

# **A Critique of the Oil Spill Liability Trust Fund: The Current Tax Exemption for Tar Sands Companies Limits TransCanada's Accountability for a Potential Oil Spill**

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## ABSTRACT

*This note is a critique of the Oil Spill Liability Trust Fund, which is a federally maintained fund meant to keep money available to pay the costs stemming from oil spills, including restoration costs and payment of damages claims. The largest source of revenue for the fund is a per-barrel excise tax collected from oil that is imported into the United States. However, with the potential approval of the highly debated Keystone XL Pipeline, some of the glaring inadequacies and loopholes of the current law can be illustrated by a fund that is handicapped by outdated legislation. TransCanada, which will construct the pipeline and potentially transport oil derived from tar sands through the Keystone XL Pipeline, will not be forced to pay into the fund due to an exemption for tar sands oil in the tax code.*

*Despite the exemption, tar sands oil appears to be more dangerous and economically and environmentally harmful than conventional crude oil. TransCanada's exemption from the excise tax paid into the Oil Spill Liability Trust Fund creates an inequitable result because, in the event of an oil spill, much of the cleanup costs could come from the fund. Although TransCanada would be liable for an oil spill, the Oil Pollution Act limits its liability to \$350 million if it is not grossly negligent and there is no willful misconduct. The rest of the expense from the spill would be paid by the federal fund. The only equitable and logical way to reconcile this issue is to pass legislation to redefine the definition of oil in the tax code to include tar sands and eliminate the discrepancy between the tax code and the Oil Spill Liability Trust Fund in the definition of "oil." This would force TransCanada to pay into a fund from which it will certainly receive a benefit, and avoid the possibility that federal tax dollars will fund an oil spill from an international company.*

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## I. INTRODUCTION

Before July 25, 2010, the Kalamazoo River in Michigan was a setting of serenity, flowing through parks, boats, and cornfields.<sup>1</sup> However, on that fateful

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1. David Hasemyer, *The Dilbit Disaster 3 Years Later: Sunken Oil Is Looming Threat to Kalamazoo River*,

day, an aging oil pipeline burst on the river, spilling 850,000 gallons of heavy Canadian crude oil, and causing the largest inland oil pipeline spill in United States history.<sup>2</sup> This was the first major pipeline spill involving diluted bitumen, the same type of oil that will be carried by the proposed Keystone XL pipeline.<sup>3</sup> Diluted bitumen is carried in tar sands crude oil, which is considered a “highly corrosive, acidic, and potentially unstable blend of bitumen and volatile natural gas liquid condensate.”<sup>4</sup> The spill continued to flow almost endlessly as it took the pipeline’s owner 17 hours to shut the pipeline down, with the oil turning 40 miles of the river black and causing the air to be “rank with toxic stink.”<sup>5</sup> Ralph Dollhopf of the U.S. Environmental Protection Agency (“EPA”), who supervised the cleanup for three years, stated, “[w]e know we are not going to get all of the oil out.”<sup>6</sup>

According to the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), the United States had more than 10,000 pipeline leaks and blowouts in the past twenty years, killing 371 people and spilling over 92 million gallons of oil.<sup>7</sup> Based on Keystone XL’s Final Supplemental Environmental Statement provided by the Department of State, 79 incidents (spills or leaks) occurred within the first year of pipeline operation for crude oil pipelines installed between 2002 and 2013.<sup>8</sup> The Keystone XL Environmental Impact Statement (“EIS”) acknowledges 2,672 oil pipeline spills in the last 20 years totaling over \$2 billion in damage.<sup>9</sup> Additionally, the PHMSA found that, in the first year of a Trans-Canada pipeline, 14 spills are “not unusual start-up issues that occur on pipelines.”<sup>10</sup>

Oil Spills can be extensive, difficult to clean, and cause extreme environmental harm by polluting drinking water, ruining farmland, and creating an uninhabitable environment for homeowners.<sup>11</sup> The risk of spills and leaks represent the

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INSIDECLIMATE NEWS (Jul. 25, 2013), <http://insideclimatenews.org/news/20130725/dilbit-disaster-3-years-later-sunken-oil-looming-threat-kalamazoo-river>.

2. *Id.*

3. *Id.*

4. ANTHONY SWIFT, SUSAN CASEY-LEFKOWITZ & ELIZABETH SHOPE, NAT. RES. DEF. COUNCIL, TAR SANDS PIPELINES SAFETY RISKS 3 (2011) [hereinafter JOINT REPORT].

5. Hasemyer, *supra* note 1.

6. *Id.*

7. Alan Neuhauser, *Debate Rages Over Keystone and Offshore Drilling, Yet Data Lacking*, U.S. NEWS & WORLD REPORT (Feb. 10, 2015, 12:01 AM), <http://www.usnews.com/news/special-reports/energy-of-tomorrow/articles/2015/02/10/debate-rages-over-keystone-xl-and-offshore-drilling-yet-spill-data-lacking>.

8. U.S. DEP’T OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT VOLUME III §§ 4.13-.31 (2014).

9. Brief For Plaintiff-Appellant at 25, *Sierra Club, Inc. v. Bostick*, 2014 WL 3887388 (10th Cir. July 30, 2014) (No. 14-6099). The National Environmental Policy Act requires all federal agencies to prepare an Environmental Impact Statement for “all major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C) (1974).

10. Brief for Plaintiff-Appellant, *supra* note 9, at 25.

11. Rush Holt, *Keystone Pipeline All Risk and No Reward*, CONGRESS BLOG: THE HILL’S FORUM FOR LAWMAKERS AND POLICY PROFESSIONALS, (Apr. 8, 2013, 2:45 PM), <http://thehill.com/blogs/congress-blog/energy-a-environment/292313-keystone-pipeline-all-risk-and-no-reward>.

“greatest potential threat to water and aquatic resources.”<sup>12</sup> Moreover, pipeline spills account for the highest volume of oil spilled in the United States and Canada.<sup>13</sup> This note advocates for an amendment to the flawed tax code. Part one of this note explains the loophole and how it goes against the true intent of the Oil Spill Liability Trust Fund (“OSLTF”). Part two highlights the legitimate and likely threat of a tar sands oil spill. Part three illustrates the substantial revenue that the OSLTF is missing out on due to the exemption. Finally, the note discusses the potential costs of a tar sands oil spill and the disproportionate liability of the OSLTF as compared to the company that is responsible in the event of an oil spill.

## II. BACKGROUND

### A. TRANSCANADA AND THE KEYSTONE XL PROJECT

Since the new millennium, Canada has become the largest exporter of petroleum into the United States, with the bulk coming from Alberta’s tar sands.<sup>14</sup> The United States imports more than half of the approximately 4 million tons of oil it uses per day.<sup>15</sup> TransCanada is a Canadian corporation based in Calgary that owns a network of pipelines that tap into “virtually all major natural gas supply basins in North America.”<sup>16</sup> TransCanada’s first stage of the Keystone pipeline began production in 2010 and is currently operational, moving crude oil from Canada to Illinois, Nebraska, and Oklahoma.<sup>17</sup> Keystone XL is the proposed extension of the overall Keystone Project. TransCanada, a \$48 billion company that made \$1.4 billion in profits in 2013, is spearheading the Keystone XL extension and has been trying to influence the U.S. government and Americans to support the proposed pipeline.<sup>18</sup> TransCanada will be the “operator of the project” and currently operates the Keystone Pipeline system that transports oil into the United States.<sup>19</sup>

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12. U.S. DEP’T OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT EXECUTIVE SUMMARY 30 (2014) [hereinafter KEYSTONE EIS EXECUTIVE SUMMARY].

13. MERV FINGAS, THE BASICS OF OIL SPILL CLEANUP 4 (3rd ed. 2013).

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

15. FINGAS, *supra* note 13, at 2.

16. *About Us*, TRANSCANADA, <http://www.transcanada.com/about-us.html> (last updated Feb. 23, 2009).

17. PLAINS JUSTICE, THE NORTHERN GREAT PLAINS AT RISK: OIL SPILL PLANNING DEFICIENCIES IN KEYSTONE PIPELINE SYSTEM 4 (2010).

18. *See* Office of U.S. Senator Robert Menendez, *Menendez, Gillibrand Push to Make Sure Big Oil Companies like TransCanada are Held Responsible for Spills*, ATLANTIC HIGHLANDS HERALD (Jan. 22, 2015), <http://www.ahherald.com/newsbrief/monmouth-news/19276-menendez,-gillibrand-push-to-make-sure-big-oil-companies-like-transcanada-are-held-responsible-for-spills>.

19. U.S. DEP’T OF STATE, APPLICATION OF TRANSCANADA KEYSTONE PIPELINE, L.P. FOR A PRESIDENTIAL PERMIT AUTHORIZING THE CONSTRUCTION, CONNECTION, OPERATION, AND MAINTENANCE OF PIPELINE FACILITIES FOR THE IMPORTATION OF CRUDE OIL TO BE LOCATED AT THE UNITED STATES-CANADA BORDER 5 (2012) [hereinafter PRESIDENTIAL PERMIT].

The proposed extension would transport up to 830,000 barrels of tar sands oil per day from Alberta into the United States, which would reduce United States' imports from other countries by about seven percent.<sup>20</sup> As the oil industry continues to make investments in increasing rail transport capacity, TransCanada could potentially transport more than one million barrels per day in coming years through the proposed pipeline.<sup>21</sup> Keystone XL would be one of the longest, highest capacity, and highest pressure crude oil pipelines ever built.<sup>22</sup>

The primary purpose of TransCanada's proposed Keystone XL pipeline is to transport diluted bitumen from tar sands.<sup>23</sup> Tar sands are a combination of clay, sand, water, and bitumen.<sup>24</sup> Bitumen is a "heavy black viscous oil substance" contained within the tar sands.<sup>25</sup> To sell tar sands oil, it must be transported to refineries first, where tar sands are processed into diluted bitumen and transported via pipeline into the United States.<sup>26</sup> The tar sands are refined using the same processes as those used in the refining of crude oil and no "distinction exists between finished products refined from crude oil or refined from tar sands."<sup>27</sup> The pipeline would run through not merely unpopulated areas but through important natural resources, such as rivers and the Ogallala Aquifer, all of which would be at extreme risk to a pipeline burst.<sup>28</sup> The Ogallala Aquifer runs through eight states and contains about a fifth of the U.S. freshwater supply, with 8 million people relying on it for drinking water.<sup>29</sup>

TransCanada and supporters of the project claim the benefit of economic development through tax revenue, job creation, and lower gas prices within the United States outweighs the potential ecological consequences of the project.<sup>30</sup> Proponents also believe that the pipeline would help reduce United States dependence on unstable foreign sources of oil.<sup>31</sup> The U.S. State Department's Final Supplemental EIS found that the project would support 42,000 "direct and indirect" jobs across the country.<sup>32</sup> Seasonal workers that actually partake in the

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20. Sarah Bridges, *American Trade News Highlights for Spring, 2013 The Keystone XL: To Choose Economic Triumph, or Environmental Disaster*, 19 L. & BUS. REV. AM. 263, 269 (2013).

21. KEYSTONE EIS EXECUTIVE SUMMARY, *supra* note 12, at 10.

22. PLAINS JUSTICE, *supra* note 17, at 1.

23. See JOINT REPORT, *supra* note 4, at 5.

24. I.R.S. Tech. Adv. Mem. 201120019 (Jan. 12, 2011) [hereinafter IRS Ruling].

25. *Id.*

26. Brandon D. Cunningham, Student Article, *Border Petrol: U.S. Challenges to Canadian Tar Sands Development*, 19 N.Y.U. ENVTL. L.J. 489, 523 (2012).

27. IRS Ruling, *supra* note 24.

28. PLAINS JUSTICE, *supra* note 17, at 4.

29. Dave Saldana, *Keystone PipeLIES Exposed: The Facts on Sticky Leaks, Billion Dollar Spills, and Dirty Air*, PRWATCH (Feb. 26, 2014), <http://www.prwatch.org/news/2014/02/12401/keystone-pipelies-exposed-sticky-oil-leaks-billion-dollar-spills-and-human-health>.

30. See *Myths & Facts, Myths Addressed: Exports, Jobs, Economic Benefits and More*, TRANSCANADA, <http://keystone-xl.com/myths-addressed-exports-jobs-economic-and-more/> (last visited Feb. 28, 2015).

31. *Id.*

32. See Amy Harder, *House Passes Keystone XL Bill; Obama Veto Expected*, WALL ST. J. (Feb. 11, 2015,

construction and manufacturing aspect of the pipeline would account for 11,000 of the jobs.<sup>33</sup> The 42,000 jobs estimate also includes “spinoff jobs” through Keystone’s supply chain since TransCanada would need to purchase materials for the project.<sup>34</sup> Furthermore, construction employees would spend their wages in the neighboring area on lodging, food, entertainment, and health care, which would boost the economy and add jobs.<sup>35</sup> Additionally, TransCanada states that the Keystone XL pipeline would be the “safest pipeline ever constructed in the United States,” complying with “57 new safety procedures.”<sup>36</sup>

However, critics believe the pipeline would threaten the land, water supply, property, and cattle of the 100,000 ranches throughout the Midwest.<sup>37</sup> In South Dakota, Montana, and Nebraska alone, the pipeline would cross over 1,000 bodies of water, including the Yellowstone River and the Platte River.<sup>38</sup> It would also run within a mile of more than 3,000 wells that provide drinking and irrigation water.<sup>39</sup> Communities along the pipeline route are especially concerned about the risk of a potential release of oil and the ability of operators to respond to a spill, particularly in more remote areas.<sup>40</sup> Extracting oil from tar sands alone usually involves environmentally destructive mechanisms, such as razing forests, open pit mining, massive water consumption, and immense pollution.<sup>41</sup> Environmentalists and some politicians have complained that the soot pollution from tar sands could “increase asthma attacks and other lung diseases.”<sup>42</sup>

In contrast to the supporters’ claim that the pipeline would create 42,000 jobs, the State Department and a ranking member of the U.S. House of Representatives Subcommittee on Energy and Mineral Resources estimate the pipeline would only create thirty-three “permanent jobs.”<sup>43</sup> The State Department found the project would directly employ 3,900 fulltime workers over a two-year construc-

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6:23 PM), <http://www.wsj.com/articles/house-sends-keystone-pipeline-bill-to-obama-veto-vowed-1423693620>.

33. Katie Sanders, *TransCanada CEO says 42,000 Keystone XL Pipeline Jobs are ‘Ongoing, Enduring’*, POLITIFACT.COM (Nov. 16, 2014, 1:19 PM), <http://www.politifact.com/punditfact/statements/2014/nov/16/russ-girling/transcanada-ceo-says-42000-keystone-xl-pipeline-jo/>.

34. *Id.*

35. *Id.*

36. PRESIDENTIAL PERMIT, *supra* note 19, at 18-19.

37. *Stopping the Keystone XL Pipeline*, NRDC, <http://www.nrdc.org/energy/keystone-pipeline/> (last visited Feb. 28, 2015).

38. *Id.*

39. *Id.*

40. PAUL W. PARFOMAK ET AL. CONG. RESEARCH SERV., R41668, KEYSTONE XL PIPELINE PROJECT: KEY ISSUES 18 (2013).

41. See DAN WOYNILLOWICZ ET AL., PEMBINA INST., OIL SANDS FEVER: THE ENVIRONMENTAL IMPLICATIONS OF CANADA’S OIL SANDS RUSH 30-41 (2005).

42. Juan Carlos Rodriguez, *House Greenlights TransCanada’s Keystone XL Pipeline*, LAW360 (Nov. 14, 2014, 1:19 PM), <http://www.law360.com/articles/595703/house-greenlights-transcanada-s-keystone-xl-pipeline>.

43. Holt, *supra* note 11.

tion period, with nearly all of the jobs lasting less than one year.<sup>44</sup> United States President Barack Obama is similarly skeptical of the project, saying he does not think the pipeline would create many permanent jobs or reduce gas prices, and may only benefit the Canadian oil industry.<sup>45</sup> Additionally, critics are concerned that the use of tar sands promotes continued United States dependence on fossil fuels, which contribute to climate change.<sup>46</sup>

#### B. THE POLITICAL FIGHT OVER THE KEYSTONE XL PROJECT

Over the last six years, the fight over the Keystone XL pipeline has become a “proxy for far broader fights over climate change, energy, and the economy.”<sup>47</sup> In general, Republicans and some Democrats want the pipeline built, but most Democrats and environmentalists are opposed to its construction. The debate started when TransCanada filed an application requesting a Presidential permit for the pipeline in 2008.<sup>48</sup> For the Keystone XL pipeline to be constructed, the President of the United States and the Department of State must approve the project in the form of a permit from the Department of State under Executive Order 13337 because the pipeline would cross the Canadian-U.S. border.<sup>49</sup> The project also requires an environmental assessment evaluated and documented in an EIS according to the terms of the NEPA.<sup>50</sup> The Department of State’s EIS describes the proposed project, “the potential impacts of construction and normal operation,” cumulative impacts, and “issues related to potential spills from the proposed project.”<sup>51</sup> Before the State Department can approve such a permit, it must determine that the project is in the “national interest” by evaluating factors such as energy security; health; the environment; cultural, economic, and foreign policy concerns; and consulting with at least eight government agencies including the EPA.<sup>52</sup>

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44. Laura Beans, *History of Oil Spills Plagues Future of Keystone XL Pipeline*, ECOWATCH (Aug. 14, 2013, 3:10 PM), <http://ecowatch.com/2013/08/14/oil-spills-plagues-future-of-keystone-xl/>.

45. Harder, *supra* note 32.

46. PARFOMAK, *supra* note 40, at 18.

47. Coral Davenport, *Senate Approves Keystone XL Pipeline Bill, Testing Obama*, N.Y. TIMES (Jan. 29, 2015), <http://www.nytimes.com/2015/01/30/us/politics/keystone-xl-pipeline-bill-senate-vote.html>.

48. PRESIDENTIAL PERMIT, *supra* note 19, at 2.

49. Executive Order 13337 states, “[T]he Secretary of State is hereby designated and empowered to receive all applications for Presidential permits . . . for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum . . . or other fuels to or from a foreign country.” Exec. Order No. 133,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

50. *Id.*

51. Letter from Alexander Yuan, NEPA Coordinator, Keystone XL Project EIS Project Manager, to “All interested parties” (Aug. 26, 2011) (on file with author), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182008.pdf>.

52. *New Keystone XL Pipeline Application*, U.S. DEP’T OF STATE, <http://keystonepipeline-xl.state.gov> (last visited Mar. 18, 2015).

The Department of State took three years to consider the initial 2008 application, finding relatively mild environmental warnings in its Final EIS.<sup>53</sup> In 2010, the EPA criticized the State Department's report, stating it failed to "look at oil response plans, safety issues, and greenhouse gas concerns."<sup>54</sup> In 2011, President Obama denied the 2008 application, explaining that the Department of State did not have a sufficient "period to obtain and access the necessary information."<sup>55</sup> In 2012, TransCanada submitted a second application to the Department of State for a modified route of the pipeline, claiming that (i) it avoided sensitive areas, (ii) it would generate hundreds of millions of dollars in immediate revenue, and (iii) TransCanada agreed to take any responsibility for a spill.<sup>56</sup> President Obama then denied this proposal in 2012, citing the State Department's inability to adequately complete an environmental review within Congress's mandated sixty-day time frame.<sup>57</sup>

TransCanada quickly reapplied on May 4, 2012 after their second proposal was denied.<sup>58</sup> Despite resistance from the government, TransCanada remains confident the pipeline will eventually be constructed, as shown through their 14 alternate pipeline routes on hand.<sup>59</sup> Alex Pourbaix, TransCanada's President of Energy and Oil Pipelines, said "The company is ready to begin construction once it gets approval. TransCanada has procured and stored all the pipe and other major equipment along the route and secured the necessary labor agreements."<sup>60</sup> The State Department released its final EIS in January 2014, but is still reviewing comments from the public and selected federal agencies to decide whether issuing a permit would be in the "national interest."<sup>61</sup> The Department of State continues to review the "Presidential Permit application for the proposed Keystone XL pipeline in a rigorous, transparent, and objective manner."<sup>62</sup>

On November 13, 2014, the U.S. House of Representatives approved TransCanada's proposal to complete the Keystone XL pipeline.<sup>63</sup> Under the

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53. U.S. DEP'T OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT § 3.13.5 (2011).

54. Megan O'Rourke, *The Keystone XI Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 VILL. ENVTL. L.J. 149, 154 (2013).

55. Public Notice 7786, 77 Fed. Reg. 5,614 (Feb. 3, 2012).

56. PRESIDENTIAL PERMIT *supra* note 19.

57. Aamer Madhani & Susan Davis, *Obama rejects Keystone pipeline from Canada to Texas*, USA TODAY, <http://www.usatoday.com/news/washington/story/2012-01-18/obama-rejects-keystone-pipeline/52655762/1> (last updated Jan. 18, 2012).

58. *New Keystone XL Pipeline Application*, *supra* note 52.

59. See Ken Silverstein, *Keystone Pipeline Ensnared in Politics, Hypocrisy*, FORBES (Feb. 5, 2012), <http://www.forbes.com/sites/kensilverstein/2012/02/05/keyston/>.

60. Rebecca Penty & Bradley Olson, *U.S. Keystone Decision May Delay TransCanada Six Months*, BLOOMBERG (Mar. 5, 2013, 5:19 PM), <http://www.bloomberg.com/news/articles/2013-03-05/keystone-ruling-delay-may-set-back-transcanada-pipe-six-months>.

61. PAUL PARFOMAK ET AL., CONG. RESEARCH SERV., R43787, KEYSTONE XL PIPELINE: OVERVIEW AND RECENT DEVELOPMENTS 1, 5 (2015).

62. *New Keystone XL Pipeline Application*, *supra* note 52.

63. Rodriguez, *supra* note 42.

House Bill, the State Department's EIS was considered to satisfy all requirements of the National Environmental Policy Act ("NEPA").<sup>64</sup> The Senate then passed an amended bill on January 29, 2015, to force approval of the Keystone XL pipeline.<sup>65</sup> On February 11, 2015, the House passed the legislation approved by the Senate to construct the Keystone XL pipeline.<sup>66</sup> On February 24, President Obama vetoed the legislation to authorize the pipeline, accusing Congress of seeking to circumvent the administration's approval process by cutting short "consideration of issues that could bear on our national interest."<sup>67</sup> Now, President Obama has the authority to make the final judgment on the pipeline with no timeline pressure.<sup>68</sup> The White House stated that President Obama will decide whether to allow the pipeline when "all of the environmental reviews are completed," with a final decision coming at any time.<sup>69</sup>

### C. OIL SPILL LIABILITY TRUST FUND DESCRIPTION

OSLTF is a federally mandated pool of money designed to respond quickly and effectively to oil spills. Congress set up the crude oil tax in 1980 as part of legislation that established a new fund that managed hazardous waste cleanup.<sup>70</sup> These crude oil taxes were funneled less than a decade later into the OSLTF.<sup>71</sup> The OSLTF was created to provide an immediate source of federal funding to respond to oil spills in a timely manner.<sup>72</sup> In 1990, President George H.W. Bush signed the Oil Pollution Act (OPA) into law and authorized use of the OSLTF.<sup>73</sup> The OPA was intended to be comprehensive oil spill legislation, focusing on prevention, containment, cleanup, and liability.<sup>74</sup> Payments from the fund are used towards several costs that stem from an oil spill: removal, payments associated with assessing injuries to natural resources caused by the spill, payments of parties' claims for uncompensated removal costs and for uncompensated damages, research and development, and payment of loans to provide

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64. *Id.*

65. Davenport, *supra* note 47.

66. Harder, *supra* note 32.

67. Michael D. Shear & Coral Davenport, *Obama Vetoes Bill Pushing Pipeline Approval*, N.Y. TIMES (Feb. 24, 2015), [http://www.nytimes.com/2015/02/25/us/politics/as-expected-obama-vetoes-keystone-xl-pipeline-bill.html?\\_r=0](http://www.nytimes.com/2015/02/25/us/politics/as-expected-obama-vetoes-keystone-xl-pipeline-bill.html?_r=0).

68. *See id.*

69. *Id.*

70. Lisa Song, *Is Dilbit Oil? Congress and the IRS Say No*, INSIDECLIMATE NEWS (Jul 31, 2012), <http://insideclimatenews.org/news/20120731/oil-spill-liability-trust-fund-coast-guard-tar-sands-refineries-excise-tax-irs-epa-enbridge>.

71. *Id.*

72. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R43128, OIL SANDS AND THE OIL SPILL LIABILITY TRUST FUND: THE DEFINITION OF "OIL" AND RELATED ISSUES FOR CONGRESS 2 (2015).

73. *The Oil Spill Liability Trust Fund*, U.S COAST GUARD, [http://www.uscg.mil/npfc/About\\_NPFC/osltf.asp](http://www.uscg.mil/npfc/About_NPFC/osltf.asp) (last updated Oct. 22, 2013).

74. S. REP. NO. 101-94, at 2-3 (1989).

assistance to fishermen and aquaculture claimants impacted by the spill.<sup>75</sup>

The U.S. Coast Guard administers the OSLTF.<sup>76</sup> The OSLTF is made up of two components used to pay potential claims. First is the Emergency Fund: the President has authority, without Congressional appropriation, to use up to \$50 million each year to fund removal activities and initiate natural resource damage assessments.<sup>77</sup> The second component is the Principal Fund: money coming from the Principal Fund is used to pay claims and to fund appropriations made by Congress.<sup>78</sup> The amount paid out by the OSLTF depends on the incident. The *maximum amount available per incident is \$1 billion* or the balance in the fund, whichever is less at the time.<sup>79</sup>

The Principal Fund has several sources of revenue, but the largest is the “Barrel Tax,” which accounts for 90 percent of the fund’s revenue.<sup>80</sup> The barrel tax is collected from the oil industry on petroleum produced in or imported into the United States.<sup>81</sup> The nation’s refineries pay the excise tax for imported crude oil, and these fees are considered standard practice in the industry to pay for “anything that can harm the environment,” said Esa Ramasamy, an editorial director at a major global energy information provider.<sup>82</sup> The current tax is eight cents per barrel imported, but will increase to nine cents in 2017.<sup>83</sup> Over the last five years, the excise tax has generated about \$500 million per year.<sup>84</sup>

Many types of claims can be funded through the OSLTF. A person or organization that has incurred removal costs or suffered damages due to an oil spill, including uncompensated removal costs, damages to property, loss of profit claims, third party claims, or a range of other direct costs are specified in the Oil Pollution Act, and can be funded by the OSLTF.<sup>85</sup> Additionally, the funds can be used to pay for cleanup contractors, overtime for government personnel, equipment used in removal of the oil, and disposal of recovered oil and debris.<sup>86</sup>

#### D. THE OIL SPILL LIABILITY TRUST FUND’S (“OSLTF”) IMPACT ON THE LEGAL LIABILITY OF TRANSCANADA

Although it is a Canadian company, TransCanada would be liable in the event of an oil spill on United States soil because of the liability structure for such

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75. U.S. COAST GUARD, NPFC PUB 16465.2, OIL SPILL LIABILITY TRUST FUND FUNDING FOR OIL SPILLS 7 (2006).

76. *The Oil Spill Liability Trust Fund*, *supra* note 73.

77. *Id.*

78. U.S. COAST GUARD, *supra* note 75, at 1.

79. *Id.* at 2 (emphasis added).

80. *Id.*

81. *Id.*

82. Song, *supra* note 70.

83. *The Oil Spill Liability Trust Fund*, *supra* note 73.

84. RAMSEUR, *supra* note 72, at 6.

85. U.S. COAST GUARD, *supra* note 75, at 7.

86. *Id.* at 1.

spills. TransCanada's emergency response plans have been approved by state and federal agencies, and the company claims to be responsible for responding to, cleaning up, and restoring any pipeline leak.<sup>87</sup> TransCanada is required by federal law to respond to and clean up oil spills.<sup>88</sup> Once the Keystone XL pipeline is in operation, it will have to comply with the laws and regulations of six states, the federal government, and the Canadian regulatory scheme.<sup>89</sup>

The OSLTF is in essence a backup or insurance policy for victims of an oil spill by paying for removal costs and damages that are not fully paid for by the "responsible party," with certain caveats. The "responsible party" can be "any person owning or operating the pipeline."<sup>90</sup> In TransCanada's Presidential permit application, the company states that it will be the "operator of the project."<sup>91</sup> Therefore, TransCanada is indisputably the responsible party for any potential spill from the Keystone XL Pipeline with respect to the OSLTF.

The ultimate liability of the responsible party in the event of an oil spill is dependent on many factors. The responsible party is accountable for the complete cleanup of the spill *up to its limit of liability*, with the rest being paid for out of the OSLTF.<sup>92</sup> Thus, if the responsible party incurs costs greater than its "applicable limit of liability," it may submit a claim for the excess costs and damages to be paid for out of the OSLTF.<sup>93</sup> The responsible party is only allowed to limit its liability if it "exercise[s] appropriate judgment and due care regarding the oil cargo."<sup>94</sup> The responsible party can satisfy this burden by cooperating with officials and reporting the spill in a timely manner.<sup>95</sup> However, the limit on liability is conditional; the responsible party is not entitled to its limit if it is grossly negligent or violates a particular federal regulation.<sup>96</sup> The limit also does not apply if the responsible party violates federal safety, construction, or operating regulations that proximately caused the spill.<sup>97</sup> Therefore, the responsible party must report the incident and cooperate with response officials to maintain the limitation on their potential liability.<sup>98</sup> Funds from the OSLTF will also be used when liability of the responsible party has been legally refuted via a

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87. TRANSCANADA, *supra* note 30.

88. PLAINS JUSTICE, *supra* note 17, at 4.

89. See Rachel Degenhardt, *1700 Miles of the Keystone XL Pipeline: A State, Federal and International Regulatory Concern*, THE ENHESA BLOG (Nov. 14, 2011), <http://enhesa.wordpress.com/2011/11/14/1700-miles-of-the-keystone-xl-pipeline-a-state-federal-and-international-regulatory-concern/>.

90. 33 U.S.C. § 2701(32)(E) (2010).

91. PRESIDENTIAL PERMIT, *supra* note 19 (TransCanada stating it will be the "operator of the project").

92. U.S. COAST GUARD, *supra* note 75, at 3 (emphasis added).

93. See *id.*

94. Jay Angle et al., *Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990*, 19 PENN ST. ENVTL. L. REV. 403, 449 (2011).

95. See *id.* (citing 33 U.S.C. § 2703(c)).

96. U.S. COAST GUARD, *supra* note 75, at 4.

97. *Id.*

98. See *id.*

defense or the responsible party has insufficient funds to satisfy all of the admissible claims for compensation.<sup>99</sup>

Federal law currently protects oil companies by imposing a limit of liability in the event of an oil spill to \$134 million in damages for offshore oil spills and \$350 million for spills that occur onshore.<sup>100</sup> Onshore facilities include pipelines, which would be the source of a potential spill from Keystone XL.<sup>101</sup> The pipeline is entirely onshore, so the \$350 million limit will apply to TransCanada for response costs and applicable damages if it receives the limit of liability.<sup>102</sup> The ultimate result is that the liability of responsible parties is limited in many circumstances because they exercise “appropriate judgment” and are not found to be “grossly negligent,” leaving the OSLTF to be financially responsible for up to a \$1 billion expense per incident if the total restoration costs exceed the liability limit.<sup>103</sup>

Congress established the limit of liability to ensure accountability on the part of the responsible party and encourage the responsible party to take proper action following an oil spill by cooperating with officials and dealing with the spill in rapid fashion to avoid further harm.<sup>104</sup> In essence, the OSLTF plays a “backup role” while incentivizing responsible parties to respond to oil spills.<sup>105</sup>

The final financial burden on the OSLTF can ultimately be minimal if the majority of the OSLTF’s payments to clean up the spill are reimbursed by the responsible parties.<sup>106</sup> This was the case in the 2010 *Deepwater Horizon* oil spill where BP was the responsible party, but BP paid back almost the entire bill that was initially paid by the OSLTF.<sup>107</sup> However, if the responsible party does not meet its obligations for payment under the OPA, the OSLTF will be liable for compensating cleanup costs.<sup>108</sup> Should the responsible party not pay or have insufficient funds, then the OSLTF will provide the funding for the necessary restoration costs.<sup>109</sup> If the responsible party does not remove the spill or the incident is so extensive that it requires government response, then the Federal On-Scene Coordinator responds, using funds from the OSLTF.<sup>110</sup> The responsible party will later be billed for the costs for an amount determined by its

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99. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1012(a)(4), 104 Stat. 484 (1990).

100. Office of U.S. Senator Robert Menendez, *supra* note 18. The Coast Guard issued a proposed rule change in August 2014 that would increase the limit to \$405 million, but this has not been approved. RAMSEUR, *supra* note 72, at 11.

101. 33 U.S.C. § 2704 (2012).

102. *See id.*

103. *See id.* at 2.

104. Angle, *supra* note 95, at 449 (citing 33 U.S.C. § 2704(c) (2012)).

105. RAMSEUR, *supra* note 72, at 2.

106. *See id.* at 11.

107. *See id.*

108. *See* Angle, *supra* note 94, at 409.

109. *See* U.S. COAST GUARD, *supra* note 75, at 4.

110. *Id.* at 3.

ultimate liability, up to its corresponding limit.<sup>111</sup>

E. TAR SANDS ARE EXEMPT FROM THE PER-BARREL EXCISE TAX TO THE OSLTF

The Tax Code of the United States currently exempts tar sands from payment into the OSLTF. Currently, Section 4611 of the Tax Code imposes an excise tax, or the “per-barrel” tax on (1) crude oil received at a U.S. refinery; (2) imported petroleum products entered into the United States for consumption, use, and warehousing; and (3) any domestically produced crude oil that is used in or exported from the United States and no taxes were previously imposed.<sup>112</sup> Section 4612(a)(1) provides that the term “crude oil” includes crude oil condensates and natural gas.<sup>113</sup> Companies that transport crude oil are required to pay the excise tax into the fund, but oil derived from tar sands is currently exempt. The Internal Revenue Service (“IRS”) has ruled that Congress clearly distinguished tar sands oil from crude oil.<sup>114</sup>

In a 2011 ruling, the IRS held that tar sands oil, which is the type of Canadian crude oil that will be transported in the proposed Keystone XL pipeline, is exempt from the per-barrel tax created for the OSLTF due to the 1980 formulation of the crude oil tax, which explained that the “term crude oil, as used in §§ 4611 and 4612 . . . does not include tar sands.”<sup>115</sup> The exemption for tar sands dates back to the 1980 crude oil tax, which was the predecessor to the excise tax that funds the OSLTF.<sup>116</sup> Prior to the OPA, natural resource damages resulting from oil spills were assessed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”).<sup>117</sup> CERCLA, which was amended in 1986, originally gave the federal government the authority and the funding, through the “Superfund,” to clean up sites contaminated by hazardous waste.<sup>118</sup> The OSLTF was established in the same year under Section 9509 of the Internal Revenue Code (“IRC”) via the Superfund Amendment.<sup>119</sup> Sections 4611 and 4612 of the IRC, which define crude oil for the purpose of the excise tax, were added directly from CERCLA to support the “Superfund.”<sup>120</sup> The “Superfund” is now expired in favor of the OSLTF.<sup>121</sup>

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111. *See id.*

112. IRS Ruling, *supra* note 24.

113. 26 U.S.C. § 4612(a)(1) (1992).

114. *See* IRS Ruling, *supra* note 24.

115. *Id.* (emphasis added).

116. *Id.*

117. *Gen. Elec. Co. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 769 (D.C. Cir. 1997).

118. *CERCLA & Coast Guard Superfund Use*, U.S. COAST GUARD, [http://www.uscg.mil/npfc/About\\_NPFC/cercla.asp](http://www.uscg.mil/npfc/About_NPFC/cercla.asp) (last modified Jan. 26, 2012).

119. 40 C.F.R. § 300.5 (2001); *see also* 26 U.S.C. § 9509 (1994).

120. IRS Ruling, *supra* note 24.

121. RAMSEUR, *supra* note 72, at 8.

The IRS declared that the “plain language” of the current code provision does not “clearly include or exclude tar sands from the definitions of the terms crude oil and petroleum product.”<sup>122</sup> But due to “legislative history” of a House report dating back to CERCLA, the term “crude oil” as used in Sections 4611 and 4612, does not include synthetic petroleum, and tar sands are considered synthetic petroleum.<sup>123</sup> Therefore, the IRS ruling imputed the language of the expired “Superfund” onto the current tax code, which maintains that oil derived from tar sands remains exempt from taxation.

Since some conventional crude oils are mixed with oil derived from tar sands, the IRS memorandum clarified that the “crude oil and/or petroleum products that are comingled with tar sands are subject to the excise tax on petroleum imposed by § 4611.”<sup>124</sup> Therefore, the actual ratio of the components that are transported is essential in computing the correct excise tax that should be imposed on the company transporting the oil.<sup>125</sup> This is especially important for revenue purposes of the OSLTF because of the heavy volume of oil transported and because the ratio of diluted bitumen can vary from 70-80 percent.<sup>126</sup>

Over the past few years, many senators and congressmen have been pushing to force TransCanada to pay taxes into the OSLTF via proposed amendments to the Keystone XL Bill.<sup>127</sup> But currently, there is nothing in the Keystone XL Pipeline Bill that was passed by the House or Senate that would close the tax loophole for TransCanada and force them to pay the excise tax into the OSLTF. When the House of Representatives approved TransCanada’s proposal, it rejected an amendment by Democrat Lois Capps of California that would have required TransCanada to pay an eight-cent-per-barrel fee to the OSLTF with the passing of the Keystone XL Pipeline Approval Act.<sup>128</sup> Other amendments that would force tar sands companies to pay the excise tax into the OSLTF or would eliminate the limit on liability for the responsible party did *not* pass in the Senate.<sup>129</sup> Senator Ron Wyden offered an amendment to change the tax code to include tar sands within the definition of crude oil, and Senator Ed Markey put forth an amendment to delay the Keystone XL Bill until the tax code was changed.<sup>130</sup> Both amend-

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122. IRS Ruling, *supra* note 24.

123. *Id.*

124. *Id.*

125. RAMSEUR, *supra* note 72, at 10.

126. *Id.*

127. See, e.g., *id.* at 2, 14; Sputnik, *U.S. Senators Want to Ensure TransCanada Responsibility in Case of Oil Spill*, SPUTNIKNEWS (Jan. 17, 2015), <http://sputniknews.com/us/20150116/1016999917.html>.

128. Press Release, Congresswoman Lois Capps, *Capps Offers Amendment to Keystone Bill to Protect Environment* (Feb. 11, 2015) (on file with author), available at <http://capps.house.gov/press-release/capps-offers-amendment-keystone-bill-protect-environment>.

129. Emily Atkin, *Here are All the Extra Provisions Attached to the Senate’s Keystone XL Bill*, THINK-PROGRESS (Jan. 29, 2015, 1:59 PM), <http://thinkprogress.org/climate/2015/01/29/3617045/keystone-xl-amendments/> (emphasis added).

130. *Id.*

ments failed. The only amendment that the senate passed was a “Sense of the Senate” Amendment, indicating it was Congress’ stance that all types of oil companies *should* be required to pay a per-barrel tax that goes to the fund.<sup>131</sup> Since this amendment is only a “Sense of the Senate,” it does not mean tar sands companies like TransCanada are actually obligated to contribute to the OSLTF via the excise tax. In summary, the Senate could have approved three other amendments to force TransCanada to pay into the fund, but it declined to do so.

### III. THE TAX CODE PROVIDES A LOOPHOLE FOR TAR SANDS COMPANIES THAT GOES AGAINST THE INTENT OF THE OIL SPILL LIABILITY TRUST FUND

Due to the exemption, a potential oil spill from TransCanada’s Keystone XL pipeline could put an exponentially heavy burden on the federal fund to pay for the cleanup. This places an enormous strain on both the fund itself and potentially American taxpayers. According to an IRS memorandum, the tax code allows the cleanup expense to be incurred by the fund. The tax code does not force TransCanada, the responsible party, to contribute to the fund even though TransCanada would ultimately be responsible for restoration costs. This is inequitable because there is no logical rationale that applies today to allow transporters of tar sands oil to be exempt from paying into the fund. Therefore, the exemption in the tax code should be eliminated to remove these inequities.

#### A. THE INTERNAL REVENUE SERVICE MEMORANDUM INTERPRETING THE TAX CODE ALLOWS TAR SANDS COMPANIES TO BENEFIT FROM THE FUND WITHOUT FORCING THEM TO PAY INTO IT

The IRS has classified tar sands as different from conventional oil, so the tax levied to finance the fund designed to respond to oil spills is not levied on tar sands.<sup>132</sup> The IRS ruled on the exemption of tar sands oil in a Technical Advice Memorandum (“TAM”) in January 2011, issued at the request of a company that requested to keep its identity secret.<sup>133</sup> The anonymous company was an “independent refining and chemicals company that operates several refineries in the United States.”<sup>134</sup> Since tax returns are confidential, the IRS cannot reveal the name of the refinery involved.<sup>135</sup> The memorandum stated, “[t]ar sands imported into the United States are not subject to the excise tax on petroleum imposed by

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131. Keystone XL Pipeline Approval Act, S.1, 114th Cong. § 123 (as passed by Senate, Jan. 22, 2015), available at <https://www.congress.gov/amendment/114th-congress/senate-amendment/123> (emphasis added).

132. *Arkansas Oil Spill Should be Nail in the Coffin for Keystone Pipeline*, RT (Dec. 25, 2013, 8:36 AM), <http://rt.com/usa/arkansas-spill-nail-keystone-299/>.

133. IRS Ruling, *supra* note 24.

134. *Id.*

135. Song, *supra* note 70.

§ 4611 of the Internal Revenue Code.”<sup>136</sup> Lorne Stockman, the research director at Oil Change International, stated the effect of the memorandum was to “do away with any ambiguity about whether tar sands importers should pay or not.”<sup>137</sup>

TAMs are technically only binding on the taxpayer who is the subject of the ruling because they only apply to the particular facts mentioned in the memorandum directed at a particular party.<sup>138</sup> Although TAMs do not set binding legal precedent, they are “instructive” because they clarify how the IRS looks at particular issues and help similarly situated firms make decisions on similar issues.<sup>139</sup> Additionally, some courts have cited them to support a taxpayer’s position and reveal how the IRS interprets the law.<sup>140</sup> TAMs are considered persuasive because of their reasoning in prior decisions.<sup>141</sup> Therefore, a TAM can reinforce a taxpayer’s independently viable position and reveal the IRS’s interpretation of the law.<sup>142</sup> Furthermore, revenue rulings such as the TAM issued here can be cited and relied upon.<sup>143</sup> Anthony Swift, a Natural Resources Defense Council (NRDC) attorney, declared that the IRS decision is based on a set of facts that would almost certainly apply to all tar sands refineries.<sup>144</sup> Thus, the TAM discussed above makes it universally accepted that tar sands imported into the United States are not subject to the excise tax on petroleum imposed by § 4611.<sup>145</sup> According to Swift, it will probably take an act of Congress to remove the current exemption and amend the definition of crude oil to include tar sands and synthetic crude oil to be able to impose excise taxes on tar sands oil.<sup>146</sup> Therefore, the IRS memorandum that ruled in favor of the exemption will apply to tar sands companies like TransCanada because it is extremely unlikely the IRS will make an alternate ruling to the TAM without legislative changes.

This is a loophole that allows certain oil companies to dodge paying money into the necessary fund and surely does not line up with the actual intent of the fund since the OSLTF responds to both conventional oil spills *and* tar sands oil spills. Since TransCanada and other companies that transport tar sands receive the benefit of the OSLTF, they should be forced to pay into the fund. Otherwise,

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136. IRS Ruling, *supra* note 24.

137. Song, *supra* note 70.

138. I.R.M. 4.10.7.2(10) (2006).

139. *See id.*; *see also* *Buckeye Power, Inc. v. United States*, 38 Fed. Cl. 283, 285 (1997) (stating that a “TAM provides a cohesive and logical discussion” of a legal question although the court cannot rely on the TAM as precedent).

140. *Buckeye*, 38 Fed. Cl. at 286.

141. *Id.*

142. *See id.*

143. *What Is The Value And Utility Of Regs, Rulings, And Other IRS Documents?—PART II*, FED. TAXES WKLY ALERT Art. 16, (Thomson Reuters, New York, N.Y.), Apr. 24, 2014 (West 2014).

144. Song, *supra* note 70.

145. *See* IRS Ruling, *supra* note 24.

146. *See* Song, *supra* note 70.

international companies such as TransCanada take advantage of a loophole to become free riders by potentially receiving aid from the federally mandated fund that other similarly situated oil companies have to finance. Currently, there are thirty oil companies importing tar sands oil into the United States utilizing the loophole to avoid paying the per-barrel excise tax into the OSLTF.<sup>147</sup> Thus, if the loophole is closed, there is potential to extract substantial funds from companies that currently evade the excise tax.

#### B. THE DISCREPANCY BETWEEN THE TAX CODE AND THE FUND IS INEQUITABLE

The scope of oil spills that trigger a response from the OSLTF under the OPA includes spills from tar sands crude oil, which is distinguishable from the IRS's scope of what is included within the definition of crude oil. As compared to the IRC definition that was discussed previously, the OPA's definition of oil is "oil of any kind or in any form."<sup>148</sup> Therefore, tar sands derived crude oil certainly fits within the OPA definition of oil for the use of OSLTF funds, but does not meet the definition of crude oil in the context of the OSLTF excise tax.<sup>149</sup> This makes the OPA's definition of crude oil irrationally and unfairly broader than the IRS's definition of crude oil, despite the IRS's interpretation being directly responsible for financing the OSLTF.<sup>150</sup>

As a result, the costs of oil spills from tar sands are covered and will trigger a unilateral response by the OSLTF, but transporters of tar sands oil are not subject to the corresponding excise tax.<sup>151</sup> Should the Keystone XL pipeline be approved under current law, this illogical discrepancy means TransCanada will receive the potential benefits of the OPA in the event their pipeline spills without having to pay, making them free riders. According to attorney Anthony Swift of NRDC, the current discrepancy allows tar sands products to place an "inordinate strain" on a fund to which they are not even contributing.<sup>152</sup> Therefore, the resulting problem is that the companies that are responsible for a spill do not have to pay the tax that funds the restoration process as more tar sands are coming into the United States and the United States government is unfairly accountable for cleaning up the spill.

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147. Sputnik, *supra* note 127.

148. 33 U.S.C. § 2701(23) (2010).

149. RAMSEUR, *supra* note 72, at 10.

150. *See id.* at 9.

151. When InsideClimate News, a Pulitzer Prize winner for National Reporting, contacted three pipelines including TransCanada about possible taxation on tar sands imports into the United States, a spokesman from TransCanada responded, "Questions about tax policy should be directed to tar sands refiners, producers, or the IRS." Song, *supra* note 70.

152. Elana Schor, *IRS Exempts Most Oil Sands Crude from Spill Cleanup Tax*, E&E PUBLISHING: E&E DAILY (Feb. 8, 2012), <http://www.eenews.net/stories/1059959621>.

C. THE OUTDATED TAX EXEMPTION SHOULD BE AMENDED TO EFFECTIVELY  
COVER THE MODERN OIL MARKET

The 1980 tax code that did not include tar sands within its definition of crude oil was constructed in a time period that is incongruous with today's oil industry. At the time the definition of "crude oil" was decided in 1980, the United States' deposits of tar sands were not extracted on a commercial scale for energy purposes.<sup>153</sup> Canadian tar sands accounted for less than one percent of Canadian crude oil production in 1980.<sup>154</sup> Today, Canadian oil producers are using more and more diluted bitumen to facilitate transport.<sup>155</sup> Esa Ramasamy said the 1980 definition of crude oil that was used in the IRS ruling dates back to a time "when it wasn't financially feasible to produce tar sands oil on a large scale. The first sizeable shipments of [diluted bitumen] into the U.S. didn't occur until 1999."<sup>156</sup>

Now, the United States imports more than 1.2 million barrels of Canadian diluted bitumen and synthetic crude oil per day.<sup>157</sup> In contrast with 1980, today, "tar sands production is a huge industry," which Congress did not expect when the definition of crude oil was decided for tax purposes.<sup>158</sup> Due to the 2011 IRS memorandum, the exemption of tar sands that was used in the expired legislation of CERCLA has been interpreted onto current provisions of the IRC. Tar sands oil is now being used and transported through North America on a massive scale, and due to outdated legislation, the OSLTF is missing out on a large source of revenue that should be imposed on Canadian companies such as TransCanada.

IV. TAR SANDS OIL POSES MORE OF A THREAT TO THE FUND THAN  
CONVENTIONAL CRUDE OIL

A. THE PHYSICAL CHARACTERISTICS OF TAR SANDS MAKE IT MORE EXPENSIVE TO  
CLEAN

Cleaning an oil spill made up of tar sands is even more expensive, onerous, and equipment-intensive than an oil spill made up of conventional crude oil because of the characteristics of diluted bitumen. Compared to a conventional crude oil spill, a tar sands spill will require more money from the OSLTF to be used. In the event of a leak or spill, diluted bitumen is more likely to explode than conventional oil, and it contains toxins that are dangerous to humans and wildlife.<sup>159</sup> According to Stephen K. Hamilton, a professor of aquatic ecology at Michigan State University who advises the EPA, tar sands oil "is even harder to

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153. RAMSEUR, *supra* note 72, at 15.

154. *Id.*

155. *Id.*

156. Song, *supra* note 70.

157. *Id.*

158. *Id.*

159. See Cunningham, *supra* note 26, at 524.

clean up because of its tendency to stick to surfaces and its tendency to become submerged.”<sup>160</sup>

Tar sands spills are especially challenging and more expensive to clean in rivers and wetland environments. Senator Maria Cantwell, Chair of the Senate Subcommittee on Energy, stated that tar sands oil is the “dirtiest oil” produced today and a spill can be even more difficult to clean up than standard crude; the reasoning for the difficulty of the cleanup process is explained by the physical characteristics of diluted bitumen.<sup>161</sup> According to the Final Supplemental Environmental Statement by the Department of State’s Bureau of Oceans and International Environmental and Scientific Affairs, a large spill could have disastrous environmental effects.<sup>162</sup> Tar sands oil would infiltrate deep into the soil throughout a large area, and once the spill reaches the surface, the oil would flow and potentially affect an extensive amount of wildlife and vegetation.<sup>163</sup> Oil that contains diluted bitumen barely evaporates, allowing the oil to sink directly into the water.<sup>164</sup> As shown with previous large spills, sinking tar sands oil can be deposited in rivers or stream bottoms, which become a “continual source of oil release over time.”<sup>165</sup> Unlike lighter conventional crude oils that just float on top of the water, “the majority of diluted bitumen is heavier than water,” causing tar sands oil to “sink into the water column and wetland sediments.”<sup>166</sup> Considering Keystone XL pipeline’s majority usage of heavy tar sands oil and its proximity to many rivers and a major aquifer, oil could spread very quickly downstream, allowing the heavy oil to “collect on the shoreline rather than dissipate,” creating an extremely expensive cleanup process in the event of a spill.<sup>167</sup>

Removing the substance from river sediment, shores, or even rocks requires more aggressive cleanup operations than required by conventional spills.<sup>168</sup> Since diluted bitumen causes tar sands oil to sink rather than float, removing the spill becomes extremely difficult and elongates the process for the cleanup crew.<sup>169</sup> The higher density of diluted bitumen makes the EPA’s standard clean up equipment of booms and skimmers “ineffective.”<sup>170</sup> The complexity of the cleanup process made the tar sands spill that occurred in the Kalamazoo River in

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160. Dan Frosch, *Amid Pipeline Debate, Two Costly Cleanups Forever Change Towns*, N.Y. TIMES (Aug. 10, 2013), [http://www.nytimes.com/2013/08/11/us/amid-pipeline-debate-two-costly-cleanups-forever-change-towns.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2013/08/11/us/amid-pipeline-debate-two-costly-cleanups-forever-change-towns.html?pagewanted=all&_r=1).

161. See Sputnik, *supra* note 127.

162. GENEVIEVE WALKER, U.S. DEP’T OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone XL PROJECT EXECUTIVE SUMMARY 18-19 (2014).

163. *Id.*

164. PLAINS JUSTICE, *supra* note 17, at 7.

165. WALKER, *supra* note 162, at 19.

166. JOINT REPORT, *supra* note 4, at 7; Song, *supra* note 70.

167. See PLAINS JUSTICE, *supra* note 17, at 47.

168. JOINT REPORT, *supra* note 4, at 7.

169. Song, *supra* note 70.

170. JOINT REPORT, *supra* note 4 at 7.

Michigan in 2010 the “most expensive oil pipeline spill in U.S. history.”<sup>171</sup> Although tar sands oil is not taxed, its physical characteristics have proven to make it more difficult to remove after a spill, requiring more money to clean up than conventional oil.

#### B. PIPELINES THAT TRANSPORT TAR SANDS ARE MORE PRONE TO OIL SPILLS

Tar sands oil is refined and is otherwise very similar to other crude oil that is taxed by the OSLTF, but it is likely more dangerous and corrosive than regular oil, which will reduce the lifespan of the pipeline and inevitably lead to an increased likelihood of leaks. In fact, due to the corrosive nature of tar sands oil, transporting it may increase the probability of an oil spill in a pipeline. Many companies in the oil industry, such as TransCanada, dispute the fact that diluted bitumen, which makes up tar sands oil, is more corrosive than conventional crude oil.<sup>172</sup> But there are many sources and evidence that indicate otherwise. For example, the National Wildlife Federation concluded that diluted bitumen is “acidic, corrosive, toxic, and so thick that it requires high pressure and heat to move through the pipelines,” posing greater risks of corrosion.<sup>173</sup> Diluted bitumen also contains “fifteen to twenty times higher acid concentrations than conventional crudes and five to ten times as much sulfur as conventional crudes, while being up to seventy times more viscous than conventional crudes.”<sup>174</sup> Many environmental groups are concerned that transporting diluted bitumen poses “significant risks of pipeline leaks or ruptures due to corrosion.”<sup>175</sup>

Corrosion is the main cause of spills in Alberta’s crude oil pipelines, which transport a much higher proportion of diluted bitumen than the United States, accounting for 38% of the total incidents.<sup>176</sup> As evidentiary support, the Alberta pipeline system has had approximately “sixteen times as many spills due to internal corrosion as the U.S. system.”<sup>177</sup> In a span of two weeks in the spring of 2011, the TransCanada Keystone pipeline spilled over 20,000 gallons of tar sands oil in the Dakotas while another leaked 1.2 million gallons in Alberta.<sup>178</sup> This excessive rate of pipeline spills is strong evidence that the corrosive nature of diluted bitumen causes more pipeline spills than other crude oils. The sheer length of the Keystone pipeline—over 2,000 miles—combined with its corrosive

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171. Song, *supra* note 70.

172. *Id.*

173. Cunningham, *supra* note 26, at 523.

174. JOINT REPORT, *supra* note 4, at 6.

175. Cunningham, *supra* note 26, at 523-24.

176. GENEVIEVE WALKER, U.S. DEP’T OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone XL PROJECT VOLUME III §§ 4.13-.24 (2014).

177. JOINT REPORT, *supra* note 4, at 3.

178. Josh Mogergerman, *Uhhh, About Those Pipeline Safety Claims: Bad Week for Canadian Oilies*, NRDC: SWITCHBOARD (May 9, 2011), [http://switchboard.nrdc.org/blogs/jmogerman/uhhh\\_about\\_those\\_pipeline\\_safe.html](http://switchboard.nrdc.org/blogs/jmogerman/uhhh_about_those_pipeline_safe.html).

nature may also increase the potential for oil spills and leaks.<sup>179</sup>

When it comes to taxes, oil companies like TransCanada get to claim that tar sands oil is not like crude oil, but when “it comes to the safety of moving tar sands in pipelines, they say it’s just like crude oil.”<sup>180</sup> Given the likely danger and toxicity of tar sands compared to conventional crude oil, it is irrational that this type of oil would be exempt from a fund whose function is to respond to both conventional and tar sands oil spills. As large corporations such as TransCanada continue to be exempt, and tar sands oil becomes a larger percentage of the oil transported in the United States, the exemption will only minimize the availability of funds to aid the restoration and recovery process of inevitable oil spills. The corrosive nature of tar sands oil and its proneness to pipeline spills means the OSLTF is vulnerable to a greater risk of not being able to deliver a quick, efficient response to dangerous spills.

#### V. THE OSLTF LOSES SUBSTANTIAL AND NECESSARY REVENUE FROM THE EXEMPTION OF TAR SANDS

##### A. THE OSLTF NEEDS FUNDS TO MAINTAIN ITS BALANCE

Since the cost of an oil-spill cleanup can be exponentially expensive, it is essential for the OSLTF to maintain an appropriate balance. For the fiscal year 2015, the beginning balance in the OSLTF was about \$3.9 billion.<sup>181</sup> The Secretary of the Treasury is required by 26 U.S.C. § 9602(a) to submit the financial condition and results of operations of the fund during the past fiscal year and those expected during the next five fiscal years to Congress.<sup>182</sup> Oddly, the “Estimated Expenses” for each year after 2015 is only \$197 million, despite expenses in 2014 reaching over \$400 million and the estimated expense for 2015 reaching \$578 million.<sup>183</sup> Although there seems to be enough money currently in the fund to respond to a large oil spill, the \$1 billion cap per incident will play an enormous factor on the availability of funds for an emergency response.<sup>184</sup>

Much of the funds in the OSLTF are currently being used to pay for massive oil spills stemming from the BP *Deepwater Horizon* spill and the tar sands spill in Michigan in 2010. The *Deepwater Horizon* spill released five million barrels into the Gulf of Mexico, making it the largest oil spill in American history, and led to the nation’s largest oil response.<sup>185</sup> The 2010 oil spill in Michigan resulted in

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179. O’Rourke, *supra* note 54, at 159.

180. Song, *supra* note 70.

181. OFFICE OF MGMT. AND BUDGET, FISCAL YEAR 2015 APPENDIX BUDGET OF THE U.S. GOV’T 540 (2014).

182. 26 U.S.C. § 9602(a) (2015).

183. U.S. DEP’T OF THE TREASURY, TREASURY BULLETIN, TRUST FUNDS, at 108.

184. Figure 2 of the Congressional Research Service report shows a steady increase in the balance of funds over the last six years. See Ramseur, *supra* note 72, at 7.

185. U.S. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2015 REVENUE PROPOSALS 187 (2014) [hereinafter GENERAL EXPLANATIONS].

850,000 gallons of diluted bitumen leaking into the Kalamazoo River.<sup>186</sup> As of 2014, the Coast Guard billed BP for \$716 million used from the fund.<sup>187</sup> As of 2012, approximately \$35 million had been obligated from the OSLTF with respect to the Michigan spill.<sup>188</sup> These incidents reinforced the need to maintain a significant balance to respond to such severe oil spills that have extensive environmental ramifications and result in a plethora of damages being filed from surrounding residents.<sup>189</sup>

#### B. THE OSLTF MISSES OUT ON SUBSTANTIAL REVENUE FROM TAR SANDS COMPANIES

Due to the exemption, the OSLTF is unable to realize millions of dollars in excise taxes to help fund its operations. Over the last four years, the excise tax has generated, on average, \$485 million per year.<sup>190</sup> The balance allowed in the fund is limitless, so the government can collect as much revenue from taxes as possible from the importation of oil.<sup>191</sup> Thus, the tar sands exemption results in the OSLTF losing out on substantial potential revenue from companies that are transporting oil and circumventing the excise tax. In 2014, based on import data of Canadian tar sands, the tax revenue of the OSLTF would have increased by over \$40 million if tar sands were not exempt.<sup>192</sup> Over the last seven years, the United States has missed out on \$30 million in excise taxes on average if it is assumed Canadian tar sands companies are not paying any excise tax on tar sands oil.<sup>193</sup> The Congressional Budget Office (CBO) estimated that \$475 million in additional revenue would be raised between 2013 and 2018 if the exemption were eliminated from the OSLTF.<sup>194</sup>

Diluted bitumen, or tar sands, makes up 80 percent of Keystone's projected mix of oil. Therefore, the weighted average exemption of all oil in the Keystone system is 80 percent.<sup>195</sup> The proposed pipeline would transport up to 830,000 barrels of tar sands from Canada into the United States.<sup>196</sup> In the first year of

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186. RAMSEUR, *supra* note 72, at 2.

187. Song, *supra* note 70.

188. STAFF OF JOINT COMM. ON TAX'N, 113TH CONG., JCX-18-14, at 6 n. 23 (Comm. Print 2014).

189. *See* GENERAL EXPLANATIONS, *supra* note 185, at 187-188.

190. RAMSEUR, *supra* note 72, at 11.

191. *Id.* at 8.

192. *Id.* at 12.

193. *Id.* Tar sands companies are not forced into paying the excise tax. However, some companies may incidentally be paying taxes on some of the tar sands being transported because diluted bitumen may be mixed with conventional oil.

194. *See* CONG. BUDGET OFFICE, ESTIMATE OF THE BUDGETARY EFFECTS OF S. 953, THE STUDENT LOAN AFFORDABILITY ACT, AS INTRODUCED IN THE SENATE ON MAY 14, 2013 (2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/s953.pdf>.

195. *See* OIL CHANGE INTERNATIONAL, EARTH TRACK & NRDC, TAR SANDS EXEMPTION FROM OIL SPILL LIABILITY TRUST FUND § III (2012), available at [http://priceofoil.org/content/uploads/2012/05/Irrational\\_exemption\\_Calcs.pdf](http://priceofoil.org/content/uploads/2012/05/Irrational_exemption_Calcs.pdf).

196. Bridges, *supra* note 20.

operation, this would amount to about \$25 million in lost revenue, nearly doubling the amount of lost revenue for the OSLTF from the tar sands exemption compared to the previous seven years.<sup>197</sup> According to the CBO estimate, the current version of the Keystone XL pipeline bill will cost the United States “hundreds of millions of dollars” in lost tax revenue over its lifetime.<sup>198</sup>

In Obama’s 2015 fiscal year budget, he proposed to increase the per-barrel tax to 9 cents, and further increase the rate to 10 cents per barrel in 2017 for the OSLTF tax base.<sup>199</sup> Thus, the amount of potential additional revenue to be gained from taxing tar sands oil will only continue to grow as the excise tax per barrel increases and Keystone XL’s pipeline’s infrastructure develops to transport more barrels of crude oil per day.<sup>200</sup> If Congress amended the tax code to include tar sands within the definition of “oil,” the tax revenue that funds the OSLTF would increase, allowing the fund to have more financial leverage to respond to oil spills.

## VI. THE OSLTF COULD HAVE DISPROPORTIONATE LIABILITY FOR AN OIL SPILL FROM THE KEYSTONE XL PIPELINE

### A. TRANSCANADA’S LIMIT OF LIABILITY IN THE EVENT OF A SPILL CAN SHIFT LIABILITY TO THE OSLTF

Since TransCanada will likely receive a limit on its liability for an oil spill, the OSLTF could potentially be liable for up to \$1 billion for one incident from Keystone XL’s pipeline. As discussed previously, TransCanada’s limit on its liability is capped at \$350 million for a potential spill.<sup>201</sup> As further confirmation that TransCanada would receive a limit on its liability, the Final Supplemental EIS states, “If there is an accidental release that could affect surface water, no matter what the reason, [TransCanada] would be liable for all costs . . . up to a maximum of \$350,000,000 per OPA 90.”<sup>202</sup> Federal law imposes a liability limit of \$350 million for spills that occur onshore, with the rest being paid for through the use of the OSLTF, as long as the responsible party is not grossly negligent and does not violate a federal safety construction or operation regulation.<sup>203</sup>

The language in the statute makes it apparent that the “General Rule,” rather than the exception, is to limit responsible parties’ liability in the event of a

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197. To calculate \$25 million, the 830,000 barrels of tar sands transported per year is multiplied by the 8 cents per-barrel excise tax and by 365 for every day of the year. 830,000 multiplied by .08 multiplied by 365 is equal to about \$25 million.

198. Sputnik, *supra* note 127.

199. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015 ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT 166 (2014).

200. See KEYSTONE EIS EXECUTIVE SUMMARY, *supra* note 12, at 10.

201. See 33 U.S.C. § 2704 (2012).

202. WALKER, *supra* note 176, at 118.

203. See *id.*

spill.<sup>204</sup> The plain language of § 2704 supports the conclusion that when a responsible party seeks to limit its liability, only a *prima facie* showing of entitlement to the liability limit is required.<sup>205</sup> So the burden on TransCanada to limit its liability is low. Therefore, as long as TransCanada is not found grossly negligent, there is no willful misconduct, there is no violation of a federal regulation, and the company reports the incident in a timely manner, the general rule will apply, and it will receive the limit on its liability in a potential oil spill.<sup>206</sup>

The problem with the liability limit is that the OPA allows the responsible parties to seek reimbursement from the OSLTF if their costs and damages exceed their limit.<sup>207</sup> Assuming TransCanada satisfies the provisions in the statute, it would not be fully liable for the costs and damages resulting from a potential spill where total costs exceed \$350 million, and excess costs would likely have to be paid for out of the OSLTF if TransCanada decides not to pay for the rest. If TransCanada does receive its liability limit, the OSLTF could be responsible for up to \$1 billion for response costs and applicable damages above the \$350 million limit.<sup>208</sup> Although there seems to be enough money currently in the OSLTF to pay the restoration costs of a potential spill, TransCanada's liability limit means the excess cost of a cleanup would be forced upon other parties who paid into fund but are not responsible for the spill. If the spill exceeds the OSLTF cap of \$1 billion and TransCanada's personal liability of \$350 million, any additional cleanup costs would be paid out of the states and federal government's budget, which is essentially American taxpayer dollars.<sup>209</sup>

B. IT IS LIKELY FOR A TAR SANDS OIL SPILL TO REACH OR EXCEED THE LIMIT FOR  
BOTH TRANSCANADA AND THE OSLTF, ILLUSTRATING THE UNFAIRNESS OF THE  
EXEMPTION

It is certainly possible that an oil spill from the proposed pipeline could exceed \$1.35 billion. Although it is almost impossible to obtain a valid estimate of the potential total cost of a "worst-case" oil spill from the Keystone XL pipeline, comparing the cost of a recent tar sands oil spill will help to get a basic understanding of the potential costs of a Keystone XL spill based on the correlation between spill volume and damage costs.

The estimate of a worst-case spill is necessary to show the potential adverse impact on the OSLTF because of the excessive costs and the \$1 billion cap per incident. A project-specific Emergency Response Plan, which includes the

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204. See 33 U.S.C. § 2704(a) (2012).

205. See John M. Woods, *Going on Twenty Years: The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1329 (2009).

206. See 33 U.S.C. § 2704; see also 33 U.S.C. § 2704(c) (2012).

207. See generally 33 U.S.C. § 2708 (2012).

208. RAMSEUR, *supra* note 72, at 11; *The Oil Spill Liability Trust Fund*, *supra* note 73.

209. See RAMSEUR, *supra* note 72, at 11; see also WALKER, *supra* note 176, at 118.

worst-case discharge scenario, must be prepared and submitted to the PHMSA in accordance with federal regulations prior to initiating operation of the pipeline.<sup>210</sup> The Department of State's Final Supplemental EIS for the Keystone XL pipeline does not include a project-specific Emergency Response Plan, so the calculation of a worst-case discharge estimate from TransCanada is not yet available to the public.<sup>211</sup> However, Professor John Stansbury performed an independent analysis of a worst-case scenario from Keystone XL in response to some of the questionable methods and assumptions used in TransCanada's publicly available worst-case assessment of the original Keystone pipeline.<sup>212</sup>

Stansbury's analysis took into account spill frequency, vulnerable spill locations, and spill volume, which is calculated using pumping rate volume and shut-down time.<sup>213</sup> The primary difference between Stansbury's assumptions and TransCanada's assumptions were the expected time to shut down the pumps and valves on the pipeline after a spill is discovered.<sup>214</sup> TransCanada almost certainly used "flawed" assumptions to calculate its worst-case scenario spill due to an overly optimistic shut down time.<sup>215</sup> The PHMSA regulations require an estimate of the "maximum" shut down time, whereas TransCanada's 19-minute assumption is actually a minimum shut down time.<sup>216</sup> The 19-minute shutdown time does not adequately consider a "worst-case" scenario situation because of the difficulty for operators to "distinguish between an actual leak and other pressure situations" and other possible operator errors during use of an extremely complex pipeline control system.<sup>217</sup> Instead, Stansbury considers "confounding circumstances where a shut-down decision is not clear" and takes into account that the Keystone XL pipeline would cross extremely remote areas and verification of a leak could take many hours, so Stansbury assumes a shut-down time of two hours in his worst-case analysis.<sup>218</sup>

Stansbury estimated the "worst-case spill volumes" for the proposed Keystone XL pipeline in four of the most high-risk areas because a spill in these locations would result in the most severe impact to drinking water, wildlife, recreation, and inflict harm on hundreds of thousands of people.<sup>219</sup> Stansbury's conclusive estimates of the worst-case spills occurred at the Missouri River, the Yellowstone

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210. RAMSEUR, *supra* note 72, at 98; 49 C.F.R. § 194 (2015).

211. *Id.*

212. JOHN STANSBURY, ANALYSIS OF FREQUENCY, MAGNITUDE AND CONSEQUENCE OF WORST-CASE SPILLS FROM THE PROPOSED KEYSTONE XL PIPELINE 3 (2011). Professor John Stansbury is a professor of Environmental and Water Resources Engineering at the University of Nebraska. He performed this independent assessment so that it could be compared with the methods and assumptions used in a previous TransCanada analysis.

213. *See id.* at 1-9.

214. *Id.* at 1-2.

215. *Id.* at 11.

216. *See* PLAINS JUSTICE, *supra* note 17, at 35.

217. STANSBURY, *supra* note 212, at 7; PLAINS JUSTICE, *supra* note 17, at 2, 12.

218. STANSBURY, *supra* note 212, at 7.

219. *Id.* at 2.

River, the Platte River, and the Sandhills region of Nebraska. The estimated volumes were 5.16 million gallons, 6.95 million gallons, 5.92 million gallons, and 8 million gallons, respectively.<sup>220</sup>

In comparison, the Michigan Enbridge pipeline spilled 850,000 gallons of heavy tar sands oil into the Kalamazoo River on July 25, 2010, costing \$1.2 billion over the last four years, making it the most expensive on-land spill in United States history.<sup>221</sup> The spill required more than 2,000 personnel, over 150,000 feet of boom, 175 heavy spill response trucks, 43 boats, and 48 oil skimmers to clean.<sup>222</sup> The cleanup process is not even complete and federal or state penalties are not included in this cost.<sup>223</sup> This was the first major pipeline spill involving tar sands, giving us a basis of comparison of the potential expense from a tar sands spill caused by the Keystone XL pipeline.<sup>224</sup> Enbridge Inc., the operator of the pipeline, is a Canadian corporation based in Calgary, like TransCanada.<sup>225</sup>

At the time of the Enbridge spill, the pressure in the pipeline was 425 pounds per square inch, daily capacity of the pipeline was 300,000 barrels per day, and Enbridge assumed a shutdown time of only 19 minutes in their Emergency Response Plan.<sup>226</sup> However, the actual shutdown time took twelve hours because the control room mistook alarms of a pipe break for a drop in pressure.<sup>227</sup> Enbridge's twelve hour shutdown time despite its eight minute assumption provides evidence that TransCanada's shutdown estimate of nineteen minutes is likely inappropriate, and will be much longer, especially in a worst-case scenario situation due to unexpected complexities.<sup>228</sup> The proposed Keystone XL pipeline would likely pump almost twice as fast as the Enbridge pipeline, meaning that in the case of a leak or spill, the volume of oil will be released at a much faster rate.<sup>229</sup> Thus, the response time and costs could be "much worse than the spill" from the Enbridge pipeline.<sup>230</sup> The proposed Keystone XL pipeline is significantly larger in diameter than the Enbridge pipeline, so there would be a greater concentration of oil where a leak would occur.<sup>231</sup> Also, the "remoteness of the

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220. *Id.*

221. RAMSEUR, *supra* note 72, at 2.

222. PLAINS JUSTICE, *supra* note 17, at 1.

223. RAMSEUR, *supra* note 72, at 2.

224. *See* Hasemyer, *supra* note 1.

225. David Olive, *Enbridge, TransCanada Pipeline Safety is a Pipedream*, THE STAR (Mar. 31, 2015, 12:57 PM), [http://www.thestar.com/business/2012/07/13/enbridge\\_transcanada\\_pipeline\\_safety\\_is\\_a\\_pipedream\\_david\\_olive.html](http://www.thestar.com/business/2012/07/13/enbridge_transcanada_pipeline_safety_is_a_pipedream_david_olive.html).

226. PLAINS JUSTICE, *supra* note 17, at 7, 35.

227. STANSBURY, *supra* note 212, at 2.

228. *See id.*

229. U.S. DEP'T OF STATE, TRANSCANADA KEYSTONE PIPELINE, LP KEYSTONE XL PIPELINE PROJECT PRESIDENTIAL PERMIT APPLICATION EXHIBIT C 3 (2012) (showing that Keystone XL's maximum pressure will be 1,308 psig); PLAINS JUSTICE, *supra* note 17, at 13.

230. PLAINS JUSTICE, *supra* note 17, at 13.

231. *Id.* at 12.

northern segment of the Keystone XL pipeline route” would make it more difficult to react timely to a spill than the Enbridge spill.<sup>232</sup>

Stansbury’s estimates of a worst-case spill for the proposed Keystone XL pipeline ranged from 5 million gallons to 8 million gallons, depending on the location of the spill. This estimate is about five to eight times greater than the Enbridge pipeline discharge volume of 850,000 gallons.<sup>233</sup> Therefore, the proposed Keystone XL pipeline could have a shut down time of hours rather than minutes, would be transporting more oil at much faster rates, and would have an estimated possible spill volume in several locations that is far greater than the 850,000 gallons spilled from the Enbridge pipeline. After taking into account all of these factors, a potential tar sands oil spill from the Keystone XL pipeline could greatly exceed the \$1.2 billion that the spill from the Enbridge pipeline has cost so far.

Therefore, after accounting for TransCanada’s liability limit of \$350 million the total restoration costs of a severe oil spill caused by the Keystone XL pipeline may easily be greater than the \$1 billion per-incident cap that is placed on the OSLTF, which could force American tax dollars to be expended to cover the difference. In conclusion, the cost of a tar sands oil spill can be far greater than the potential liability from TransCanada, and possibly even larger than the allowed limit per incident from the OSLTF. Since TransCanada could receive such a disproportionate benefit from a spill, it only makes sense that it is forced to pay the excise tax as well.

#### VII. CONCLUSION: ELIMINATE THE DISCREPANCY TO FORCE TAR SANDS COMPANIES TO PAY INTO THE OSLTF

After considering the discrepancy between the tax code and the obligations of the OSLTF combined with the potential threat of a tar sands spill from the proposed Keystone XL pipeline, an amendment that closes this loophole is the only logical and effective solution. One such amendment, Senate Bill S. 953 from the 113<sup>th</sup> Congress, would have changed the definition of crude oil to include “any bitumen or bituminous mixture, and any oil derived from a bitumen or a bituminous mixture.”<sup>234</sup> But this amendment was not enacted.<sup>235</sup> Several members of the 114<sup>th</sup> Congress have put forth amendments to modify the definition of crude oil in the tax authority under Section 4612 to include tar sands oil.<sup>236</sup> Another proffered resolution from Congress is to increase

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232. *Id.* at 13.

233. See STANSBURY, *supra* note 212, at 2.

234. CONG. BUDGET OFFICE, *supra* note 194.

235. See *id.*

236. RAMSEUR, *supra* note 72, at 14; Sputnik, *supra* note 128.

or even eliminate the cap on limit of liability on the individual companies.<sup>237</sup> This would ensure that oil companies are entirely liable for all damages that stem from an oil spill, rather than funds potentially being used from the federal government.<sup>238</sup> Eliminating or raising the liability might encourage oil companies to take on less risk and make sure all necessary cautionary measures are taken to avoid spills. However, altering or eliminating the limit might intrude on Congress's intent to incentivize oil companies to remain accountable and follow the proper guidelines and regulations following a spill. The fastest response to a spill is necessary to alleviate further damage to the environment and the surrounding citizens. Additionally, lifting the limit on liability would create a drastic financial liability issue for the oil industry.

There is also the possibility of a new IRS ruling that would overturn the TAM that ruled tar sands would be exempt from taxation. The text of the tax code made no reference to tar sands in particular, leaving the definition of crude oil ambiguous, so the decision was based on legislative history. Oil companies have relied heavily on this ruling, which established firm expectations within the industry. The IRS likely cannot alter its ruling on the same, unchanged provision simply due to foregone revenue from future pipelines because a TAM from the IRS interprets the law rather than making its decisions to achieve better policy. Precedent influences IRS rulings, so their interpretation of the tax code likely would not be reversed based on current politics. Legislative change is therefore necessary.

It is financially sensible and logical for Congress to eliminate the discrepancy between the OPA and the tax code, which creates a free rider and inequity problem between tar sands and non-tar sands oil companies. Although amendments proposed to the current Keystone XL bill would provide a temporary benefit by taxing TransCanada, the best solution consists of a permanent change in the tax code. Congresswoman Lois Capps, who offered the final amendment to the Keystone XL Pipeline Approval Act on the House Floor that was ultimately rejected, stated:

That is why we have the Oil Spill Liability Trust Fund, to ensure that the oil companies that create these messes also pay to clean them up. My common-sense amendment would have required TransCanada to certify that it will pay the same per-barrel fee for its tar sands oil as it does for regular crude, and I am disappointed it was not adopted.<sup>239</sup>

It is important to eliminate the discrepancy between the tax code and the OPA's definition of oil, which forces the OSLTF to respond to oil spills caused by tar

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237. See Office of U.S. Senator Robert Menendez, *supra* note 18.

238. *See id.*

239. Press Release, *supra* note 128.

sands companies but does not impose a tax on those same oil companies who are responsible for the spill to finance the fund. Congress should force TransCanada to pay into the OSLTF instead of allowing them to operate their pipeline tax-free and externalize the costs of an oil spill. Congress can easily accomplish this by changing the tax code to include within the definition of oil, “bitumen and bituminous mixtures.”<sup>240</sup>

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240. See IRS Ruling, *supra* note 24.