, TRANSCANADA.COM (May 31, 2011), http://www.transcanada.com/project_information.html.

[15] This paper does not take a position on whether oil sands development is on aggregate positive or negative for the U.S. or the world, but instead starts from the knowledge that many U.S. environmentalists wish to discourage development.

[16] PARLIAMENTARY INFORMATION AND RESEARCH SERVICE, LEGISLATIVE SUMMARY LS-539E: BILL C-30: CANADA'S CLEAN AIR AND CLIMATE CHANGE ACT 1 (2006), *available at* http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c30-e.pdf.

sands development.[17] By contrast, since the U.S. has re-engaged somewhat in the United Nations climate process,[18] and as the Kyoto Protocol loses relevance, the U.S.'s pariah status may also be diminishing.

Nonetheless, fighting the tar sands as a nation is difficult for the U.S. for at least five reasons. First, the U.S. has not been a leader on climate change. The U.S. has been attacked for obstructing global efforts to reduce emissions,[19] particularly in the context of the United Nations Framework Convention on Climate Change, where the U.S. government failed to ratify the Kyoto Protocol and was accused of obstructionism in the Bali round of negotiations.[20] Second, the U.S. relies on coal, which is not clearly environmentally superior to the oil sands, making it somewhat hypocritical for the U.S. to criticize Canada's fuel-related environmental problems. Coal is not a clean fuel, and because it generates half of all electricity used in the U.S., American coal-fired plants contribute far more to overall worldwide carbon emissions than Albertan oil sands bitumen development—by some estimates, fifty to seventy times more.[21] Third, the U.S. has its own

[17] *See* Ron Johnson, *What Does Canada's Election Mean for the Fate of the Tar Sands?*, EARTH ISLAND JOURNAL (May 9, 2011), http://www.earthisland.org/journal/index.php/elist/eListRead/what_does_canadas_election_means_for_the_fate_of_the_tar_sands.

[18] *Compare* Richard Black, *Obama Vows Climate 'Engagement,'* BBC NEWS (Nov. 18, 2008), http://news.bbc.co.uk/2/hi/science/nature/7736321.stm (Obama pledges to re-engage in the U.N. climate talks) *with* David G. Taylor, *Stops and Starts in U.N. Negotiations, update to The Obameter: Work with UN on Climate Change*, POLITIFACT (July 22, 2011), http://www.politifact.com/ truth-o-meter/promises/obameter/promise/455/work-with-un-on-climate-change/ ("It is clear that the Obama administration has worked with the U.N. on climate change.").

[19] *See* Pablo Solon, *Climate Talks: We Must Not Allow Cancún to Turn into Can'tCun*, GUARDIAN (Nov. 31, 2010), http://www.guardian.co.uk/environment/2010/nov/30/cancun-climate-talks-pablo-salon?cat=environment& type=article (accusing the U.S. of sabotaging international progress on climate change, bullying, and "holding the rest of humanity hostage"); Isabel Hilton, *China Shakes Off Image as Climate Criminal with Green Revolution*, GUARDIAN (Jun. 11, 2009), http://www.guardian.co.uk/commentisfree/cifgreen/2009/jun/11/china-carbon-emissions (identifying China and U.S. as "the two elephants in the climate change room").

[20] *See* Marwaan Macan-Markar, *US Herded into Consensus in Bali*, IRRAWADDY (Burma) (Dec. 17, 2007), http://www.irrawaddymedia.com/article.php?art_id=9612&page=1.

[21] J. Scott Childs, *Continental Cap-and-Trade*: *Canada, The United States, and Climate Change Partnership in North America*, 32 HOUS. J. INT'L L. 393,

deposits of bitumen it might one day wish to develop.[22] Fourth, under its current energy setup, the U.S. needs Canada's oil as a safe and accessible source of liquid fuel. And finally, it is difficult for the U.S. to give up such a useful resource when, as discussed below, the resource might simply go elsewhere, such as to China.[23]

These reasons probably explain the reluctance of the U.S. federal government to discourage oil sands development, but they needn't prevent all Americans from doing so. And while the U.S.'s reliance on coal is also a worthy target for those concerned about climate change and the environment, there are still good reasons to focus on the oil sands now. Coal is to a large extent locked into the current U.S. energy system; hundreds of power plants have been designed and built to burn coal.[24] In contrast, although decades of investment have gone into oil sands development,[25] compared to coal, oil sands development is in its infancy. Relatedly, and even more importantly, we seem to be at a tipping point for the tar sands. The massive investments being considered now (a 70% increase in production is forecast by 2019)[26] could economically lock both countries into oil sands production for years to come and divert money from the development of cleaner energy sources.[27]

Because the reasons above are likely to prevent most U.S. federal government action against the oil sands, it is important to focus on avenues available to individuals, nongovernmental

427-28 (2010).

[22] U.S. DEP'T OF ENERGY, SECURE FUELS FROM DOMESTIC RESOURCES 6-7 (2007).

[23] *See infra* notes 57–58 and accompanying text.

[24] As of 2009 the U.S. had 594 coal plants, representing 1,436 energy generating units due to multiple units per facility. U.S. ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2009, 47 Table 5.1, 17 Table 1.2 (2009). In 2010 coal plants produced just under 50% of U.S. electricity production, with a total coal energy output second only to China and more than all the countries in the world combined (China excluded). INT'L ENERGY AGENCY, KEY WORLD ENERGY STATISTICS 25 (2010). *See also Existing U.S. Coal Plants*, SOURCEWATCH, http://www.sourcewatch.org/index.php?title=Existing_U.S._Coal_Plants#cite_ref-source_1-0 (last visited Nov. 3, 2011).

[25] *See* MARC HUMPHRIES, CONG. RESEARCH SERV., RL 34258, NORTH AMERICAN OIL SANDS: HISTORY OF DEVELOPMENT, PROSPECTS FOR THE FUTURE 6 (2007); *The Oil Sands Story*, SUNCOR ENERGY, http://www.suncor.com/en/about/ 744.aspx (last visited Nov, 3, 2011).

[26] Mar statement, *supra* note 11, at 2.

[27] Shawn McCarthy, *Oil Sands Feel the Heat in Washington*, GLOBE & MAIL (Toronto), June 4, 2009, at B2 (citing "a statement to be released. . . by leaders of 21 U.S. environmental groups and nine Canadian ones").

organizations (NGOs), cities and states, many of which have in fact come out clearly against oil sands development.[28] This paper describes the avenues of challenge available and assesses their relative merits and their difficulties. Some of the avenues discussed are hortatory, some exert indirect financial pressure, and others attack development directly through regulation or lawsuits.

Part I gives a short introduction to oil sands development, the associated environmental problems, and the lobbies in favor of and against development, and considers the reasons Americans might want to discourage development. Part II focuses on current and potential future challenges under the North American Free Trade Agreement (NAFTA) and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC). Part III discusses the importance of pipeline construction to oil sands development and the legal barriers the construction is facing. Part IV considers low carbon fuel standards (LCFS), which limit fuel imports based on the carbon-intensity of fuel production, and therefore have great potential to affect oil sands development. Part V discusses climate litigation, specifically lawsuits against oil sands producers for climate harms. Part VI considers a number of quasi-legal policy and market approaches and lists potential further areas of consideration and research.

I. THE TAR SANDS

The tar sands go by many names, including oil sands, bitumen sands, extra heavy oil, and Western Canadian Basin Sedimentary (WCSB) crude oil reserves.[29] While there are some oil sands reserves in the U.S., notably in Utah,[30] and large reserves in Venezuela,[31] the largest accessible oil sands region in the world is the Canadian province of Alberta.[32] Alberta's oil sands reserve of

[28] *See, e.g., id.*; *infra* notes 215-216 and accompanying text. Given this focus, this paper excludes some potential avenues such as challenges to Canadian government subsidies to the oil sands under World Trade Organization law, which would be available only to the federal government.

[29] I use the terms interchangeably in this paper to avoid any potential political implications of the choice of term.

[30] U.S. DEP'T OF ENERGY, *supra* note 22.

[31] *Heavy Oil and Tar Sands*, WORLD RESOURCES INSTITUTE, http://www.wri.org/publication/content/10339 (last visited Sept. 10, 2011).

[32] *Oil Sands*, ENERGY MINERALS DIVISION, AMERICAN ASSOCIATION OF PETROLEUM GEOLOGISTS, http://emd.aapg.org/technical_areas/oil_sands.cfm (last visited Nov. 3, 2011).

175 billion barrels of oil place Canada behind only Saudi Arabia and Venezuela in proven oil reserves.[33] Development of the reserves is occurring rapidly, growing from 0.1 million barrels per day in 1980 to 1.5 million barrels per day in 2010, and estimated to rise to 3.7 million barrels per day by 2025.[34] As a result, oil sands projects are Canada's most rapidly-increasing source of greenhouse gas (GHG) emissions.[35]

Tar sand is essentially ordinary-looking soil under boreal forests that has oil mixed into it, although the oil is not visible until heated up and processed.[36] Processing the oil out of the oil sands is difficult, expensive, and energy intensive.[37] The oil sands must first be either mined or processed in situ, both of which require clearing swaths of boreal forest and wetlands.[38] The processing, which essentially boils the oil out of the soil, uses massive amounts of water and results in toxic tailing ponds.[39] The oil product is then transported to upgrading facilities and refineries to convert the oil into usable liquid fuel.[40] The environmental consequences allegedly associated with oil sands development include forest and wildlife habitat loss, water and fisheries poisoning, increased cancer rates in native (First Nations) communities nearby, air pollution, migratory bird death, and increased GHG emissions from the energy-intensive processing.[41]

Many Canadians are in favor of oil sands exploitation, citing the massive input to the Canadian economy, the ability to avoid buying oil from unstable and undemocratic foreign nations, and the fact that there are currently no real alternatives to liquid hydrocarbon fuel for many applications.[42] But many Canadians are

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[33] U.S. CENTRAL INTELLIGENCE AGENCY, *supra* note 9.

[34] CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, *supra*, note 2.

[35] THE ECOENERGY CARBON CAPTURE AND STORAGE TASK FORCE, CANADA'S FOSSIL ENERGY FUTURE: THE WAY FORWARD ON CARBON CAPTURE AND STORAGE 8, 14, 20 (2008); SIMON DYER ET AL., UNDERMINING THE ENVIRONMENT: THE OIL SANDS REPORT CARD 4 (2008).

[36] *See generally* Schorn, *supra* note 3.

[37] *See* NAT'L WILDLIFE FED'N, THE 17% CONTRADICTION 2–3 (2010), *available at* http://blog.nwf.org/wildlifepromise/files/2010/12/Cancun-Tar-Sands-Fact-Sheet-Final-11-23-10.pdf.

[38] *Id.*

[39] *Id.*

[40] *See* Schorn, *supra* note 36.

[41] *Id.*

[42] *Intelligence Squared Debate: The Oil Sands are Good for Canada and*

also against tar sands development. Canadian environmentalists are concerned about the environmental damage resulting from development and the increasing contribution of the industry's carbon emissions to climate change.[43] Further, as explained in detail below, under NAFTA restrictions Canada cannot easily limit the amount of oil sent south to feed the U.S.'s voracious demand;[44] some Canadians are beginning to resent the fact that their environment is being harmed and their gas prices raised because of the U.S.'s inability to reduce its own energy demands.[45] There is certainly a regional dimension to the divided opinion: Canadians in Alberta, benefiting the most economically from the oil sands, are generally more supportive of development than are Canadians in other provinces.[46]

There is a complicated and sometimes unpredictable array of those in the U.S. in favor of and against increasing Canadian oil sands production. Environmental NGOs are generally against expansion because of the associated environmental damage: a statement released by 21 U.S. environmental groups and nine Canadian ones called for "a moratorium on expansion of tar sands development and [the] halt[ing of] further approval of infrastructure that would lock us into using dirty liquid fuels."[47] The U.S. federal government, on the other hand, is also very concerned with energy security. The U.S. has a seemingly insatiable thirst for oil, and Canada is a safe and close source.

Good for the World, INTELLIGENCE SQUARED (Dec. 20, 2010), http://www.intelligencesquared.com/quick-debates/the-oil-sands-are-good-for-canada-and-good-for-the-world (comments by David McLean).

[43] *See* NANOS RESEARCH, ENVIRONMENT TRUMPS JOBS FOR OIL SANDS (2009), *available at* http://www.nanosresearch.com/library/polls/POLNAT-W09-T363.pdf; *Responsible Oilsands Development*, THE PEMBINA INSTITUTE, http://www.pembina.org/oil-sands/overview (last visited Nov. 15, 2011).

[44] *See infra* Part II.

[45] Stacey L. Middleton, *How the Petroleum Addict Negotiates With the Dealer*, 11 CARDOZO J. INT'L & COMP. L. 177, 178, 189, 192–93 (2003) ("The United States' high consumption of fuel and its unwillingness to increase exploration for fossil fuels on its own lands has caused Canada's domestic fuel prices to increase and has created a scarcity of resources throughout North America.").

[46] *See* GOVINDA R. TIMILSINA, NICOLE LEBLANC & THORN WALDEN, ECONOMIC IMPACTS OF ALBERTA'S OIL SANDS x (2005), *available at* http://www.ceri.ca/docs/OilSandsReport-Final.PDF (demonstrating Alberta reaping 72% of the economic benefit of the oil sand); *cf.* NANOS RESEARCH, *supra* note 43.

[47] McCarthy, *supra* note 27.

President Obama, while recognizing the oil sands' large carbon footprint, has refrained from condemning them, instead placing his attention on carbon capture and sequestration.[48] The President did, however, support a federal low-carbon fuel standard.[49] Although he has made no recent moves on this front, such a scheme would have a huge impact on the import of tar sands oil.[50] California and a number of other states have taken steps to limit imports of oil sands through state measures such as LCFS[51] and 1000 U.S. mayors have agreed not to import tar sands oil.[52]

Americans have valid reasons to want to discourage further tar sands development, based on both international and domestic considerations. Many in the U.S. are concerned about the climate change effects of oil sands development and about becoming locked into a system dependent on such a high-carbon fuel.[53] U.S. environmentalists may also care about protecting Canadian wilderness as a good in itself, because they value wilderness and the ability to enjoy it. Further, in many ways the health of wilderness and wildlife in the two countries is linked—for example through migrating birdlife and through the importance of the Canadian boreal forest as a carbon sink. Some Americans are concerned about importing pollution, as refining tar sands into useable oil, which is done mainly in the U.S., "creates vast

[48] *See* Childs, *supra* note 21, at 435.

[49] Press Release, The White House, Office of the Press Sec'y, President Obama Announces Steps to Support Sustainable Energy Options, Departments of Agriculture and Energy, Environmental Protection Agency to Lead Efforts (May 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Steps-to-Support-Sustainable-Energy-Options.

[50] *See infra* Part IV (Low Carbon Fuel Standards).

[51] *Id.*

[52] Stepan Wood et al., *What Ever Happened to Canadian Environmental Law?*, 37 ECOLOGY L.Q. 981, 1027 (2010); *see also* Press Release, The United States Conference of Mayors, 1000TH Mayor–Mesa, AZ Mayor Scott Smith Signs The U.S. Conference of Mayors Climate Protection Agreement (Oct. 2, 2009), *available at* http://usmayors.org/climateprotection/newsroom.asp (last visited Nov. 15, 2011); John Vidal, *Canadians Ponder Cost of Rush for Dirty Oil*, GUARDIAN (July 11, 2008), http://www.guardian.co.uk/environment/2008/jul/11/fossilfuels.pollution.

[53] *See, e.g.*, *Stop Dirty Fuels: Tar Sands*, NRDC, http://www.nrdc.org/energy/dirtyfuels_tar.asp (last visited Sept. 21, 2012); Sarah Risser, *If Approved, the Keystone XL Pipeline Will Lock the U.S. into a Long-Term Dependence on Dirty Oil from the Alberta Oil Sands*, NORTH STAR SIERRA CLUB (Aug. 15, 2011), http://northstarsierraclub.posterous.com/tar-sands-dirty-oil.

amounts of air, water and global warming pollution."[54] To accommodate increasing volumes of tar sands the refineries will need to be upgraded, costing billions of dollars that could be used to create clean energy jobs instead.[55] Another concern is the risk of a leak or spill from the high pressure pipelines crossing the U.S. that transport the oil sands to the refineries, which could endanger sensitive aquifers and agricultural land.[56]

An important threshold question to how Americans can affect tar sands development is whether Americans refusing to import tar sands oil would make any difference to oil sands development at all. Oil is a global commodity, and some commentators claim that if the U.S. does not buy the tar sands oil, then Canada will just sell it to China.[57] I shall call this argument 'if I don't do it, someone else will.' A key factor influencing this argument is that there is currently no satisfactory way to get the oil to China (or anywhere else) without going through the U.S., because pipelines to the Pacific are unfeasible due to the moratorium on oil tankers in Northern British Columbia (B.C.).[58] This makes U.S. oil sands challenges particularly powerful. This is especially true with respect to U.S. pipeline challenges; such challenges are extremely valuable as a tool to discourage tar sands expansion largely because pipelines through the U.S. currently represent the only export market access for tar sands oil. While the two major opposition political parties in Canada, the Liberal Party and New Democratic Party, want to keep the moratorium in place, the Conservative party would like to see a Canadian pipeline to the Pacific go ahead.[59] Now that the Conservatives have won a majority in Parliament it is possible that such a pipeline will be built, which would vastly undermine the ability of the U.S. to discourage tar sands development.

With this in mind, the first response to 'if I don't do it, someone else will' is that a pipeline to the Pacific might never be

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[54] Susan Casey-Lefkowitz, *Uncommon Ground over Tar Sands and Climate*, NRDC SWITCHBOARD (Feb. 18, 2010), http://switchboard.nrdc.org/blogs/sclefkowitz/uncommon_ground_over_tar_sands.html.

[55] *Id.*

[56] *Id. See also* the discussion on pipelines, *supra* Part III.

[57] BRUNO ET. AL, *supra* note 7, at 22.

[58] *Id.*

[59] *Canada Faces Fight Over Oil Sands*, BBC News (May 1, 2011), http://www.bbc.co.uk/news/world-us-canada-13244503.

built, and so someone else won't necessarily be able to 'do it.' Building a pipeline to the Pacific might be difficult; it would likely require crossing, and therefore consulting with, a number of First Nations' territories.[60] It would also certainly face stiff resistance from Canadian environmentalists.[61] China's recent heavy investment in oil sands projects[62] might indicate that at least China believes the pipeline is possible (although on the other hand, China can also access the oil through the U.S. even without a Pacific pipeline). The second response to 'if I don't do it, someone else will' is that that argument - while if true it would be powerful with respect to U.S. concerns about the climate change impacts of the oil sands - is not relevant to any of the local pollution concerns listed above. The U.S. would still receive the *local* benefits of reducing U.S. imports of tar sands oil even if China buys all the oil the U.S. rejects. Finally, 'if I don't do it, someone else will' suffers from the same logical infirmity to which all such justifications[63] are vulnerable: an unacceptable action does not become acceptable simply because someone else might be found who would also be willing to do it. Of course it is possible that U.S. efforts will only lead to delay, rather than prevention, of tar sands development. But collective action problems begin to vanish when individuals begin to act; if it is correct that in fact the tar sands should not be exploited, U.S. environmentalists should discourage the exploitation and allow environmentalists in other nations the chance to do the same.

II. NAFTA AND NAAEC

This Part gives an introduction to the North American Free Trade Agreement[64] as it relates to energy and the environment and

[60] BRUNO ET AL., *supra* note 7, at 22.

[61] *Id.*

[62] *See* Shawn McCarthy, *China's Move into Oil Sands Irks the U.S.*, GLOBE & MAIL (Toronto) (Sept. 1, 2009), http://www.theglobeandmail.com/globe-investor/chinas-move-into-oil-sands-irks-the-us/article1272498.

[63] Similar arguments are also frequently offered against U.S. GHG emissions reductions, in the form of "why should the U.S. reduce its emissions if the reductions will be rendered useless by China's increases?" *See, e.g.*, *Fact Sheet: United States Policy on the Kyoto Protocol*, U.S. DEP'T OF STATE, http://www.usembassy.at/en/download/pdf/kyoto.pdf (last visited Nov. 15, 2011) (offering the lack of involvement of China and India as a reason for the U.S.'s withdrawal from the Kyoto Protocol).

[64] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992,

describes the role of the North American Agreement on Environmental Cooperation (NAAEC).[65] It then discusses a number of routes for pursuing environmental protection under these treaties. Although, as will be discussed, the NAFTA-NAAEC treaty complex fails to provide much substantive environmental protection, a substantial treatment is appropriate because the treaties play a large role in the development of the tar sands, both by promoting tar sands development and by hindering efforts to limit such development.

A. *The Treaties*

NAFTA is a trilateral treaty between Canada, the United States, and Mexico which entered into force in 1994.[66] The treaty's goal is to maximize economic growth and liberalize trade between the three nations.[67] Energy has played, and continues to play, a prominent role in these agreements. According to Edward Ney, the U.S. Ambassador to Canada at the time of the treaty negotiations, accessing Canada's energy reserves was the "prime motivation" for the United States in the negotiations.[68]

Therefore, the most significant of NAFTA's provisions are arguably found in Chapter Six: the Energy Chapter. These provisions restrict parties' ability to impose either minimum or maximum export or import prices on energy products[69] or to impose taxes and duties on energy products unless the same taxes and duties are imposed domestically.[70] The provisions reflect requirements generally already found in the General Agreement on Tariffs and Trade (GATT),[71] but article 605 goes further than the

32 I.L.M. 289, *available at* http://www.nafta-sec-alena.org/en/view.aspx?conID=590 [hereinafter NAFTA].

[65] North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480, *available at* http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567 [hereinafter NAAEC].

[66] Middleton, *supra* note 45, at 177.

[67] *Id.*

[68] *Id.* at 194 (commenting on CFTA, the predecessor to NAFTA).

[69] Alastair R. Lucas, *Canada's Role in The United States' Oil and Gas Supply Security: Oil Sands, Arctic Gas, NAFTA, and Canadian Kyoto Protocol Impacts*, 25 ENERGY L.J. 403, 421 (2004).

[70] Middleton, *supra* note 45, at 186–87.

[71] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. GATT is a separate multilateral treaty that is part of World Trade Organization law.

GATT. It controls parties' imposition of quantitative restrictions that would otherwise be allowed under the GATT, such as temporary restrictions to prevent critical shortages or to conserve non-renewable resources, and ensures that such measures cannot be used to "establish export prices higher than domestic prices or disrupt normal channels of supply."[72] In essence, the NAFTA's Energy Chapter establishes energy sharing obligations[73] and price controls between the parties.[74]

Although NAFTA incorporated environmental concerns to an unprecedented degree, it does not clearly offer much substantive protection on its own.[75] President Clinton was therefore required to negotiate the NAAEC side agreement in order to convince the U.S. Senate to ratify NAFTA.[76] Designed to "complement the already existing, comprehensive environmental provisions within NAFTA," with the goal of "strengthen[ing] the development and enforcement of environmental laws,"[77] the NAAEC requires the three member states (again Canada, United States, and Mexico) to ensure that their laws provide for high levels of environmental protection and to enforce those laws effectively.[78] The agreement includes a government-to-government dispute resolution process if a party fails to fulfill this obligation, and a citizen participation process through which private actors are permitted to make submissions.[79]

Discretionary access to the citizen participation process is

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[72] Lucas, *supra* note 69, at 421.

[73] *Id.* at 422.

[74] Middleton, *supra* note 45, at 187.

[75] *See* Michael Sang H. Cho, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade*, 27 ST. MARY'S L. J. 817, 828 (1996); MARY TIEMANN, U.S. DEP'T OF STATE, NAFTA: RELATED ENVIRONMENTAL ISSUES AND INITIATIVES, ISSUE BRIEF (March 2000), *available at* http://fpc.state.gov/6143.htm.

[76] Martha Siefert, *The NAFTA's Environmental Side Agreement: Is the Mandatory Arbitration Procedure Fact or Fiction? A Proposal to Allow for Citizen Suits in the Greening of Mexico*, 3 SW. J.L. & TRADE AM. 467, 472–74 (1996). The NAAEC is a separate agreement from NAFTA, but is typically referred to as the NAFTA side agreement. *Id.* at 474.

[77] *Id.* at 474; Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1, 13 (2007).

[78] NAAEC, *supra* note 65.

[79] Siefert, *supra* note 76, at 475, 478.

granted by the Commission for Environmental Cooperation (CEC).[80] The CEC is a trilateral institution led by the three nations' Secretaries of the Environment (in the case of the U.S., the Administrator of the Environmental Protection Agency (EPA)).[81] The CEC is designed to "facilitate cooperation on environmental issues. . . and to avoid or settle environmental disputes among the [parties]."[82] It is trumpeted as the first commission in the world to link environmental cooperation with trade relations, and as "stand[ing] out for its provisions for public participation and for the unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws."[83] According to the CEC, the NAAEC's mandate allows it to "address almost any environmental issue anywhere in North America."[84]

NAFTA's environmental provisions and the NAAEC together convinced a number of key environmental groups that the most important environmental concerns around free trade had been adequately dealt with.[85] Unfortunately, while the treaties provide for a number of processes to address environmental problems, they do not actually impose any binding substantive environmental requirements on the parties unless the parties themselves choose to invoke the party dispute resolution procedure. In a situation where all parties concerned are fine with the environmental degradation taking place, or at least willing to allow it because of the economic benefits, the treaties place no limit on the amount of degradation that may occur.[86] The tar sands seem to represent just such a situation. For this reason the clout of the treaties lies not in their substantive requirements but instead in their ability to facilitate the

[80] *Id.* at 475.

[81] TEN-YEAR REVIEW AND ASSESSMENT COMM. TO THE COMM'N FOR ENVTL. COOPERATION, TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION ix (2004).

[82] Siefert, *supra* note 79, at 474.

[83] TEN-YEAR REVIEW AND ASSESSMENT COMM. TO THE COMM'N FOR ENVTL. COOPERATION, *supra* note 81, at ix.

[84] *Id.*

[85] Government assurances in this regard were "accepted in good faith by a group of ENGOs in the United States who . . . stepped forward in a signing ceremony at the White House to offer their endorsement of NAFTA." David J. Blair, *The CEC's Citizen Submission Process: Still a Model for Reconciling Trade and the Environment?*, 12 J. ENV'T & DEV. 295, 300 (2003).

[86] No party has yet invoked the dispute resolution procedure. *See infra* note 106 and accompanying text.

release of information and draw attention to environmental problems, as discussed in Section II-D-3 below.

B. *Effect of NAFTA on the Tar Sands*

In many ways, NAFTA is at the heart of the tar sands issue. It both encourages private developers to send oil south (through its goals of trade liberalization and market integration) and obstructs any potential Canadian plans to staunch the southward flow. While the role of Canadian government subsidies in the development of the tar sands industries complicates the matter,[87] it seems clear that Canadian companies would eventually develop the oil sands to satisfy American thirst for oil even in the absence of a government that actively promotes them. This is because NAFTA acts in a number of ways as a barrier to any Canadian efforts to limit tar sands oil exports and tar sands development.

Because most tar sands oil goes to the U.S., an obvious way for the Canadian government to limit tar sands development would be to restrict tar sands exports. NAFTA Chapter Six specifically addresses import and export restrictions and taxes on energy and petrochemical goods, and prevents a party from imposing minimum or maximum export price requirements or otherwise imposing a higher price on exports than on domestic sales.[88] If Canada did want to restrict oil sands exports it would have to justify it through one of the very limited export restriction exceptions in Article 605, which allows restrictions that would be justified under certain sections of the GATT.[89] Canada might be

[87] According to a Global Subsidies Initiative report commissioned by Greenpeace, in 2008 the Canadian and Alberta governments provided $1.59 billion in subsidies to the tar sands industry. Keith Stewart, *Government Subsidies to Tar Sands Companies Larger than Environment Canada's Entire Budget*, GREENPEACE CANADA (Nov. 8, 2010), http://www.greenpeace.org/canada/en/Blog/government-subsidies-to-tar-sands-companies-l/blog/28184/, *citing* GLOBAL SUBSIDIES INITIATIVE OF THE INT'L INST. FOR SUSTAINABLE DEV., TAX & ROYALTY-RELATED SUBSIDIES TO OIL EXTRACTION FROM HIGH-COST FIELDS 52–58 (2010), *available at* http://www.greenpeace.org/international/Global/international/publications/climate/2010/Tax%20and%20Royalty%20Related%20Subsidies%20to%20Oil%20Extraction%20from%20High%20Cost%20Fields%20November%202010%205MB.pdf. *But see* Jack M. Mintz, *Oil Isn't Subsidized*, NATIONAL POST (June 3, 2010), http://fullcomment.nationalpost.com/2010/06/03/oil-isnt-subsidized/.

[88] Middleton, *supra* note 45, at 187 (parties may not impose a higher price on exports to another NAFTA nation than on domestic sales).

[89] *See* NAFTA, *supra* note 64, art. 605.

able to claim that a restriction is "necessary to protect human, animal or plant life or health"[90] (the so-called 'environmental exception'), or "relat[es] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[91] These restrictions are analogous to those placed on Canada by the GATT, but Article 605 allows those exceptions only subject to stringent conditions that go beyond GATT rules, such as maintaining the same proportion of exports to domestic products as in the previous three years and not disrupting the normal channels of supply.[92] These rules make it very difficult for Canada to use export limitations to control the amount of oil sands development by reducing the amount of oil sent to the U.S. Some commentators have been calling since the early 2000s for renegotiation of Chapter Six,[93] as Canada's resources are being depleted faster than predicted during the NAFTA negotiations due to the U.S.'s "unwillingness to accept responsibility for its soaring energy demands and develop alternative energy resources."[94] However, there is no indication that either the U.S. or Canadian governments are pursuing or interested in pursuing renegotiation.

Whereas NAFTA's Chapter Six limits Canada's ability to control tar sands development through limiting exports, Chapter Eleven makes it difficult to limit tar sands development at all, regardless of whether the product is destined for export or for domestic consumption. Chapter Eleven provides protection for private investors against Party governments instituting measures that are "tantamount to nationalization or expropriation" by providing the investors with direct remedies against governments

[90] GATT, *supra* note 71, art. XX(I)(b).

[91] GATT, *supra* note 71, art. XX(I)(g).

[92] NAFTA, *supra* note 64, art. 605.

[93] Middleton, *supra* note 45, at 189, 193.

[94] John Fohr, *How NAFTA Can Increase Global Energy Security*, 22 WIS. INT'L L.J. 741, 758–59 (2004) (describing the "cruel irony, as [while] U.S. environmental proponents press for the United States to preserve its own oil-rich lands in the Arctic National Wildlife Refuge, Canadian corporations are depleting Canada's natural resources to meet American demand"). *See also Why It's Time to Renegotiate NAFTA Energy and Trade Agreements*, COUNCIL OF CANADIANS, http://www.canadians.org/energy/documents/NAFTA-fs.pdf (last visited Nov. 11, 2011) ("61% of Canadians agree that NAFTA should be renegotiated to include enforceable labour and environmental standards").

in NAFTA tribunals.[95] If Canada attempted to restrict tar sands development in a way that harmed U.S. investors, such as by placing new environmental protections on land the investors had obtained for oil exploitation, Chapter Eleven could make it very expensive and burdensome to do so by subjecting Canada to litigation and eventual payouts of fair market value compensation.[96] Environmental activists claim that Chapter Eleven has become a "'key offensive strategic tool' for corporations to fight new environmental laws that interfere with their ability to make a profit through exports."[97]

NAFTA tribunals applying Chapter Eleven have been somewhat inconsistent in their determinations of what constitutes expropriation,[98] but a number of tribunal decisions have confirmed that expropriation may be found where otherwise lawful environmental regulations have affected investments.[99] At least one commentator has concluded that a Chapter Eleven challenge to certain governmental environmental protection efforts that affect

[95] NAFTA, *supra* note 64, art. 1110. *See* Joseph Cumming & Robert Froehlich, *NAFTA Chapter XI and Canada's Environmental Sovereignty: Investment Flows, Article 1110 and Alberta's Water Act*, 65 U. TORONTO FAC. L. REV. 107, 116 (2007).

[96] *See* Lucas, *supra* note 69, at 423; *see also* Meera Fickling, *Filling the Legislative Vacuum: Local, Regional, and EPA Climate Change Efforts and United States-Canada Integration*, 36 CAN.-U.S. L.J. 42, 60 (2010). There is a relatively untested possibility, based on dicta in one tribunal decision that in the case of certain government actions taken for a "public purpose" no compensation need be paid. Cumming & Froehlich, *supra* note 95, at 128-29.

[97] Danielle Knight, *Lawsuits Spark Calls for Changes in NAFTA*, THIRD WORLD NETWORK, http://www.twnside.org.sg/title/spark-cn.htm (last visited Nov. 11, 2011). For example, in 1999 Canada settled a suit by the U.S.-based Ethyl Corporation under Chapter Eleven for damages resulting from a Canadian federal ban on one of Ethyl's products, a gasoline additive. Lucas, *supra* note 69, at 423.

[98] Cumming & Froehlich, *supra* note 95, at 124. A number of different types of expropriation are considered in the cases, including "direct expropriation," "indirect expropriation," "creeping expropriation," and "tantamount to expropriation." *Id.* at 126–128. For a summary of relevant cases, *see id.*

[99] *See, e.g.*, Metalclad Corp. v. The United Mexican States (Award), 30 Aug. 2000, (NAFTA Arbitral Tribunal); Pope & Talbot Inc. v. Gov't of Canada (Interim Award), 26 June 2000 (NAFTA Arbitral Tribunal). *But see* Methanex Corp. v. United States (Final Award on Jurisdiction and Merits) Chapter D, 4, 3 August 2005 (NAFTA Arbitral Tribunal) (finding no expropriation "unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation").

oil sands investments would have a good chance of success.[100] Even more significant is the fact that governments have shown a tendency to settle such claims, perhaps due to the uncertainty around what will be considered an expropriation.[101] For this reason, Chapter Eleven threatens significant expense to the Canadian government even if environmental regulations affecting tar sands investments would not in fact be considered expropriations under Chapter Eleven.

While it would be farfetched to suggest that Canada is being forced against its will to develop the tar sands to send oil south, many Canadians are beginning to resent the fact that their gas prices are being raised and their environment harmed because of the U.S.'s insatiable thirst for oil.[102] From a trade perspective, the U.S. should arguably be dissatisfied with NAFTA's performance as well, in that it is allowing or even requiring Canada to produce dirty oil to be sold in the U.S., undercutting potential U.S. development of alternative fuel sources. Admittedly, however, it's unlikely this concern would outweigh the U.S.'s interest in a secure energy supply, which NAFTA was intended to facilitate.

While NAFTA-NAAEC has clearly worked very effectively in securing U.S. access to Canada's energy supplies, it has certainly not succeeded in protecting the environment the way some environmentalists hoped it would. The problems described above seem to be exactly the sort of environmental problems environmentalists and environmentally concerned members of Congress sought to prevent during NAFTA's creation. In order to fulfill the demands of the free trade market Canada has failed to enact strong environmental protections for the tar sands land, and the investment protection provisions seem to leave future environmental regulation of the tar sands vulnerable. Unfortunately, the parties have not utilized the environmental dispute resolution process, and the ability of NGOs to participate has turned out to be less meaningful than expected,[103] as will be discussed below.

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[100] *See* Cumming & Froehlich, *supra* note 95, at 126–29.

[101] *See id.* at 117, 124.

[102] *See* Middleton, *supra* note 45, at 178; *see also* Fohr, *supra* note 94, at 758 (describing Canadian opinions that NAFTA "handcuffs Canadians to the ebb and flow of the global energy market").

[103] Siefert, *supra* note 76, at 468.

C. *Party-to-Party Government Dispute Resolution*

Article 5 of the NAAEC requires Party governments to "effectively enforce its environmental laws and regulations through appropriate governmental action" with "the aim of achieving high levels of environmental protection."[104] The dispute resolution process (known as Part V proceedings) can, following efforts at consultation and arbitration, result in imposition of a monetary enforcement assessment against the non-complying party, and, if this assessment remains unpaid, eventual suspension of trade benefits up to the amount of the assessment.[105] Given the rather desperate need for oil in the U.S., it is unlikely the American government would be willing or able to bring an enforcement action to reduce its flow. On the other hand, it is not inconceivable that the U.S. government would wish to force Canada to internalize the environmental costs of tar sands development. The capital used to develop the oil sands could be used instead to finance development of a U.S. renewable energy industry; lax environmental standards are arguably artificially lowering the costs of developing the tar sands and providing the exploitive industry a competitive advantage. Also, at some point the costs of climate change, whatever they are, must be actualized and the U.S. government could be on the hook for an enormous bill; they therefore have an interest in keeping those costs under control.

This dispute resolution process has never been used, and in fact the parties have still not agreed on the exact rules of procedure for the process if a party ever did initiate a case.[106] The process itself does not seem promising for efforts to stop the development of the tar sands. The governmental challenger would have to identify a Canadian or Albertan environmental law, primarily aimed at protecting the environment or human health,[107] the

[104] *See* NAAEC, *supra* note 65, art. 34(5), 36(1). Appropriate governmental action includes "monitoring compliance and investigating suspected violations, . . . using licenses, permits or authorizations. . . [and] initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations." *Id.* art. 5(1)(a)-(k).

[105] Siefert, *supra* note 76, at 476-77.

[106] Blair, *supra* note 85, at 298-99. Commentators attribute this to the strong opposition shown by the Canadian and Mexican governments to any mechanism that could be used to reverse some of NAFTA's trade benefits. *Id.*

[107] Siefert, *supra* note 76, at 476.

enforcement failure of which is also trade-related or involves competing goods or services.[108] Even following successful identification of such a law, it would likely be difficult to establish the necessary "persistent failure" to enforce the law. Because many environmental laws allow room for enforcement discretion and flexibility, both establishing what exactly is required by the law and adducing proof of the enforcement failure could be challenging.[109]

Another obstacle to a successful challenge, most relevant in the earlier consultation and arbitration stages of the dispute resolution process, might be Alberta's power in Canada's NAAEC matters. Because of Canada's complex interplay of federal and provincial jurisdiction in the environmental arena, at the time of signing the NAAEC Canada agreed to be bound only for matters within its federal jurisdiction.[110] Three provinces have agreed also to be bound by the NAAEC through a separate Canadian agreement called the Canadian Intergovernmental Agreement Regarding the NAAEC (CIA).[111] As a result those provinces are the only ones with a direct voice in Canada's participation in the NAAEC.[112] As Alberta is one of only three signatories,[113] its influence could be quite significant in any attempt by the U.S. government to challenge actions concerning the tar sands. A strong Albertan voice in NAAEC decision-making would be unlikely to facilitate Canadian compromise on tar sands development should the U.S. request it.

While many originally considered this dispute resolution the

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[108] TIEMANN, *supra* note 75.

[109] In fact, Article 45 of the NAAEC specifically allows for discretion in enforcing environmental laws–according to its terms, no failure under Article 5(1) will be found in a case that reflects a reasonable exercise of investigatory, prosecutorial, regulatory or compliance discretion, or that results from bona fide decisions to allocate enforcement resources to higher priority environmental matters. *See* NAAEC, *supra* note 65, art. 45.

[110] Gov't of Can., *North American Agreement on Economic Cooperation (NAAEC): Canadian Implementation*, NORTH AMERICAN AGREEMENT ON ECONOMIC COOPERATION, CANADIAN OFFICE, http://www.naaec.gc.ca/eng/implementation/implementation_e.htm (last visited Nov. 11, 2011).

[111] *Id.*; GOV'T OF CAN., CANADIAN INTERGOVERNMENTAL AGREEMENT REGARDING THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (1995), *available at* http://www.naaec.gc.ca/eng/implementation/cia_e.htm [hereinafter CIA].

[112] Gov't of Can., *supra* note 110.

[113] The other two are Québec and Manitoba. *Id.*

most important component of the NAAEC, the complete lack of utilization has rendered it far less significant than expected. Instead the citizen submission process, detailed below, has become the primary enforcement mechanism under the agreement.[114]

D. *The Citizen Submission Process*

The government-to-government process established under NAFTA for resolving trade disputes was widely criticized as failing to incorporate the public's interests in accessing information and participating in the resolution of environmental disputes.[115] The NAAEC is meant to remedy this shortcoming by providing citizens access to judicial and administrative procedures to demand enforcement of environmental laws.[116] The citizen submission process has the potential to be a useful tool for environmentalists to challenge oil sands developments. In fact, the environmental legal advocacy group the Natural Resources Defense Council (NRDC), has already begun such an attempt.[117]

1. *The Procedure*

Pursuant to article 14 of the NAAEC, any individual or NGO may file a submission with the Secretariat of the CEC alleging that a Party State is "failing to effectively enforce its environmental laws."[118] A submission must pass through a series of hurdles if it is to lead to the ultimate remedy of preparation of a factual record, which is a statement of facts relating to the dispute.[119] The Secretariat screens the submissions to assure they satisfy formal criteria specified in Article 14(1); to be successful, a submission should "[appear] to be aimed at promoting enforcement rather than at harassing industry," and be "filed by a person or organization residing or established in the territory of a Party."[120] The

[114] Blair, *supra* note 85, at 299.

[115] Cho, *supra* note 75, at 830-31.

[116] *See id.*; Blair, *supra* note 85, at 297.

[117] *See infra* notes 147-149 and accompanying text.

[118] JOINT PUBLIC ADVISORY COMM., COMM'N FOR ENVTL. COOPERATION, LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 3 (2001).

[119] *See infra* notes 127-130 and accompanying text.

[120] NAAEC, *supra* note 65, art. 14(1)(a)–(f). In addition, if the matter raised is the subject of a pending judicial or administrative proceeding, the entire submission process is terminated. COMM'N FOR ENVTL. COOPERATION,

Secretariat must also decide if the submission merits a response, taking into account whether a) the submission alleges harm to the submitter; b) the submission raises matters whose further study in this process would advance the goals of the NAAEC; c) private remedies have been pursued; and d) the submission is drawn exclusively from mass media reports.[121] Once the Party has had an opportunity to submit its own information,[122] the Secretariat determines whether it will recommend the development of a factual record to the Council,[123] which must authorize the factual record development by a two-thirds majority vote for the process to continue.[124] The factual records produced are based on information that is publicly available, submitted by interested NGOs or persons, submitted by the CEC's Joint Public Advisory Committee (JPAC),[125] or developed by the Secretariat or by independent experts.[126] Even if a factual record is prepared, no one may access it, including the submitter, unless the CEC votes by a two-thirds majority to make the record publicly available.[127] Publication of a factual record is the maximum remedy the citizen submission process provides.[128]

While the factual record itself is mainly a compilation of all the relevant documentation surrounding the submission, it includes a critical component, namely the responses of the governments to the CEC regarding the complaints. It is rare for the Secretariat to pass judgment, reach conclusions or make recommendations.[129] There are indications, however, that there is movement for this to become less rare; the 10-year review of the CEC by the JPAC recognized commentators' views that the factual records should

Guidelines for Submissions on Enforcement Matters § 9.4, *in* BRINGING THE FACTS TO LIGHT 17 (2000), *available at* http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf.

[121] NAAEC, *supra* note 65, art. 14(2).

[122] *Id.* art. 14(3).

[123] COMM'N FOR ENVTL. COOPERATION, *supra* note 120, § 9.5.

[124] NAAEC, *supra* note 65, art. 15(1)-(2).

[125] The JPAC is composed of five members of the public from each member nation to "advise the Council and provide technical, scientific, or other information to the Secretariat." Siefert, *supra* note 76, at 475.

[126] NAAEC, *supra* note 65, art. 15(4).

[127] *Id.* art. 15(7).

[128] *See* Siefert, *supra* note 76, at 479; JOINT PUBLIC ADVISORY COMM., *supra* note 118, at 12.

[129] Blair, *supra* note 85, at 318.

clearly state conclusions and recommendations and be made public immediately.[130]

2. *What Would a Citizen Submission for the Tar Sands Look Like?*

As mentioned, there is already one citizen submission in process relating to the tar sands, but there is the potential for many more given a) the broad definition of "environmental law" challengeable,[131] and b) the plethora of environmental harms alleged to be linked to the tar sands, from pollution of rivers by tailings ponds to increases in greenhouse gas emissions. For the citizen submission process, the first issue is determining which environmental laws are being systematically under-enforced resulting in these harms. While to date the CEC has only issued factual records involving failures to enforce federal laws,[132] it is also possible to challenge the failure to enforce provincial environmental laws if the province in question has signed on to the CIA.[133] Fortunately Alberta is one such province;[134] if it were not, Canada's complex division of environmental power between the federal and provincial governments[135] could render certain environmental harms associated with the tar sands unreachable by

[130] JOINT PUBLIC ADVISORY COMM., *supra* note 118, at 10-11.

[131] NAAEC, *supra* note 65, art. 45(2) (Environmental law includes any statute or regulation of a Party "the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health," through, among other things, control of emissions of pollutants, the dissemination of information related thereto and the protection of wild flora and fauna and their environment.). Note, however, that the definition excludes laws "the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources." *Id.* art. 45(2)(b).

[132] ENFORCEMENT OF ENVTL. LEGISLATION GRP., COMM'N FOR ENVTL. COOPERATION, THE IMPACT OF THE CITIZEN SUBMISSION PROCESS ON THE ENFORCEMENT OF ENVIRONMENTAL LEGISLATION: A CANADIAN CASE STUDY 13 (2003).

[133] *See* CIA, *supra* note 111 and accompanying text. A submission currently before the CEC is challenging the failure of the government of Québec to enforce their standards on automobile emission of hydrocarbons, carbon monoxide and nitrogen oxides. The CEC submitted a draft factual record to the Council in March 2011. *See Quebec Automobiles*, COMMISSION FOR ENVTL. COOPERATION (May 20, 2011), http://www.cec.org/Page.asp?PageID=2001&ContentID=2392&SiteNodeID=544&B. The success of this submission could indicate an increased willingness of the CEC to consider challenges to provincial regulations and bodes well for potential future tar sands challenges.

[134] *See* CIA, *supra* note 111 and accompanying text.

[135] *See* Gov't of Can., *supra* note 110 and accompanying text.

the process.

a. *Challenging Domestic and Local Environmental Problems*

A memo from the Canadian Deputy Minister of the Environment to the Canadian Minister of the Environment in 2009 discussed federal and provincial laws that might require action relating to Alberta's oil sands tailing ponds.[136] Regarding federal laws, the memo identified a) the Fisheries Act,[137] which is relevant because tailing ponds may seep into fish-bearing bodies of water, b) the Species at Risk Act[138] and c) Migratory Birds Convention Act and Regulations,[139] which are relevant because listed animals could be affected, and d) the Canadian Environmental Protection Act,[140] which is relevant because many toxic substances in the tailings ponds are on Schedule 1 of the Act, and because the ponds are also potentially releasing regulated air emissions.[141] Of Alberta's provincial laws, the memo identified the Environmental Enhancement and Protection Act,[142] which requires environmental assessment and conditioning of project approval on environmental performance, and the Water Act,[143] which requires permits for withdrawals of surface water[144] (the processing of oil sands requires massive volumes of water).[145] A CEC report named the Fisheries Act and the Canadian Environmental Assessment Act, which applies to all federal projects and projects that have some federal connection, as federal legislation relevant to the citizen submission process.[146] Depending on the evidence available, each of these laws could potentially be the subjects of a citizen

[136] Memorandum from Ian Shugart, Canadian Deputy Minister of the Environment, to Canadian Minister of the Environment, on Oil Sands Tailing Ponds (Jan. 19, 2009). The memo was released under the Access to Information Act (the Canadian equivalent of the Freedom of Information Act).

[137] *Id.* at 5 (referencing Fisheries Act, R.S.C. 1985, c. F-14 (Can.)).

[138] *Id.* (referencing Species at Risk Act, S.C. 2002, c. 29 (Can.)).

[139] *Id.* (referencing Migratory Birds Convention Act, S.C. 1994, c. 22 (Can.); Migratory Birds Regulations, C.R.C. 2012, c. 1035 (Can.)).

[140] *Id.* (referencing Canadian Environmental Protection Act, S.C. 1999, c. 33 (Can.)).

[141] *Id*. at 4-5.

[142] *Id.* at 5 (referencing Environmental Enhancement and Protection Act, R.S.A. 2000, c. E-12 (Can.)).

[143] *Id.* (referencing Water Act, R.S.C. 2000, c. W-3 (Can.)).

[144] *Id*.

[145] *Id*. at 2.

[146] ENFORCEMENT OF ENVTL. LEGISLATION GRP., *supra* note 132, at 13.

submission.

Citizen submission challenges to the oil sands under these types of laws have now begun. In keeping with the relative success under the federal Fisheries Act in the citizen submission process,[147] the joint submission by Environmental Defence Canada and the U.S.-based NRDC challenged Canada's failure "to effectively enforce subsection 36(3) of the Canadian Fisheries Act against the practice of leaking deleterious substances from oil sands tailings ponds."[148] The submission claims that the Canadian government has "neither prosecuted any company for documented surface water contamination, nor. . . pursued regulation governing tailings pond leakage."[149] This is a strong candidate for a factual record – the submission is pending.

A particularly good candidate for another submission would be the Migratory Birds Convention Act and Canada Wildlife Act, which together require protection of migratory birds and wildlife habitats in designated areas.[150] According to the Department of the Environment memo, "habitat loss from oil sands development (including the creation of tailing ponds) is currently the greatest concern to migratory birds (particularly the whooping crane) and to the woodland caribou due to severe challenges for landscape restoration and reclamation."[151] Tailing ponds can act as biological traps for migrating birds; the NRDC has estimated 8,000 to 100,000 birds die annually from contact with the ponds.[152] The Blue Quills Wildlife Area is within the Tar Sands Lease Area[153] – it is worth investigating whether Blue Quills' protection is being sufficiently enforced. As some of these bird species are

[147] All four factual records addressing Canadian government actions produced between 1995 and 2003 mentioned the Fisheries Act. *Id.*

[148] MATT PRICE ET AL., ENVIRONMENTAL DEFENCE CANADA ET AL., SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION REGARDING OIL SANDS TAILINGS PONDS (Apr. 14 2010), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2864&SiteNodeID=544&BL_ExpandID=.

[149] *Id.*

[150] *See* Migratory Birds Convention Act, S.C. 1994, c. 22, art. 4 (Can.); Canada Wildlife Act, R.S.C. 1985, c. W-9, § 12(i) (Can.).

[151] Memoranda, *supra* note 136, at 4.

[152] *Id.*

[153] *See* Gov't of Alberta, Alberta's Oil Sands Projects and Upgraders, ALBERTA ENERGY, http://www.energy.alberta.ca/LandAccess/pdfs/OilSands_Projects.pdf (last visited Nov. 21, 2011).

endangered, such as whooping cranes and peregrine falcons, it would also be worth investigating whether the Species at Risk Act, which also requires habitat protection, is being consistently enforced.[154]

The recent saga with Syncrude's tailings ponds could provide evidence for these challenges. After 1,600 ducks died after landing on one of Syncrude's tailing ponds, Syncrude was found guilty of violating provincial and federal wildlife and migratory bird laws.[155] However, both the Albertan and Canadian governments took no action until nearly a year after the incident, after an environmental NGO filed a private prosecution against Syncrude.[156] Further, while Alberta has implemented a new directive,[157] Directive 074, designed to limit increases in tailing ponds such as the one at issue in the Syncrude affair, government regulators have recently approved an expansion of the tailing ponds,[158] perhaps indicative of a failure to enforce a provincial law – Directive 074 itself. Several tar sands developers have submitted plans that show they will not comply with the new directive.[159] These facts would sound strongly in a challenge for failure of the Albertan and Canadian governments to effectively enforce their environmental laws.

b. *Challenging the Oil Sands' Greenhouse Gas Emissions*

Oil sands processing is contributing to Canada's GHG emissions, and this issue represents the greatest concern for many regarding the oil sands.[160] It is therefore worth considering how

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[154] Memorandum, *supra* note 136, at 5; Species at Risk Act, S.C. 2002, c. 29, § 49 (Can.).

[155] Susan Casey-Lefkowitz, *Tar Sands Found Guilty in Dead Duck Case—But Will Clean Up Ever Happen?*, NRDC SWITCHBOARD (June 25, 2010), http://switchboard.nrdc.org/blogs/sclefkowitz/tar_sands_found_guilty_in_dead.html.

[156] The government then laid charges. Simon Dyer, *Syncrude Found Guilty, but Has Justice Been Served?*, THE PEMBINA INSTITUTE BLOG (June 25, 2010), http://www.pembina.org/blog/387.

[157] ENERGY RESOURCES CONSERVATION BOARD, DIRECTIVE 074: TAILINGS PERFORMANCE CRITERIA AND REQUIREMENTS FOR OIL SANDS MINING SCHEMES (2009), *available at* http://www.ercb.ca/ directives/Directive074.pdf.

[158] Dyer, *supra* note 156.

[159] *See* TERRA SIMIERITSCH ET AL., PEMBINA INSTITUTE, TAILINGS PLAN REVIEW 5–6 (2009), *available at* http://pubs.pembina.org/reports/tailings-plan-review-report.pdf.

[160] *See* Casey-Lefkowitz, *supra* note 54 and accompanying text.

this aspect of oil sands development might be approached directly under the citizen submission process.

One avenue would be to challenge the Canadian government's failure to consider the impact of their administrative decisions on climate change under the Canadian Environmental Assessment Act (CEAA). One citizen submission has already successfully used the CEAA, albeit in tandem with the Fisheries Act, to successfully petition for the preparation and publication of a factual record.[161] To use the CEAA in a tar sands submission would require finding that the oil sands projects have a federal connection such that the CEAA would apply.[162] As of 2009, Environment Canada was still treating oil sands projects as lacking in federal triggers under the CEAA,[163] although this is certainly challengeable. It would then involve alleging that the CEAA requires consideration of GHG emissions and that failing to do so thus creates a persistent pattern of failure to effectively enforce the CEAA.

Similar suits, though not under NAFTA/NAAEC, have had some success in the U.S. and elsewhere,[164] and some academics have concluded that such an interpretation of the CEAA is likely to succeed. Shi-Ling Hsu and Robin Elliot note that the CEAA requires consideration of "any change that the project may cause in the environment," with "environment" to be understood as encompassing "air, including all layers of the atmosphere."[165] They also note that decisions of the Supreme Court of Canada support consideration of all possible environmental effects,

[161] After a citizen submission by Friends of the Oldman River, the CEC issued a factual record concerning the construction of a forest access road in Alberta. ENFORCEMENT OF ENVTL. LEGISLATION GRP., *supra* note 132, at 13.

[162] *See* ENFORCEMENT OF ENVTL. LEGISLATION GRP., *supra* note 132, at 13. A "federal connection" can be found in projects that "a federal authority is itself proposing, that a federal authority intends to support financially, that involves the sale or lease of federal lands or that implicates an area of federal concern identified by regulation." Shi-Ling Hsu & Robin Elliot, *Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions*, 54 MCGILL L.J. 463, 498 (2009) (*citing* CEAA, S.C. 1992, c. 37 § 5(1) (Can.)).

[163] Memorandum, *supra* note 136, at 5.

[164] For a list of suits, see Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 713-14 (2008).

[165] Hsu & Elliot, *supra* note 162, at 469, *citing* CEAA, S.C. 2012, c. 19 §§ 2(1), 16(1).

including GHG emissions, in projects with a federal connection.[166] Further, a House of Commons Environment Committee has recommended that the Minister of the Environment ensure national environmental priorities and international environmental commitments are "incorporated into" the environmental assessment process of the CEAA.[167] This could potentially bring within the scope of an environmental assessment both the effects of GHG emissions on Canada and also Canada's obligations under the Kyoto Protocol. In its response to the Environment Committee report, the government pledged to undertake a systematic examination of its domestic and international commitments so that they may be incorporated into environmental assessments.[168]

There is also a strong argument that Canada has failed to effectively enforce its law implementing the country's Kyoto obligations.[169] In 2007 opposition parties managed to pass the Kyoto Protocol Implementation Act requiring the Canadian government to enact regulations by a specific date to give effect to its obligations under the Protocol.[170] The Canadian government subsequently failed to do so, but the federal courts declined to review the issue on political question grounds and the Canadian Supreme Court denied leave to appeal.[171] A challenge pursuant to

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[166] *Id.* at 480-81.

[167] STANDING COMM. ON ENV'T & SUSTAINABLE DEV., SUSTAINABLE DEVELOPMENT ENVIRONMENTAL ASSESSMENT: BEYOND BILL C-9, REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT Recommendation 3.6 (2003), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032309&Language=E&Mode=1&Parl=37&Ses=2&File=66 ("The committee recommends that the minister of the environment ensure that Canada's national and international environmental legal and policy commitments, objectives and standards are incorporated into the environmental assessment process under CEAA."). *See also* Albert Koehl, *EA and Climate Change Mitigation*, 21 J. ENVTL. L. & PRAC. 181, 212 (2010).

[168] "The government will systematically examine these domestic commitments and those arising out of international agreements ratified by Canada in an effort to develop policies and guidelines that can be used to inform environmental assessment decisions." GOV'T OF CAN., GOVERNMENT RESPONSE TO THE REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 14, *available at* http://www.parl.gc.ca/Content/HOC/Committee/372/ENVI/GovResponse/RP1140712/beyondc9/beyondc9-e.pdf (last visited May 24, 2011).

[169] Kyoto Protocol Implementation Act, S.C. 2007, c. 30,§ 7(1) (Can.).

[170] Wood et. al, *supra* note 52, at 1033–34.

[171] *Id.* While the relationship between national court interpretations of justiciability of an issue and the appropriateness of an investigation under the citizen submission process is far from clear, the Secretariat has incorporated

this failure could be successful, as there is precedent under the citizen submission process for challenging domestic acts implementing international obligations: a submission based on the U.S. government's failure to effectively enforce its Migratory Birds Treaty Act was accepted as satisfying the process criteria (although the Council ultimately declined to prepare a factual record).[172] This would be an indirect attack on the tar sands, as the submission would not allege that allowing tar sands development is itself a violation of the Kyoto Protocol Implementation Act. But because the oil sands represent Canada's fastest-growing source of GHG emissions,[173] influencing Canada to enforce its Kyoto obligations could well lead to the government implementing regulations that would discourage, or at the very least cease encouraging, oil sands development.

The Canadian government's recently passed Federal Sustainable Development Act (FSDA)[174] could also have some potential in a challenge. The FSDA requires the federal government to "create and implement a government-wide sustainability strategy, including scientifically-measurable sustainability targets, and to regularly evaluate and report on the environmental consequences of its actions."[175] Oil sands development is clearly part of the federal government's development strategy; its failure to account properly for the environmental effects of this development, based on the precautionary principle,[176] might be challengeable as a failure under the FSDA.

national judicial interpretations into its process before. In one of its factual records, "[t]he Secretariat provided information on the interpretation of the term 'failure to enforce environmental laws effectively' by referring to the respective interpretations of that term used by Canada, British Columbia and the independent Expert Panel." JOINT PUBLIC ADVISORY COMM., *supra* note 118, at 7.

[172] Blair, *supra* note 85, at 312.

[173] *See* DYER ET AL., *supra* note 35, at 4; ECOENERGY CARBON CAPTURE AND STORAGE TASK FORCE, *supra* note 35, at 14.

[174] Federal Sustainable Development Act, S.C. 2008,c. 33 (Can.).

[175] Wood et. al, *supra* note 52, at 1031-32.

[176] The FSDA "requires the Minister of the Environment to develop a Federal Sustainable Development Strategy that is based on the precautionary principle." CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY (CIELAP), BRIEF ON IMPLEMENTATION OF THE FEDERAL SUSTAINABLE DEVELOPMENT ACT (2010), *available at* http://www.cielap.org/pdf/Brief_SDStrategy.pdf.

c. *Potential for New Laws*

There may soon be new challenges available. At the end of December, 2010 the federal and provincial governments vowed to establish a "gold standard" of environmental monitoring of oil sands development.[177] In response to a report from the federally appointed Oil Sands Advisory Panel which noted "significant shortcomings" in the federal-provincial system, then Minister of the Environment John Baird acknowledged the government's lack of credible regulatory oversight and recommended a top-to-bottom overhaul of the environmental monitoring system.[178] The new monitoring plan was released in two stages in March and July of 2011.[179] Following the most recent Canadian federal election and the appointment of a new Environment Minister,[180] it is not clear whether and to what extent this plan will be implemented.[181] But new and more specific laws regarding the oil sands and the environment are very likely to provide new and potentially fruitful avenues of challenge under the citizen submission process, particularly given the proposed federal involvement.

Following this analysis, it seems clear there are a multitude of potential avenues to challenge tar sands development under the citizen submission process. The Fisheries Act seems to be the default route, perhaps because it has seen relative success, not just in getting a factual record produced but also in seeing results from the record. The submission regarding B.C. mining is held up by a CEC report as an example of success; it resulted in publication of a factual record of the government's failure to enforce the Fisheries Act against toxic discharges from mines.[182] The record is considered to have played a role in prompting the Canadian government to pursue civil remedies against past owners of the

[177] Shawn McCarthy, *Governments vow to overhaul environmental monitoring*, GLOBE & MAIL (Toronto), Dec. 22, 2010, at A15.

[178] *Id.*

[179] *Backgrounder: An Integrated Monitoring Plan for the Oil Sands*, ENVIRONMENT CANADA, http://www.ec.gc.ca/default.asp?lang=En&n=56D4043B-1&news=7AC1E7E2-81E0-43A7-BE2B-4D3833FD97CE (last visited Sep. 10, 2011).

[180] The Hon. Peter Kent, appointed Jan. 2011.

[181] *See Integrated Plan for Oil Sands Environmental Monitoring*, GLOBE-NET (July 21, 2011), http://www.globe-net.com/articles/2011/july/21/ integrated-plan-for-oil-sands-environmental-monitoring-released/?sub= (noting that the usefulness of the plan depends on its implementation).

[182] ENFORCEMENT OF ENVTL. LEGISLATION GRP., *supra* note 132, at 20-23.

mining sites and the B.C. government to enforce cleanup of certain mining sites.[183] But there is little reason to confine submissions to Fisheries Act violations; filing based on the entire range of alleged violations relating to the tar sands would effectively draw attention to the wide range of environmental damage allegedly being caused.

3. *The Value of a Factual Record*

The citizen submission process is, at its heart, purely informational and hortatory. Even if the findings are wholly damning, no follow-up enforcement is required and there are no fines or trade sanctions in the citizen submission process comparable to those in Part V party-to-party dispute resolution proceedings. Nonetheless, a factual record can be valuable in a number of ways.

First, a damning factual record could provide a justification to a government party to initiate Part V proceedings,[184] or put public pressure on them to do so. The process of requesting and producing a factual record is quite arduous and the record itself, given the voting requirements for its preparation and release, is likely to be viewed as neutral and legitimate. A factual record therefore stands as evidence that both interested parties and the CEC view the issue as significant. The public may as a result question their government about the failure to deal with environmental problems and to enforce their promises under NAFTA. The government may also itself be convinced by the contents of the factual record that a significant problem exists worth instigating dispute resolution procedures over.

Second, there is also considerable value in "naming and shaming" those who cause environmental harm. While the preparation of a factual record does not technically indicate a finding of wrongdoing, such an interpretation is not unreasonable. In order to successfully pass through the arduous process, the CEC must have determined that preparing the record advanced the purposes of the NAAEC.[185] It is hard to imagine why this condition would be found to be satisfied if the factual record

[183] *Id.*

[184] *See* Siefert, *supra* note 76 and accompanying text for an explanation of Part V proceedings.

[185] *See* NAAEC, *supra* note 65 and text accompanying note 121.

contained no support for the impropriety of the environmental conditions discussed. The Alberta government and the oil sands industry are "particularly sensitive to the notion that [they] produce[] 'dirty oil' worthy of disfavor by other jurisdictions."[186] This demonstrates that Alberta and the oil sands developers care about their reputation and are therefore likely to be responsive to "naming and shaming" of their industry. It also supports the conclusion that one of the reasons oil sands development has come so far is that people have been unaware of the associated damage, and that the developers are eager to keep this information out of the public focus. Reputational effects may have been in play in April 2011, when Alberta's government set aside one quarter of the oil sands land for conservation, angering oil companies who had invested in production in the now-protected area.[187] The government said it was attempting to spare the industry the risk of further losses by responding to environmental concerns.[188]

Third, value in the factual records exists in the benefits of interaction and cooperation between interested parties. The JPAC review found that the citizen submission process provides incentives to the challenged party "to set forth a reasoned basis for its conduct under applicable law,"[189] and that the process of doing so actually itself promotes compliance with those laws.[190] The process of developing the factual record also provides an opportunity for the submitters and the party to identify areas of possible compromise, and can facilitate settlements by clarifying facts relevant to the dispute.[191] It could even lead to environmental improvement through joint public-private initiatives.[192]

Finally, and quite simply, the citizen submission process focuses attention on the environmental issue–even more so when the factual record is made public. The achievement of each step

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[186] Childs, *supra* note 21, at 438; Bob Ewing, *U.S. Mayors Pass Boycott of Alberta Oil Sands*, DIGITAL JOURNAL (June 25, 2008), http://digitaljournal.com/article/256576#ixzz1XfiiKIjy ("'It offends me deeply to hear people say dirty oil,' Alberta Finance Minister Iris Evans said.").

[187] *Canada Faces Fight over Oil Sands*, *supra* note 59. Interestingly, this type of action seems ripe for a challenge by the investors under NAFTA Chapter Eleven, as discussed above.

[188] *Id.*

[189] JOINT PUBLIC ADVISORY COMM., *supra* note 118, at 13.

[190] *Id.*

[191] *Id.* at 14.

[192] *Id*.

along the process is an opportunity for a submitting NGO to point the public to the issue and its progress. Informing and mobilizing the public can lead to grassroots pressure on governments to increase enforcement of environmental standards or even to raise those standards.

It is fair to say that the citizen submission process is underutilized.[193] This may be largely due to frustration with the process, which can be long and frequently fails to produce a factual record. The process may be improving in the wake of the CEC's 10-year review recommendations,[194] but given the analysis above, the process seems to have a great deal of potential even without improvements. At least one commentator has concluded that efforts by those governments that have been the subject of factual records to exert greater control over the process reflects the mechanism's potential effectiveness in embarrassing governments into taking action.[195] But one unintended consequence of increased utilization must be considered: an increase in citizen submissions challenging Alberta's environmental enforcement could cause Alberta to withdraw from the CIA and thereby render itself immune to environmental enforcement challenges under its own laws.[196] In removing itself from the CIA, however, Alberta would also be giving up its voice in the Canadian administration of the NAAEC, a process in which it currently has great influence.[197] Because Alberta would still be affected by Canadian federal

[193] Between 1995, when the process became available, and 2003, there were only an average of just under five submissions filed per year. Blair, *supra* note 85, at 303.

[194] *Id.* at 307.

[195] *Id.* at 315. In the first ten years, only the Canadian and Mexican governments were the subject of factual records. *Id.*

[196] While it might be difficult to convince the CEC, it is not impossible to construe the NAAEC as applying also to the laws of provinces even if they have not specifically signed on to be reachable. Annex 41(1) of the NAAEC does specify that Canada is only to be bound in respect of matters within the jurisdiction of signatory provinces, NAAEC Annex 41(1), but one could argue that this refers to the Part V party dispute-resolution process (which truly binds Canada in the sense that it may result in fines or trade restrictions) and not to the citizen submission process, which really only "binds" provinces to the limited extent of requiring a response as to whether a matter has been subject to a hearing. NAAEC, *supra* note 65, at annex 41. *See also supra* note 122 and accompanying text.

[197] As mentioned above, as one of only three signatory provinces Alberta is currently quite influential in Canadian NAAEC affairs. *See supra* notes 111-112 and accompanying text.

NAAEC responsibilities it would likely give up this power only grudgingly.

Challenges to enforcement failures such as the ones described in this Part are an appropriate use of NAFTA-NAAEC's environmental provisions. Environmentalists active during the treaty negotiations hoped the NAAEC would mitigate the environmental race-to-the-bottom that free trade threatens,[198] and the oil sands are well within the intended subject-matter of the treaties as evidenced by the centrality of Canadian energy to the treaties' negotiations.[199] Citizen submissions represent a chance for individuals and environmental NGOs from the U.S. and Canada to work together to help ensure free trade between the two nations does not lead to runaway environmental degradation. They also represent a relatively low-cost, high impact way to challenge environmental harms and discourage oil sands development by raising the public profile and encouraging application of Canada's environmental laws to any development. Proper regulation will in turn ensure that the price of oil sands oil more closely reflects its true costs, including the environmental costs that might otherwise be externalized.

III. PIPELINE CHALLENGES

In order to sell the tar sands' oil, it must be transported to refineries and ultimately to its target markets. Because Canadian refineries are operating at full capacity, tar sands are processed into diluted bitumen (DilBit—a blend of thick raw bitumen and natural gas liquid condensate) and transported via pipeline to refineries in the U.S.[200] The National Wildlife Federation has concluded that DilBit is "acidic, corrosive, toxic, and so thick that it requires high pressure and heat to move through pipelines. . . ."[201] Some environmental groups are concerned that

[198] *See* Blair, *supra* note 85, at 297–300 (Government assurances in this regard were "accepted in good faith by a group of ENGOs in the United States who. . . stepped forward in a signing ceremony at the White House to offer their endorsement of NAFTA.").

[199] *See* Middleton, *supra* note 45, at 185.

[200] ANTHONY SWIFT ET AL., TAR SANDS PIPELINE SAFETY RISKS 3 (2011).

[201] Beth Wallace, *New Report–Tar Sands Pipeline Safety Risks*, NAT'L WILDLIFE FED'N BLOG (Feb. 16, 2011), http://blog.nwf.org/wildlifepromise/2011/02/new-report-tar-sands-pipeline-safety-risks-highlights-great-lakes-pipeline-concerns/.

transporting DilBit poses "new and significant risks of pipeline leaks or ruptures due to corrosion."[202] The rate of spills due to internal corrosion in the Alberta pipeline system, through which a much higher proportion of DilBit is regularly transported, is sixteen times that of the U.S. system.[203] In the span of two weeks in the spring of 2011, one tar sands pipeline, the TransCanada Keystone pipeline, spilled over 20,000 gallons of tar sands oil in the Dakotas while another massive pipeline failure in Alberta spilled 1.2 million gallons.[204]

DilBit is now being transported from Alberta to Illinois and Oklahoma through the TransCanada Keystone pipeline, from Alberta to Wisconsin through Enbridge's Alberta Clipper pipeline, and through the older Enbridge Lakehead system from the Canadian border to Minnesota, Wisconsin, Illinois, Indiana and Michigan.[205] DilBit is also the primary intended product for TransCanada's proposed Keystone XL pipeline, which would run nearly 2000 miles—from Alberta to refineries on the U.S. Gulf Coast—passing through "some of America's most sensitive lands and aquifers."[206]

DilBit presents a number of dangers beyond those of conventional oil. Raised soil temperatures from the heated DilBit in the pipes affect soil productivity.[207] Leaks can be harder to detect due to false alarms in leak detection systems caused by "column separation" (moving between gas and liquid phases) of the liquid natural gas condensate.[208] In the event of a leak, DilBit is more likely to explode than conventional oil and it also contains toxins such as benzene and heavy metals that are dangerous to humans and wildlife if subjected to exposure through air or water.[209] Cleanup of DilBit spills is more difficult than conventional crude: due to DilBit's higher density fractions the raw bitumen does not float on water, making booms, skimmers and

[202] SWIFT ET AL., *supra* note 200, at 6.

[203] *Id.* at 3.

[204] Josh Mogerman, *Uhhh, About Those Pipeline Safety Claims*, NRDC SWITCHBOARD (May 9, 2011), http://switchboard.nrdc.org/blogs/jmogerman/uhhh_about_those_pipeline_safe.html.

[205] SWIFT ET AL., *supra* note 200, at 5.

[206] *Id.*

[207] BRUNO ET AL., *supra* note 7, at 17-18.

[208] SWIFT ET AL., *supra* note 200, at 6-7.

[209] *Id.* at 6.

sorbent materials—EPA's "primary line of defense against oils spills"—ineffective.[210]

These concerns alone provide enough incentive for many in the U.S. to challenge both existing oil sands pipelines and proposals for future pipelines such as the Keystone XL. But pipeline challenges are also a critical component for anyone wishing to discourage development of the tar sands. Pipeline expansion is critical to attracting greater investment in oil sands development projects and to getting the oil produced to consumers. This is especially true for pipelines to the U.S. because they not only connect the tar sands with their largest market, they are currently the only viable way to access any export markets at all.[211]

The Keystone XL pipeline is particularly critical to the expansion of tar sands development. The National Wildlife Federation describes it as the "permanent opening of Pandora's Box" as it would "further institutionalize demand for a product that the U.S. does not need and will do so at the expense of new, clean renewable fuels."[212] There is vast and steadily building opposition to the Keystone XL pipeline. In April 2011, the New York Times published an editorial stating that the Department of State (DoS) should refuse to approve the pipeline.[213] EPA is reportedly giving the impression of being unconvinced that the pipeline is needed.[214] Fifty members of the U.S. House of Representatives sent a letter to the DoS requesting a full lifecycle assessment of the GHG emissions for tar sands in order to determine "whether issuing a presidential permit for the pipeline is consistent with the Administration's clean energy and climate change priorities."[215] Twenty-five U.S. city mayors have spoken out against the pipeline, expressing concern that importing high-carbon tar sands will undermine their municipal clean energy initiatives.[216] The

[210] *Id.* at 7.

[211] *But see supra* note 57 and accompanying text.

[212] NAT'L WILDLIFE FED'N, *supra* note 37, at 4.

[213] Editorial, *No to a New Tar Sands Pipeline*, N.Y. TIMES, Apr. 3, 2011, at 9; *see also* Susan Casey-Lefkowitz, *New York Times Editorial: No to a New Tar Sands Pipeline*, NRDC SWITCHBOARD (Apr. 2, 2011), http://switchboard.nrdc.org/blogs/sclefkowitz/new_york_times_editorial_no_to.html.

[214] *Canada Faces Fight over Oil Sands*, *supra* note 59.

[215] Letter from Jay Inslee et al. to Hillary Clinton, Sec'y of State (June 23, 2010), *available at* http://docs.nrdc.org/energy/files/ene_10062301a.pdf.

[216] Susan Casey-Lefkowitz, *Mayors Ask State Department to Get It Right on the Keystone XL Tar Sands Pipeline Review*, NRDC SWITCHBOARD (Mar. 24,

Congressmen from Nebraska have been vocal in their opposition to running the pipeline over the Ogallala aquifer and their desire to see the pipeline rerouted, even at great expense.[217] In May 2011, the BBC reported that the project is not moving forward the way that industry had hoped, with opposition growing in Congress, evidence of divided opinion within the Obama administration, and negative attention resulting from the Deepwater Horizon oil spill in the Gulf.[218]

A number of strategies are available to those in the U.S. to prevent or slow down increased pipeline capacity for oil sands oil; some of the major ones will be addressed in this Part. Some of the challenges presented in this section, even if successful, would more likely result in delay or alteration of the pipeline projects than in a complete ban. But delay can also be a powerful tool, increasing the costs to the developers and buying time for public awareness campaigns to have an effect. It is also possible that the project alterations negotiated for approval under the National Environmental Policy Act (NEPA)[219] or following other challenges could render the project economically unviable. Finally, challenges resulting in alterations that improve whatever environmental condition was being improperly considered are victories in themselves even if the pipeline is then approved.

A. *Utilizing NEPA*

Any pipeline that will cross the Canadian-U.S. border, such as the Keystone XL, requires presidential approval in the form of a permit from the DoS.[220] According to Executive Order No. 13,337,

2011), http://switchboard.nrdc.org/blogs/sclefkowitz/mayors_ask_state_department_to.html.

[217] Joe Jordon, *Johanns on XL Pipeline: Construction "Needs to Be Delayed,"* NEBRASKA WATCHDOG (Mar. 7, 2011), http://nebraska.watchdog.org/12969/johanns-on-xl-pipeline-construction-needs-to-be-delayed/. *See also* Liz Barratt-Brown, *State Department Announces It Will Do Supplemental EIS on Keystone XL Tar Sands Pipeline*, NRDC SWITCHBOARD (Mar. 15 2011), http://switchboard.nrdc.org/blogs/lizbb/state_department_announces_it.html.

[218] *See Canada Faces Fight over Oil Sands*, *supra* note 59.

[219] National Environmental Policy Act of 1969 42 U.S.C. §§ 4321–4370f (2006) [hereinafter NEPA].

[220] *See* Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004); U.S. DEP'T OF STATE: KEYSTONE XL PIPELINE PROJECT, http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open (last visited Nov. 15, 2011).

this approval involves an environmental assessment according to the terms of NEPA.[221] NEPA requires all federal agencies to undertake an assessment of the environmental effects of any "major federal actions;" this assessment must disclose and consider all potential environmental impacts and possible alternatives.[222] The process provides for public participation, requiring that agencies consider and respond to public comments.[223] Certain agency actions under NEPA, such as the decision of what level of inquiry must be applied,[224] can be challenged in federal court under the Administrative Procedure Act (APA),[225] providing further leverage for members of the public and NGOs.[226]

NEPA is a procedural statute and does not technically place any substantive requirements on the outcomes of government actions.[227] Nonetheless, NEPA is widely considered to have a major influence on environmental regulation by providing a procedural framework that encourages political feedback and public participation, and by ensuring that environmental issues are brought into the agency process before the project begins.[228] Participating in and challenging the Environmental Impact Statement (EIS) process[229] as applied to the pipeline projects will at the very least force the relevant actors to properly account for the risks involved, and could even lead to the refusal of pipeline projects. State equivalents to NEPA exist and can be similarly used

[221] *See* Exec. Order No. 13,337, *supra* note 220; U.S. DEP'T OF STATE: KEYSTONE XL PIPELINE PROJECT, *supra* note 220.

[222] 42 U.S.C. § 4332(2)(C) (2006). For a general introduction to the requirements for federal agencies under NEPA, see *National Environmental Policy Act*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/compliance/basics/nepa.html (last visited Nov. 15, 2011).

[223] RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 798 (1st ed. 2008).

[224] There is a range of possible assessments required under NEPA, from an early decision that an environmental impact statement is not required (because there is no potential for significant impact) to supplemental environmental impact statements. *See id.* at 797-98.

[225] Administrative Procedure Act 5 U.S.C. §§ 701-06 (2006).

[226] *But see infra* notes 245-248 and accompanying text regarding obstacles to such challenges.

[227] *See* REVESZ, *supra* note 223, at 795.

[228] *Id.* at 795-96.

[229] This paper uses "EIS process" to refer to the overall NEPA environmental impact assessment system, regardless of what level of assessment is eventually required. *See* REVESZ, *supra* note 223, at 797-98.

for pipeline challenges if a pipeline crosses the state's territory.[230]

The approval of the Keystone XL pipeline is currently in the EIS process.[231] The DoS produced an initial Draft EIS that EPA criticized for not adequately analyzing greenhouse gas emissions, air pollutant emissions, U.S. energy needs, pipeline safety and spill response, environmental justice considerations, and impacts on wetlands and migratory birds.[232] The letter from fifty members of the House of Representatives recommended applying pending NEPA guidance on consideration of the effects of climate change within the Keystone XL environmental assessment process.[233] The NRDC pointed out that among other problems, the Draft EIS failed to address the potentially new dangers of DilBit as compared to conventional crude.[234] The DoS then produced a Supplemental Draft EIS in barely a month. Again, environmental commentators criticized this review as dealing only superficially with "critical issues such as pipeline safety, the routing over the Ogallala Aquifer, climate change impacts and environmental justice around refineries."[235] They also criticized the EIS for mistakenly assuming that Canada is adequately dealing with the environmental impacts of tar sands extraction.[236] After publication of the final EIS, the

[230] *See infra* note 262. As in the case of the Keystone XL and Montana, the state process may be incorporated into the NEPA process or potentially even preempted.

[231] In addition to the DoS's NEPA assessment, TransCanada has filed for a grant of right-of-way and temporary use permit from the U.S. Bureau of Land Management to allow construction and operation of the pipeline across federal lands. They have also filed an application with Montana's Department of Environmental Quality for approval (Montana's NEPA-equivalent process), which is being considered alongside the DoS's NEPA review. *See Regulatory Requirements*, TRANSCANADA, http://www.transcanada.com/project_information.html (last visited Nov. 15, 2011).

[232] Letter from Cynthia Giles, Assistant Adm'r, EPA, to Jose W. Fernandez & Kerri-Ann Jones, Dep't of State (July 16, 2010), *available at* http://yosemite.epa.gov/oeca/webeis.nsf/(PDFView)/20110125/$file/20110125.PDF?OpenElement; Peter Lehner, *EPA Is Right to Rate Tar Sands Pipeline Assessment as "Inadequate,"* NRDC SWITCHBOARD (July 23, 2010), http://switchboard.nrdc.org/blogs/plehner/epa_is_right_to_rate_tar_sands.html.

[233] Letter, *supra* note 215.

[234] Susan Casey-Lefkowitz & Anthony Swift, *The Rule is "Safety First"—So Why Not with Tar Sands Pipelines?*, NRDC SWITCHBOARD (Mar. 25, 2011), http://switchboard.nrdc.org/blogs/sclefkowitz/the_rule_is_safety_first_-_so.html.

[235] Susan Casey-Lefkowitz, *Keystone XL Tar Sands Pipeline Environmental Review—Strike Two!*, NRDC SWITCHBOARD (Apr. 19, 2011), http://switchboard.nrdc.org/blogs/sclefkowitz/keystone_xl_tar_sands_pipeline.html.

[236] *Id.*

other federal agencies implicated will be able to provide their input to the DoS on whether or not the pipeline is in the national interest.[237] The DoS expects to issue a final determination by the end of 2011.[238]

Public involvement in every step of the EIS process will ensure that expansion of the tar sands industry does not go unchecked and that the true costs are considered. Should the DoS approve the pipeline, Americans might be able to gain judicial review through the APA[239] to challenge the adequacy of the EIS under section 102 of NEPA. Section 102 has been held to require a court to reverse a decision if it "was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith. . . ."[240] While the U.S. Supreme Court has held that NEPA requires only that adverse environmental effects be adequately identified and evaluated,[241] the APA allows challenges for agency action that is "arbitrary and capricious."[242] At least one commentator has suggested that the APA might allow substantive challenges to an agency's decision that "exhibited tunnel vision. . . ignored scientific data. . . [or] made irretrievable commitments. . . ."[243] One could conceivably use the criticisms directed at the DoS identified above, such as inadequately considering climate change impacts and pipeline safety, in such a challenge.

While NEPA challenges should be kept in mind, there are

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[237] Agencies include EPA, Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, Natural Resources Conservation Service, U.S. Army Corps of Engineers, Pipeline and Hazardous Materials Safety Administration, and Montana Department of Environmental Quality. U.S. DEP'T OF STATE, DRAFT ENVIRONMENTAL IMPACT STATEMENT: KEYSTONE XL OIL PIPELINE PROJECT § 1.3.2 (2010), *available at* http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open [hereinafter DRAFT EIS].

[238] *State Department Announces Next Steps in Keystone XL Pipeline Permit Process*, U.S. DEP'T OF STATE (Mar. 15, 2011), http://www.state.gov/r/pa/prs/ps/2011/03/158402.htm.

[239] Administrative Procedure Act 5 U.S.C. §§ 701-06 (2006).

[240] Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[241] *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 228 (1980); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

[242] 5 U.S.C. § 706.

[243] Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 20–21 (2006).

several substantial obstacles to using NEPA in this way. The U.S. Supreme Court has generally been unwilling to impose substantive requirements on agencies through NEPA,[244] making the success of such challenges less likely. Further, the only way a successful NEPA challenge could result in permanent pipeline disapproval (rather than only delay) is if a court identifies a clear factor a) any non-capricious consideration of which would rule out granting approval, and b) that could not be dealt with by rerouting the pipeline or otherwise changing the factors in the EIS. For example, if pipeline safety were the critical factor, the pipeline specifications could be changed in order to correct the EIS deficiency. The effects of climate change might represent a factor that could not be altered, thereby permanently ruling out pipeline approval. Nonetheless, it seems highly unlikely that a court would find that it is arbitrary and capricious for the DoS not to find that the increased effects of climate change due the further oil sands development caused by the pipeline require project disapproval. Such a finding seems beyond the scope of NEPA.

Finally, there is a district court precedent within the D.C. Circuit, albeit non-binding, holding the presidential permitting process and its concomitant EIS process unassailable under the APA. In 2009, NRDC attempted to challenge the presidential permit granted for the Keystone Pipeline,[245] the progenitor pipeline to the Keystone XL.[246] The district court held that because the DoS was acting "for the President" in the permitting process, and because Presidential action is not subject to judicial review under the APA, the permitting process could not be challenged under the APA.[247] Because a district court opinion is not binding precedent on future cases,[248] an APA challenge to the Keystone XL

[244] REVESZ, *supra* note 223, at 808.

[245] Natural Res. Def. Council v. U.S. Dep't of State, 658 F. Supp. 2d 105, 106 (D.D.C. 2009). The challenge focused on the EIS' failure to consider adequately the local pollution and increased GHG emissions resulting from refining the tar sands oil in the U.S. *See* Plaintiff's Motion for Summary Judgment, Natural Res. Def. Council v. U.S. Dep't of State, 658 F. Supp. 2d 105 (D.D.C 2009) (No. 08-1363) 2008 WL 5588154.

[246] *See supra* notes 204-205 and accompanying text.

[247] *U.S. Dep't of State*, 658 F. Supp. 2d at 112-13.

[248] The Ninth Circuit has, however, come to similar conclusions. *See* Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092-93 (9th Cir. 2004). For a discussion of the issue, see Crystal L. Hermann, *Bombs Under Bangor: The Ninth Circuit Holds Submarine Base Siting Beyond*

permitting process is not foreclosed. However, the foregoing legal question would have to be satisfactorily addressed.

B. *Challenging Effects on Wildlife*

Pipelines could also be challenged under the Endangered Species Act (ESA)[249] if they threaten an endangered species. Section 7 of the ESA consists of two prongs: the first prong prohibits federal actions that jeopardize endangered or threatened species;[250] the second prong prohibits certain alterations to critical habitats of those species.[251] Section 9 prohibits takings without a proper permit by any person (not just federal agencies) of an endangered species,[252] and the Fish and Wildlife Service's (FWS) associated regulations extend this protection to threatened species.[253] 'Taking' includes actions that harm a species, including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[254] The FWS, however, may grant permits for incidental takings.[255]

The Keystone XL pipeline could impact protected species and thus provide an opportunity to challenge under the ESA. The DoS's EIS, which also addresses the ESA Section 7 requirement to consider the effects of projects on endangered species, identified twenty-nine federally-protected species inhabiting the path of the proposed pipeline, including the black-footed ferret, whooping crane, and the American Burying Beetle, but found the project was not likely to adversely affect any of them.[256] The DoS is currently

the Scope of NEPA and the ESA, 13 MO. ENVTL. L. & POL'Y REV. 46 (2005).

[249] Endangered Species Act of 1973 16 U.S.C. §§ 1531-1544 (2006) [hereinafter ESA].

[250] *See id.* § 1536(a)(2) (Federal agencies must ensure "that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . .").

[251] *See* ESA, *supra* note 249, § 1536(a)(2) (Federal agencies must ensure their actions are "not likely to. . . result in the destruction or adverse modification of" critical habitat of endangered or threatened species.).

[252] *See* ESA, *supra* note 249, § 1538(a)(1)(B).

[253] 50 C.F.R. § 17.31(a) (2011).

[254] 50 C.F.R. § 17.3 (2011).

[255] *See* ESA, *supra* note 249, § 1539; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (FWS may issue § 10 permits for direct and indirect takings.).

[256] DRAFT EIS, *supra* note 237, § 3.8.3. The EIS also addresses state protections of endangered species. *Id.*

in the process of collecting information regarding the potentially affected species to assist U.S. Fish and Wildlife Service (FWS) in the biological assessment which is required under the ESA.[257] Opponents should watch the process carefully to ensure the DoS meets its obligations under Section 7; if it turns out the pipeline is in fact likely to jeopardize an endangered species, the pipeline construction could potentially be challenged in the courts and perhaps even enjoined.[258] This challenge, however, will also face the same obstacle as the NEPA challenge, namely that Presidential actions might not be challengeable under the APA.[259]

If the pipeline is built and results in actual harm to any of the endangered or threatened species, including by significantly modifying or degrading their habitats, TransCanada could be sued directly for the "taking" under ESA § 9(a)(1)(B).[260] But FWS may grant a permit for such harms.[261] Given that the pipeline would likely only receive the DoS's approval if it is undertaken in compliance with the requirements of FWS's biological assessment, FWS would probably give such a permit if needed.

C. *State Challenges*

State laws may provide potential challenges to pipelines as well. A number of states have state equivalents of NEPA, which might be subject to challenges similar to those described above. Montana is one such state that is currently on the Keystone XL route.[262] Montana's Department of Environmental Quality is a cooperating agency in the DoS's EIS process, which means that one EIS will be produced by the agencies together to satisfy both the state and federal requirements.[263] At least in theory one could

[257] DRAFT EIS, *supra* note 237, § 3.8.1.

[258] *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). The DoS can, however, obtain an exemption from the ESA's "no jeopardy" requirement if certain requirements are met and the Endangered Species Committee votes to grant it. ESA, *supra* note 249, § 1536(e).

[259] *See supra* notes 247-248 and accompanying text.

[260] *See supra* note 252 and accompanying text.

[261] ESA, *supra* note 249, § 1539; *see Babbitt*, 515 U.S. at 687.

[262] The current proposed route passes through Montana, South Dakota, Nebraska, Oklahoma and Texas. *Project Map*, DEP'T OF STATE: KEYSTONE XL PIPELINE PROJECT, *available at* http://keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/map.jpg?OpenFileResource (last visited Nov. 27, 2011).

[263] DRAFT EIS, *supra* note 237, § 1.3.2.11; MONT. DEP'T OF ENVTL. QUALITY, KEYSTONE XL PIPELINE, http://www.deq.mt.gov/mfs/keystonexl/keystonexl

challenge even a combined EIS' compliance with the Montana Environmental Protection Act (MEPA).[264] Because of the negative federal case law discussed above,[265] such state NEPA challenges might represent the only viable option for challenging insufficient consideration of the environmental impacts in the overall pipeline permitting process.

More substantively, some states provide remedies against environmental damage. For example, in Minnesota a case was brought in 2010 against Enbridge, an oil sands energy provider, regarding one of their pipelines.[266] The Minnesota Environmental Rights Act (MERA)[267] "provides a civil remedy for those that seek to protect. . .the air, water, land, and other natural resources within the state' from pollution, impairment, or destruction."[268] The plaintiff NGO claimed that Enbridge had polluted and harmed a fen in violation of MERA. The claims were procedurally barred because the plaintiffs had failed to raise the issues in the earlier petition for rehearing of the permit grant before the public utilities commission.[269] Nonetheless, this suit is illustrative of the sort of legal challenges available under state law that could delay or raise the cost of tar sands pipelines. The MERA provides "declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the. . . natural resources located within the state from pollution, impairment, or destruction."[270] Such relief seems broad enough to encompass enjoining the pipeline from locating along its intended route. However, as with the other pipeline challenges, unless the environmental considerations involved in the challenges apply to the pipeline no matter where it is placed, these challenges

index.mcpx (last visited Nov. 27, 2011).

[264] There will, however, be a risk in such a challenge of federal preemption by the federal NEPA. In fact, MEPA itself specifies that in the event of conflict between the requirements of MEPA and those of NEPA, MEPA's requirements will not apply. MONT. CODE ANN. § 75-1-201(7) (2010).

[265] *See supra* notes 245-247 and accompanying text.

[266] Minn. Ctr. for Envtl. Advocacy v. Minn. Pub. Utils. Comm'n (*MCEA*), No. A10-812, 2010 WL 5071389 (Minn. Ct. App. Dec. 14, 2010).

[267] MINN. STAT. § 116B.01–13 (2010).

[268] *MCEA*, 2010 WL 5071389, at *8, (citing State *ex rel*. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs, 711 N.W.2d 522, 525 (Minn. Ct. App. 2006)).

[269] *MCEA*, 2010 WL 5071389, at *9.

[270] MINN. STAT. § 116B.07.

may just result in relocation rather than permanent injunction. Nonetheless, opponents should carefully consider whether their state laws[271] provide civil remedies for environmental protection similar to or even beyond the Minnesota statute's. If passing a pipeline through an entire state becomes impossible or too expensive because of state environmental law requirements, it could mean the difference between a profitable venture and an unprofitable one, affecting not just the project at hand but also enthusiasm for investment in future oil sands projects.

Finally, while pipelines are particularly valuable in challenges because of their potential impact on oil sands development, state NEPA and other environmental laws can be used to challenge tar sands development in other ways. Recently, environmental groups and commissioners from a county in Montana filed a lawsuit against the Montana Department of Transportation[272] to enjoin the transportation of massive oil sands equipment on big rigs through the scenic highways of Montana.[273] The groups are concerned about changes to the rural highways that will be required, which run alongside "some of the state's most treasured trout streams and rivers," and about the effects on tourism.[274] In July 2011 the court issued a preliminary injunction based on its finding that the Department of Transportation's Finding of No Significant Impact failed to adequately consider alternatives.[275] In addition to pipeline challenges, such smaller challenges can delay and increase the costs of oil sands ventures which may have the effect of discouraging tar sands development. They are, however, unlikely to act as permanent, insurmountable barriers. For example, the Montana case seeks only to prevent the use of the smaller, scenic highways which are the easiest and most direct route for the oil sands developers to use.[276] A successful challenge would more

[271] In particular, opponents should consider state laws which would not be considered preempted by federal regulatory schemes.

[272] Imperial Oil/Exxon Mobil are intervenors. Kim Briggeman, *Montana Transportation Department Says It Will Fight Megaload Ruling*, MISSOULIAN (July 21, 2011), http://missoulian.com/news/local/article_79222f02-b343-11e0-a361-001cc4c03286.html.

[273] Hanneke Brooymans, *Hauling Oilsands Equipment thru Montana Opposed*, CALGARY HERALD (Apr. 4, 2011), http://www2.canada.com/calgaryherald/news/story.html?id=05b2dcaf-5e0f-47b5-8804-cf843e79090&p=1.

[274] *Id.*

[275] *See* Briggeman, *supra* note 272.

[276] *See id.*

likely result in rerouting along interstate highways than in abandonment of the oil sands development projects.

IV. LOW CARBON FUEL STANDARDS

Tar sands oil is extremely carbon intensive[277] when all emissions, from the beginning of extraction to the burning of the fuel, are considered. The exact figures are debated,[278] but nearly all agree that tar sands oil is one of the most carbon intensive transportation fuels in existence.[279] Low Carbon Fuel Standards (LCFS) are efforts to reduce carbon intensity in fuels by mandating specific intensity requirements, which can functionally mandate which types of fuel are used.[280] Oil sands producers are clearly concerned about LCFS given how poorly oil sands fuel compares with other transportation fuels.[281] LCFS thus stand as a potentially effective way for states, municipalities and other actors to discourage development of the tar sands even if the federal government is unwilling to do so.

A. *Existing and Nascent LCFS*

California adopted the world's first LCFS in 2007,[282] and California's standards are illustrative of how such schemes work. California's regulations "requir[e] fuel producers and importers to meet certain performance standards beginning in 2011" and require businesses providing fuel in the state to reduce the life-cycle carbon dioxide emissions of their fuel by 10% by 2020.[283] Fuel providers can reach this standard by blending gasoline with

[277] Carbon intensity refers to the amount of carbon, typically in the form of carbon dioxide emissions, a certain fuel releases, considering all the emissions involved throughout the process of producing and using the fuel. *See, e.g.*, Low Carbon Fuel Standard, CAL. CODE REGS. tit. 13, § 95481(a)(11) (2010); *see generally* SIMON MUI ET AL., NATURAL RES. DEF. COUNCIL, GHG EMISSION FACTORS FOR HIGH CARBON INTENSITY CRUDE OILS (2010).

[278] *See infra* note 300 and accompanying text.

[279] *See, e.g.*, *Report for Commission Confirms Carbon-Intensity of Tar Sands*, TRANSPORT & ENVIRONMENT (Feb. 11, 2011), http://www.transportenvironment.org/News/2011/2/Report-for-Commission-confirms-carbon-intensity-of-tarsands/.

[280] *See infra* note 283 and accompanying text.

[281] *See infra* note 300.

[282] Low Carbon Fuel Standard, CAL. CODE REGS. tit. 17, §§ 95480-95490 (2010).

[283] Childs, *supra* note 21, at 438-39.

low carbon biofuels, or by using alternative fuels such as hydrogen, electricity or natural gas.[284] They may also trade credits with other vendors through a market mechanism.[285] The scheme "set[s] rules for calculating the carbon intensity of fuel produced within or imported from outside the state," based on the well-to-wheels carbon emissions of the fuel, including land use change.[286] For example, biofuel intensity would have to take into account emissions resulting from crop production and distribution, delivery and use of the finished fuel, and emissions resulting from clearing land to plant the biofuel crops if the land was previously forested.[287] For oil sands, well-to-wheels emissions would likely have to take into account emissions from the mining of the bitumen, the land use change associated with the boreal forest clearing required, the processing of the sand to produce crude oil, transporting the resulting crude, refining the crude into useable fuel, and the final combustion of the fuel.

California's rules appear to single out oil sands by establishing two standards: "one for crudes that are already used in the California market. . . and another for crude type[s] that are not now sold in the state [which] will have to fall below [California's] average or face penalties."[288] Because Canadian oil sands fuel is not currently used in the California market, Canadian oil sands producers will have to either dramatically reduce their emissions before export or purchase expensive credits from producers of lower intensity fuels in order to sell fuel in California.[289] Because carbon capture and storage technology is not yet up to the task of dramatically reducing well-to-wheel emissions, and because oil sands production is already more expensive than traditional crude oil, these options both impose heavy burdens.[290]

Tar sands oil is not currently exported to California in significant quantities, but other states and provinces, as well as the U.S. federal government, are considering or have considered

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[284] Cymie Payne, *Local Meets Global: The Low Carbon Fuel Standard and the WTO*, 34 N.C. J. INT'L L. & COM. REG. 891, 896-97 (2009).

[285] *Id*.

[286] *Id*. at 905-06.

[287] *Id*. at 906.

[288] Shawn McCarthy, *Oil Sands Braces for American Green Fuel Regulation*, GLOBE & MAIL (Toronto), Apr. 23, 2009, at B1.

[289] *Id.*

[290] *See* Fickling, *supra* note 96, at 54.

similar standards.[291] Thirteen states have proposed such regulations,[292] and Ontario, British Columbia, and the Regional Greenhouse Gas Initiative states have already committed to adopting LCFS.[293] If other states, particularly Midwestern or Gulf Coast states, adopted similar standards it could have a huge deterrent effect on oil sands production. President Obama has called for a federal LCFS scheme in the past,[294] and one was included in an early version of the American Clean Energy and Security Act (the failed national emissions reduction bill), though it was subsequently dropped.[295] In fact, a federal system similar to a LCFS scheme for federal entities already exists under the Energy Independence and Security Act (EISA) of 2007.[296] EISA forbids federal bodies procuring "alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources" unless the lifecycle GHG emissions are less than or equal to that of the equivalent conventional fuel.[297] The Act does not specify that oil sands represent a non-conventional fuel source (although the bill's author has claimed they do[298]), and this has sparked a great debate that is yet to be resolved. The U.S. army is a federal body and is one of the biggest single users of oil products in the world[299]—preventing it from using tar sands oil could significantly discourage further oil sands development.

A LCFS scheme's effect on tar sands production and export is linked to the operation and technical specifications of the LCFS, in particular the carbon intensity values the scheme assigns to tar sands fuel and the amount of compensation for that intensity the scheme requires. There is debate about the carbon intensity of tar sands oil and it is important to ensure that any LCFS consider well–to-wheels tar sands emissions in a way that properly reflects

[291] Shawn McCarthy, *California Rule Could Hit Oil Sands Producers*, GLOBE & MAIL (Toronto), Apr. 25, 2009, at B5.

[292] *Id.*

[293] Fickling, *supra* note 96, at 51.

[294] *See* Press Release, *supra* note 49.

[295] Fickling, *supra* note 96, at 51.

[296] Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1493 (codified in scattered sections of 42 U.S.C.).

[297] 42 U.S.C.S. § 17142 (LexisNexis 2009).

[298] Childs, *supra* note 21, at 440.

[299] Terry Macalister, *Oil Groups Mount Legal Challenge to Schwarzenegger's Tar Sands Ban*, GUARDIAN (U.K.) (Feb. 14, 2010), http://www.guardian.co.uk/business/2010/feb/14/oil-sands-ban-legal-challenge.

all the emissions attached to the oil sands.[300] Emissions must partly depend on how far the fuel needs to be transported and on the method of transportation, which favors tar sands oil over middle-eastern oil in that respect. If tar sands are at all more carbon intense than other fuels, however, any rule that even requires maintaining a steady state average of carbon intensity would effectively limit any greater use of tar sands oil unless the increase could be offset by an increase in the use of a fuel of lower carbon-intensity than the average.

B. *Challenges to LCFS*

Two types of challenges currently threaten the availability of LCFS as a means of discouraging tar sands development: U.S. constitutional challenges, and international challenges under NAFTA and/or WTO law.

1. *U.S. Constitutional Challenges – Dormant Commerce Clause and Federal Preemption*

It is possible that a state LCFS scheme might be found impermissible under the U.S. Constitution's Dormant Commerce Clause as discriminatory against out-of-state businesses. A lobby group representing the interests of oil producers, refiners, and transporters has joined forces with a group of biofuel producers whose particular type of biofuel is disfavored by California's LCFS because of land-use change emissions. They are challenging California's LCFS in federal court, claiming that the scheme "interferes with the regulation of interstate commerce[,] . . . discriminates against out-of-state corn ethanol producers and

[300] Some commentators have placed tar sands at 15-20% more carbon intense than conventional oil, whereas others have claimed it is three times as intense. *Compare* MICHAEL TOMAN ET AL., RAND CORP., UNCONVENTIONAL FOSSIL-BASED FUELS: ECONOMIC AND ENVIRONMENTAL TRADE-OFFS 27 (2008), *available at* http://www.rand.org/pubs/technical_reports/2008/RAND_TR580.pdf, *with* Barratt-Brown, *supra* note 217. A comprehensive study by the Natural Resources Defense Council found that well-to-wheel emissions associated with tar sands surface mining is 8-19% greater than the U.S. average gasoline baseline, and in-situ processing is 16-37% greater. MUI ET AL., *supra* note 277 at 5-6. By contrast, Pierre Alvarez, President of the Canadian Association of Petroleum Producers, has said "Alberta oil is comparable to Venezuelan crude and Mexican heavy oil in carbon emissions, and only slightly worse than many grades of African and Middle Eastern oil, once the fuel use required for transportation is factored in." Shawn McCarthy, *Obama Adds to Oil Sands Pressure*, GLOBE & MAIL (Toronto), Jun. 26, 2008, at B4.

importers and improperly regulates their extraterritorial conduct."[301] It is true that the regulations facially discriminate against out-of-state corn ethanol by assigning them higher carbon intensity values in the lookup tables than corn ethanol produced in state.[302] Facial discrimination should mean that the regulations must meet strict scrutiny,[303] meaning California will be required to show that the regulations further a legitimate, non-economic state interest, and that there are no reasonable nondiscriminatory alternatives.[304] This is a difficult burden to meet, sometimes viewed as creating per se invalidity,[305] but a regulation has survived strict scrutiny under the dormant commerce clause before.[306] California can reasonably easily show that its LCFS are designed to further the state's important interest in preventing the harms of climate change; perhaps the state could draw on the harms analysis in the standing inquiry of *Massachusetts v. EPA*, which acknowledged the state-specific harms to Massachusetts of climate change vis-à-vis melting snowpack and drinking water.[307] However, it will be difficult to show there are no reasonable nondiscriminatory alternatives. This argument is currently facing a summary judgment motion.[308]

The plaintiffs in *Goldstene* are also claiming the LCFS scheme is preempted by the Clean Air Act (CAA) as modified by the federal EISA.[309] EPA's actions following the U.S. Supreme

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[301] Second Amended Complaint ¶ 1, Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170 (E.D. Cal. 2010) (No. 1:09-cv-02234-LJO-DLB). *See also* Macalister, *supra* note 299.

[302] *See* CAL. CODE REGS. tit. 17, § 95486(b)(1) Tables 6, 7 (2010).

[303] *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

[304] *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) (citing *Hughes*, 441 U.S. at 336).

[305] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 732 (5th ed. 2006).

[306] *Taylor*, 477 U.S. at 131.

[307] Massachusetts v. EPA, 549 U.S. 497, 521–22 (2007).

[308] The plaintiffs are also advancing a second Dormant Commerce Clause argument, claiming that the LCFS unduly burden interstate commerce by effectively closing the California market to out-of-state corn ethanol. Second Amended Complaint ¶ 87, Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170 (E.D. Cal. 2010) (No. 1:09-cv-02234-LJO-DLB). This has a good chance of success—California is the nation's largest market for biofuels and the LCFS make it difficult for out-of-state sellers to sell there. *See id.* ¶ 90.

[309] Second Amended Complaint, *supra* note 308, ¶¶ 28–32; *see* Clean Air Act

Court's holding in *Massachusetts v. EPA*[310] and the holdings in *AEP v. Connecticut* (*AEP*)[311] have brought carbon emissions into the CAA's expansive regulatory program, and the LCFS are clearly aimed at regulating carbon emissions. State LCFS will be subject to a conflict preemption analysis or a field preemption analysis. Under conflict preemption, the plaintiffs in *Goldstene* are claiming that California's LCFS interfere with the Congressional objective of promoting the U.S. biofuels industry that the CAA, as modified by the EISA, is trying to achieve.[312] As the plaintiffs have pointed out, the EISA specifically exempted existing corn ethanol producers from having to demonstrate GHG reductions,[313] whereas California's LCFS scheme clearly requires GHG reductions from those same producers. This observation strongly supports conflict preemption and it's not clear how California will overcome this problem.[314] The same argument, which is focused specifically on biofuels, would not be available to oil sands producers if they were alone in a suit, and yet they would certainly benefit if the argument leads to striking down the LCFS. The plaintiffs could also allege field preemption, meaning that Congress has regulated so extensively in this area that federal legislation occupies the field, leaving no room for state regulation.[315] They have not yet specifically alleged this type of preemption—perhaps because it is more difficult for them to

42 U.S.C. § 7545(o) (2006); *see also* Hannah, *A New Preemption Lawsuit?*, WARMING L. BLOG (Jan. 14, 2010), http://theusconstitution.org/blog.warming/?p=832; Energy Independence and Security Act, *supra* note 296.

[310] Following an endangerment finding for carbon dioxide emissions, EPA has announced its intention to begin regulating certain emitters. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010) (announcing proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities); *see also* 75 Fed. Reg. 82,390 (Dec. 30, 2010) (announcing proposed settlement agreement addressing refineries).

[311] 131 S. Ct. 2527 (2011).

[312] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

[313] Second Amended Complaint, *supra* note 308, ¶ 32.

[314] In their replies they have so far focused only on their supposed Congressional grant of authority under the CAA. *See, e.g.*, Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss at 23, *Goldstene*, 719 F.Supp.2d 1170 (2010) (No. 1:10-cv-00163-LJO-DLB).

[315] *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) ("Absent explicit pre-emptive language, Congress's intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it[.]") (internal quotations omitted).

prove. But EPA's recent progress in regulating GHGs[316] supports field preemption in the broader CAA sense.

2. *NAFTA-WTO Challenges*

Under NAFTA or WTO law, the Canadian government could challenge any LCFS schemes in the U.S. as impermissible trade restrictions. Canada has hinted it might be considering such actions: in 2009 Canada's Natural Resources Minister complained that California's LCFS appeared to "creat[e] an unfair trade barrier between [the] two countries" by singling out high-carbon intensity crude.[317]

Canada would likely claim that the LCFS scheme impermissibly discriminates against oil from Alberta oil sands in favor of U.S. energy sources in violation of the "national treatment" requirements of GATT article III:4[318] or NAFTA Art. 301.[319] Canada would need to show that the discrimination is between "like products," which has been held in past cases to cover products involved in a competitive relationship in the market.[320] It would probably succeed in doing so, as oil sands oil is a direct competitor to any other oil product used in transportation, and because the actual end product oil produced following processing of the tar sands is very similar or identical to other oil in appearance and in carbon emissions.[321] Canada could also claim

[316] *See* Proposed Settlement Agreements for Petroleum Refineries, 75 Fed. Reg. 82,390 (Dec. 30, 2010).

[317] McCarthy, *supra* note 288.

[318] GATT, *supra* note 71, art. III(1)-(5).

[319] NAFTA, *supra* note 64, art. 301.

[320] The term "like products" is not defined in the GATT, but has been elaborated on in WTO cases. The Asbestos case of 2001 defined five criteria to be used in interpreting likeness: "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; (iv) the tariff classification of the products… the additional consideration of whether, and to what extent, the products involved are—or could be—in a competitive relationship in the marketplace." Cymie Payne, *Local Meets Global: The Low Carbon Fuel Standard and the WTO*, 34 N.C. J. INT'L. L. & COM. REG. 891, 910 (2009) (citing Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 101, WT/DS135/AB/R (Apr. 5, 2001)).

[321] Attempting to distinguish an otherwise like product on the basis of the process that produced it is normally a tough sell under WTO jurisprudence although it has been upheld in a relevant circumstance. *See* Appellate Body Report, *United States—Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998) (holding that a U.S. law, which

that LCFS violate the "most-favoured nation" requirements of GATT I:1[322] by discriminating against oil sands oil in favor of crude oil from other countries. An LCFS scheme's grant of a benefit to another nation's energy products, such as the benefit granted to Brazil's biofuel in the California regulations,[323] could be seen as discriminating against Canada's oil sands oil, which is penalized financially upon import by requiring the provider to purchase expensive credits or otherwise offset the alleged carbon intensity.

Against these charges, the U.S. could invoke the GATT Art. XX or NAFTA Art. 2101 exceptions, which allow restrictions "necessary to protect human, animal or plant life or health," or "relating to the conservation of living and non-living exhaustible natural resources."[324] To invoke these exceptions, however, the U.S. would have to prove their necessity and also show that the LCFS are not unjustly discriminatory or a disguised restriction on international trade.[325] This would require not only grappling with the difficult questions of causation bridging specific carbon emissions with specific climate change harms, but also showing that there aren't less restrictive means available to prevent those harms.[326] Further, that California's LCFS scheme establishes a separate standard for crudes that were not already in use in the California market at the time of passage does seem to single out oil sands in an arguably unjustly discriminatory manner, as the

banned importation of shrimp harvested with fishing technology that could potentially harm sea turtles, arbitrarily and unjustifiably discriminated against other WTO countries in contravention of the chapeau of Article XX of the GATT 1994).

[322] GATT, *supra* note 71, art. I(1) (requiring that any "advantage to any product originating in or destined for any other country [be] accorded immediately and unconditionally to the like product originating in" the challenging party).

[323] Brazil's biofuel generally fares quite well under California's LCFS, landing in the lookup tables at 66.40 to 73.40 gCO_2e/MJ, well under standard gasoline's assigned value of 95.86 gCO_2e/MJ. CAL. CODE REGS. tit. 17, § 95486(b)(1) Tables 6, 7.

[324] GATT, *supra* note 71, art. XX(I)(b), (g); NAFTA, *supra* note 64, art. 2101. *See also supra* notes 89-92 and accompanying text.

[325] GATT, *supra* note 71, art. XX.

[326] *See* Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405-07 (2003) (citing WTO cases). Utilizing the "conservation of exhaustible natural resources" exception would also require expanding the definition of "exhaustible natural resource" to include clean air and environmental health.

Canadian minister implied.[327]

Even if Canada were unwilling to pursue these claims, investors with investments in the U.S. related to tar sands development could sue the U.S. under NAFTA's Chapter Eleven investor protection provisions.[328] Investors can sue for fair market value of their lost profits if they can show a violation of the national treatment or most favored nation requirements, or that the LCFS constitute a measure "tantamount to expropriation" of their investments.[329] A disadvantaged investor in the oil sands could claim that an LCFS scheme, by eliminating the viability of their oil in an entire market, constitutes a measure tantamount to expropriation of their investment. NAFTA provides exceptions to the rule against expropriation.[330] The U.S. may expropriate if can establish that its regulations were promulgated a) for a public purpose, b) on a non-discriminatory basis, c) in accordance with due process of law and Article 1105(1).[331] If the exception were established, the U.S. would then have to pay appropriate compensation as determined by Article 1110(2)-(6).[332]

The outcome of these challenges is uncertain and a more extended treatment is beyond the scope of this paper, but the results will be significant. A successful constitutional challenge may wipe out all state-imposed LCFS schemes. But because many arguments in the *Goldstene* case concern out-of-state biofuels as well as oil sands oil, a negative outcome based heavily on consideration of biofuels problems might not rule out an oil sands oriented LCFS scheme that avoids those particular infirmities. Further, a successful NAFTA/WTO challenge could result in trade sanctions against the U.S., which the U.S. government might not be willing to bear to support a state's regulatory program. At the very least, it would likely foreclose the possibility of a federal LCFS scheme.

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[327] McCarthy, *supra* note 288 and accompanying text.

[328] *See supra* notes 95-101 and accompanying discussion.

[329] *Id.*

[330] *See* NAFTA, *supra* note 64, art. 1110(1)(a)-(d).

[331] NAFTA Article 1105(1) requires that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Id.* art. 1105(1).

[332] NAFTA Article 1110 paragraphs 2 through 6 essentially require payment of "fair market value immediately before the expropriation took place." *See id.* art. 1110(2)-(6).

V. TRANSNATIONAL LITIGATION

A. *Suing Emitters*

Individuals in the U.S. might be able to pursue oil sands developers in the courts for their GHG emissions under a theory of nuisance. A suit could potentially be brought in a number of venues, including U.S. courts, Canadian courts, or a bilateral tribunal.

Nuisance suits in the U.S. concerning GHG emissions have received extensive scholarly attention and that work will not be duplicated here.[333] The U.S. Supreme Court recently addressed the justiciability of this type of suit under federal law in *AEP*,[334] holding that the Clean Air Act displaces federal common law nuisance claims based on emissions-related climate change harms,[335] but it remains an open question whether a nuisance suit may still be brought under state law. The Court noted in *AEP* that the state law question "depends, inter alia, on the preemptive effect of the [CAA],"[336] an issue that was not before the Court in *AEP*. The question of federal preemption involves a different analysis from the displacement at issue in *AEP*, turning on either the existence of a direct conflict between federal and state law (conflict preemption)[337] or on the intent of Congress to displace the state law in question (express preemption or field preemption).[338] In the CAA, Congress included a saving clause that explicitly states that the Act does not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek

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[333] *See generally* Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101 (2011); Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011); Michael B. Gerrard, *What Litigation of a Climate Change Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

[334] *AEP*, 131 S. Ct. 2527.

[335] *Id.* at 2538-39.

[336] *Id.* at 2540.

[337] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[338] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("The purpose of Congress is the ultimate touchstone' in every pre-emption case.") (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

any other relief. . . ."[339] The U.S. Supreme Court held in *International Paper Co. v. Ouellette* that an essentially identical saving clause (in the federal Clean Water Act) preserved state common law nuisance actions.[340] At present, there is a circuit split on the issue.[341] If State nuisance claims are allowed, the biggest challenges to would-be plaintiffs will be finding jurisdiction and standing. Haling a Canadian defendant acting in Canada into a court in the U.S. would require satisfaction of personal jurisdiction under either federal jurisprudence or potentially a state's long-arm statute. And while *Massachusetts v. EPA* supports standing for states to sue to redress climate change harms caused by GHG emissions, [342] it is not clear the same standing analysis must apply to individuals. Although the U.S. Supreme Court did not overturn the Second Circuit's grant of standing to private citizens in *AEP*, neither did it affirm the standing through a majority holding, leaving other circuits and states free to decide otherwise.[343]

A public nuisance suit against oil sands developers could also be brought in Canadian courts. Article 6 of the NAAEC guarantees access to private individuals from all member nations to each nation's remedies under its law, including suing entities under that

[339] 42 U.S.C. § 7604(e).

[340] *Ouellette*, 479 U.S. at 497 ("The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.").

[341] The Fourth Circuit recently held that, although the CAA doesn't flatly preempt the entire field of emissions regulation, field and conflict preemption principles cautioned against allowing such suits as they would conflict with or alter the role for states set out by the CAA. *See* North Carolina v. Tenn. Valley Auth., 615 F.3d 291, 302-03 (4th Cir. 2010). Intriguingly, the opinion also suggested that the existence of a common law nuisance in the face of CAA regulation might be logically impossible, as the CAA air quality standards are set based on a "sensitive citizen" standard that is more stringent than the reasonableness standard used by nuisance law. *See id.* at 310. It would therefore logically be impossible to pass the more stringent test but fail the less stringent one. The Sixth Circuit, by contrast, has allowed such a suit, holding that, based on the saving clause's plain language and on Congressional intent, the CAA does not preempt any state action. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 342-43 (6th Cir. 1989).

[342] 549 U.S. 497.

[343] The U.S. Supreme Court left intact (in a 4-4 vote) the Second Circuit's holding that private landowners as well as states would otherwise have had standing to bring the claim. *AEP*, 131 S. Ct. at 2535. Affirmances by an equally divided court have no precedential force. *See, e.g.*, Ohio v. Price, 364 U.S. 263, 263-64.

nation's jurisdiction.[344] However, Canadian courts have been less hospitable to nuisance suits than American courts. Canadian courts have been quite demanding in the requirement that plaintiffs show an injury that is different in kind from those suffered by the general public,[345] a showing that would likely prove difficult for an individual or NGO in the U.S. Commentators have also concluded that Canadian courts are a typically less friendly venue for public interest litigation.[346] A nuisance suit in Canadian court seems like a less helpful option that is not anyway uniquely well-suited to U.S. litigants—it might therefore appropriately be left to Canadian individuals and NGOs.

A final possibility worth mentioning is Shi-Ling Hsu's suggestion that the International Joint Commission (IJC) could "serve as an arbiter for what amounts to a transboundary pollution dispute."[347] The IJC was established in 1909 by the Boundary Water Treaty between the U.S. and Great Britain and views itself as "having responsibility for the investigation and adjudication of disputes over air and water pollutants that cross the Canada-U.S. border."[348] It has the authority to issue money damages.[349] Accessing the binding arbitration mechanism of the IJC requires the consent of both Canada and the U.S.,[350] and it does not seem likely the current Canadian government would grant it to a potential plaintiff. Nonetheless, should this situation change, the IJC has a long history of success and enjoys a reputation of integrity and effectiveness.[351]

Given the difficulty in bringing a nuisance suit in the U.S., Canada, or an international tribunal, transnational nuisance suits do not seem currently to present one of the most fruitful avenues for challenging further development of the tar sands.

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344 NAAEC, *supra* note 65, art. 6.

345 *See* Hickey v. Electric Reduction Co., [1970] 21 D.L.R. 3d 368 (Can.).

346 *See, e.g.*, Hsu, *supra* note 164, at 764.

347 *Id.* at 728-29; *see generally* Treaty Relating to the Boundary Waters Between the United States and Canada, Art. 10, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448 (detailing procedure) [hereinafter Boundary Waters Treaty].

348 Hsu, *supra* note 164, at 764.

349 *Id.*

350 Boundary Waters Treaty, *supra* note 347, Art. 9.

351 Hsu, *supra* note 164, at 729.

B. *Suing the Canadian Government*

Individuals and NGOs could try to litigate to force the Canadian government to honor its climate change commitments. If successful, such a suit could limit the government's ability to support oil sands expansion or even require the government to cap oil sands emissions. One can sue in Canadian courts for a declaration that the government has not complied with a federal law and request that the court mandate compliance. Standing can be established through the doctrine of public interest standing, by asserting: 1) a genuine interest in the subject raised, 2) that a serious issue is presented, and 3) that there is no other reasonable and effective way to bring the matter before the Court.[352]

The Canadian environmental NGO Ecojustice attempted to bring such a suit, challenging the government's non-compliance with the Kyoto Protocol Implementation Act.[353] Unfortunately the federal trial court dismissed the case as non-justiciable, the Court of Appeal affirmed, and the Supreme Court declined to grant leave to hear the appeal.[354] While the Supreme Court's actions did not necessarily declare the issue non-justiciable, the Court's reluctance to hear the suit makes the future success of similar suits unlikely.

Alternatively, one could try to sue the government for noncompliance with one of the federal acts connected to the environmental harms resulting from the oil sands.[355] In 2007 a coalition of environmental NGOs in Canada successfully challenged a joint Federal-Provincial panel's environmental assessment determination that the Kearl Oil Sands project would have an insignificant environmental impact.[356] While this avenue might have promise, and Article Six of the NAAEC guarantees access to Canadian courts and remedies,[357] this approach is not

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[352] *See* Canada Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, ¶ 37 (Can.).

[353] Kyoto Protocol Implementation Act, *supra* note 169.

[354] Hugh Wilkins & Albert Koehl, *Kyoto Protocol Implementation Act Lawsuit*, ECOJUSTICE (Oct. 7, 2010, 10:57 AM), http://www.ecojustice.ca/cases/kyoto-protocol-implementation-act-lawsuit.

[355] *See supra* notes 137-146 and accompanying text.

[356] Sean Nixon, *Kearl Tarsands Project*, ECOJUSTICE Jan. 12, 2010, 4:00 PM), http://www.ecojustice.ca/cases/kearl-tarsands-project. Ultimately the government approved the project anyway. *Back to Back Victories in Alberta's Tar Sands*, ECOJUSTICE, http://www.ecojustice.ca/stories/victories-in-albertas-tar-sands (last visited May 24, 2011).

[357] NAAEC, *supra* note 65, art. 6.

uniquely suited to Americans, and Canadian entities have already taken up the challenge.

VI. SHAPING THE LEGAL, POLICY, AND MARKET ENVIRONMENTS

Although this article focuses on challenges that appeal to adjudicatory bodies to enforce or apply existing treaties or legislative schemes ("negative" challenges), it is important to acknowledge the potential value of "affirmative" public participation and influence in policymaking and other non-adjudicatory arenas. Current governmental action opposing tar sands development may be less than some environmentalists would like, but governments do not operate in a vacuum. Legislative advocacy, regulatory participation, public pressure campaigns and even "dollar voting"[358] can affect oil sands development by shaping the legal environment and altering the profitability and desirability of the oil sands industry. This Part gives a brief accounting of some such actions and their potential.

A. *Legislative Advocacy*

Effective legislative advocacy around U.S. energy policy could lead to a reduction in oil sands imports in diverse ways. First, should the U.S. adopt a cap-and-trade scheme or some other national emissions reduction scheme, Canada will almost certainly end up adopting something comparable, which would almost certainly affect tar sands development.[359] Canadian officials have sent a clear message that they will not act without the U.S.,[360] and NAFTA market integration (which would likely allow each nation access to the others' carbon markets) and the prospect of trade wars threatened by the imposition of import tariffs mean that ultimately the two nations will need to adopt the same type of scheme for practical reasons.[361]

Second, U.S. investment in renewable energy production and even increasing its own non-renewable production through increased oil or natural gas drilling, would reduce demand for the

[358] "Dollar voting" is used here to refer to expressing preferences by purchasing particular products or purchasing from entities that espouse certain principles.

[359] *Cf. supra* note 174 and accompanying text.

[360] *See* Childs, *supra* note 21, at 430-31.

[361] *Id.*

even dirtier tar sands oil.[362] Advocacy for greater coal production, however, should probably be avoided given the magnitude of coal's own environmental problems. Some commentators have advocated relaxing domestic environmental restrictions on oil drilling and domestic pipeline permitting, recognizing that "U.S. environmental laws have had a direct impact on cross-border trade in oil."[363] This has some support as a 'lesser of two evils' approach, considering conventional oil is an improvement over tar sands oil.

A cleaner option would be to streamline the NEPA process for wind and solar development. Streamlining refers to altering the NEPA environmental assessment process to make it quicker and easier for certain types of projects. Because U.S. tar sands and shale oil have already been streamlined under the Energy Policy Act of 2005,[364] renewables stand at a disadvantage. Some commentators claim that NEPA has "served as a procedural tool for opponents of clean energy to unnecessarily delay projects."[365] Streamlining renewables would therefore make it easier for energy from renewables to cut into the oil sands' market.

B. *Administrative and Regulatory Participation*

It is possible for advocates to participate in the regulatory process of the agencies involved in tar sands administration, providing an opportunity to push for appropriate consideration of the environmental consequences of the tar sands' exploitation. Alberta's Energy Resources Conservation Board[366] has incorporated pre-application consultation of affected parties as well as alternative dispute resolution into their permitting and enforcement procedures.[367] At the cost of the industry applicant, an interested party can institute the "Appropriate Dispute Resolution" process, involving a mediator where desirable to achieve an

[362] Middleton, *supra* note 45, at 204-06.

[363] *Id.* at 199-200.

[364] Energy Policy Act of 2005, Pub. L. No. 109-58, § 369, 119 Stat. 594, 728 (2005).

[365] Domenic A. Cossi, *Getting Our Priorities Straight*, 31 PUB. LAND & RESOURCES L. REV. 149, 163 (2010).

[366] Previously known as the Alberta Energy and Utilities Board.

[367] Alastair R. Lucas, *Canadian Participatory Rights in Energy Resource Development*, 24 J. LAND RESOURCES & ENVTL. L. 195, 198-99 (2004).

acceptable final agreement.[368] This process seems designed for local disputes, such as when a license will affect a local landowner,[369] but it might also be useful to facilitate dialogue between environmental NGOs and oil sands developers around some issues.

C. *Regional Emissions Capping Initiatives*

Sub-federal actors can affect the viability of tar sands development by agreeing to limit their GHG emissions and thereby reducing the GHG emissions of products used within their borders. The Western Climate Initiative (WCI), which plans for a regional cap-and-trade scheme among western states and provinces, could do just this. Alberta is not currently a member, but a number of jurisdictions that import energy from Alberta are members.[370] If the energy producers in these jurisdictions are held to higher environmental standards than those in Alberta, the WCI jurisdictions will likely seek to impose a tariff on energy from less-clean sources such as oil sands in order to prevent emissions leakage.[371] Of course, such tariffs might well be vulnerable to challenges similar to those facing Low Carbon Fuel Standards.[372] Nonetheless, if successfully implemented such regional schemes could be as effective as LCFS in making tar sands oil less profitable, thereby discouraging development.

D. *Conscientious Investment*

Investment codes of conduct that counsel consideration of climate change effects could reduce the amount of investment in oil sands development projects. The Climate Principles were adopted in 2008 by a coalition of NGOs, businesses and financial institutions to assist the finance sector in managing its climate

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[368] *Id.*

[369] *See, e.g.*, ALBERTA ENERGY AND UTILITIES BOARD, INFORMATIONAL LETTER IL 2001-1 (2001), *available at* http://www.ercb.ca/regulations-and-directives/informational-letters/IL2001-01 (naming the first goal of the ADR program as "improved landowner-industry relations in the interest of all Albertans," and referring frequently to affected landowners throughout).

[370] Childs, *supra* note 21, at 416-17.

[371] *Id.* Emissions leakage refers to the emissions supposedly prevented by a jurisdiction simply being realized in another jurisdiction. *See id.*

[372] *See supra* Part IV.

impact.[373] There is some evidence the Principles are already having an effect: HSBC, a signatory, has started to sever financial ties with clients in the forestry sector in countries that lack rigorous environmental controls.[374] Entities choosing to adhere to such codes of conduct, and individuals choosing to invest in entities that do so, may affect tar sands development by decreasing the amount of capital available to tar sands developers.

E. *Public Pressure Campaigns*

Finally, public pressure can also impact tar sands development. In 1994, a cross-border campaign focused on the environmental effects of a hydro power project in Quebec resulted in the New York State Power Authority cancelling its contract and the project's consequent abandonment.[375] A similar campaign might deter future oil sands projects. There are signs that such a campaign has begun. A documentary depicting the environmental impacts of the tar sands premiered in Switzerland and played at the Toronto International Film Festival.[376] The NRDC and other environmental organizations have been lobbying in Washington, scheduling news conferences and maintaining frequent blog postings on the topic.[377] Greenpeace has incited a backlash in Norway against Statoil's investment in oil sands projects, and the issue consequently played a prominent role in Norway's federal election.[378] It seems likely that other large investors might therefore also consider the potential backlash of being associated with the oil sands and choose to invest elsewhere.

CONCLUSION

Based on the foregoing analysis the avenues with the greatest potential to challenge oil sands development are the citizen submissions process of NAFTA/NAAEC, pipeline challenges

[373] Benjamin J. Richardson, *Reforming Climate Finance Through Investment Codes of Conduct*, 27 WIS. INT'L L.J. 483, 497 (2009).

[374] *Id.* at 498.

[375] David Brooks, Remarks at the Proceedings of the Canada-United States Law Institute Conference on an Example of Cooperation and Common Cause (Apr 2-4, 2009) *in* 34 Can.-U.S. L.J. 279 (2010).

[376] Shawn McCarthy, *Oil Sands Under Attack on Environment*, GLOBE & MAIL (Toronto), Sept. 14, 2009, at B1.

[377] *Id.*

[378] *Id.*

under NEPA, and low carbon fuel standards. Of the three, NAFTA/NAAEC represents perhaps the lowest-cost but also most hortatory option. Low Carbon Fuel Standards represent the most powerful way to impose numerical limits on tar sands oil importation but are very vulnerable to challenge. Pipelines represent the current greatest opportunity for oil sands expansion and consequently challenging those pipelines could prevent opening the floodgates to future development projects.

Of course environmentalists in the U.S. cannot alone prevent oil sands exploitation. Much if not most of the work must be done in Canada, where environmentalists may not only employ Canadian procedural and substantive remedies but also participate in the political process. The threat also remains that China could step in to fill the void left by any U.S. withdrawal from the market for oil sands oil. Moreover, discouraging Canadian tar sands development might encourage U.S. tar sands development as energy supplies grow scarcer. But such concerns do not justify abandoning efforts to prevent Canadian oil sands exploitation; some environmental problems must be approached stepwise.

The broad spectrum of environmental interests implicated by oil sands development represents a chance to reunite increasingly disparate types of environmentalists, from pragmatic economist climate change activists to tree-hugging wildlife conservationists. The variety of challenges addressed in this paper demonstrate that there is a role for everyone to play—concerned individuals, environmental NGOs, municipal and state governments, and nations. As public attention to oil sands development increases, perhaps so will the legal resources dedicated to challenging oil sands projects. This issue may come to represent a turning point for the prioritization of environmental integrity over the ease of carbon-intensive fuels.