

Eminent Domain and Energy Infrastructure

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Uses of Eminent Domain (examples)

- Highways and roads (government)
- Economic development and redevelopment (government)
- Oil and gas pipelines (private)
- Electric transmission lines (private)

Kelo v. City of New London

549 U.S. 469 (2005)

- Court held 5-4 that a city's use of eminent domain for a redevelopment plan to "revitalize an economically distressed city" by creating jobs and increase tax revenues was a "public use" under the Fifth Amendment.
- Public backlash resulted in ½ the states amending state constitutions or enacting statutes to limit use of eminent domain for economic redevelopment.
- State law changes focused almost solely on *government* use of eminent domain; did not limit private party use of eminent domain previously defined as "public use" under state law




Two years later

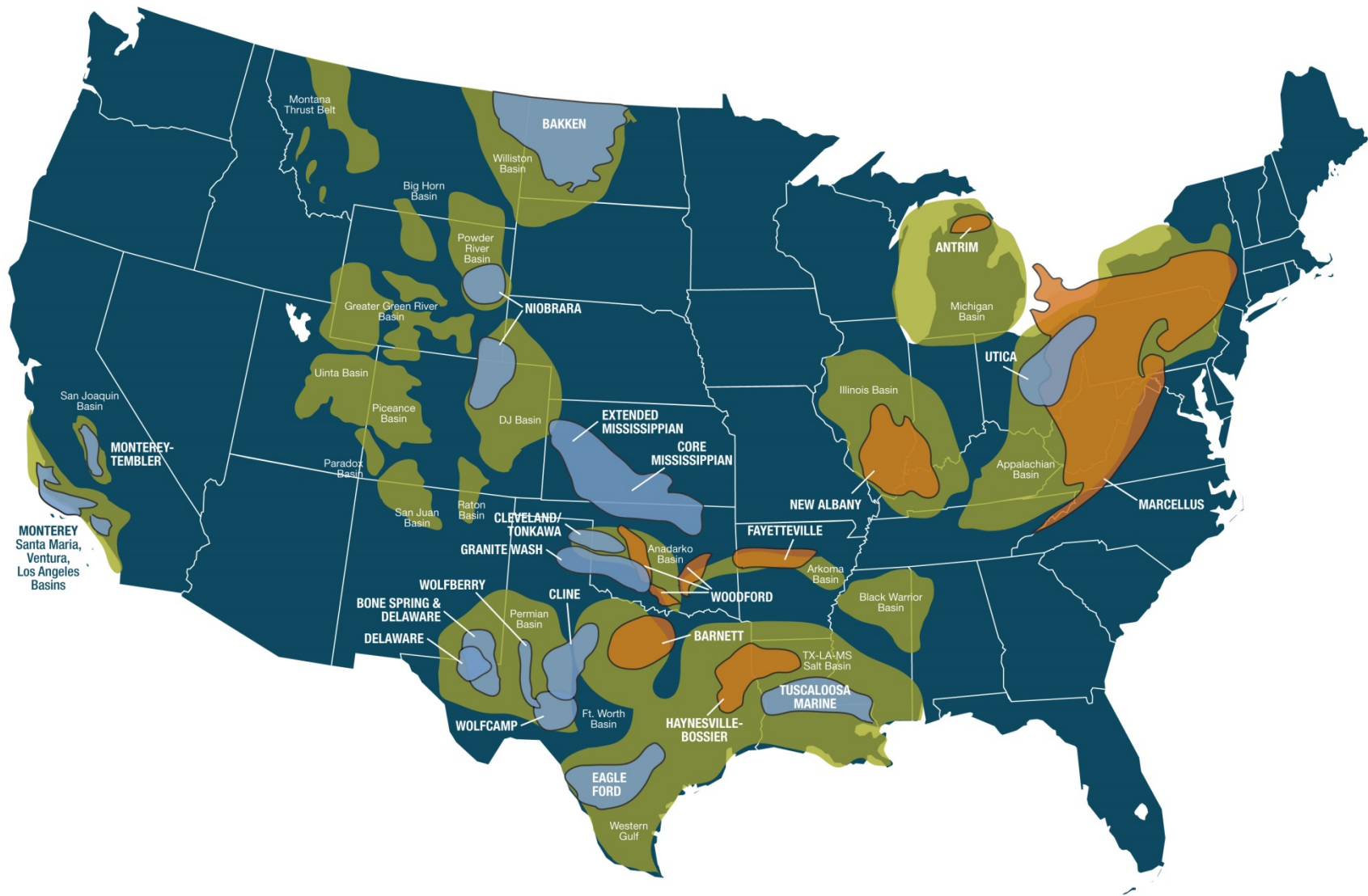
- Fracking revolution created new sources of U.S. oil and gas in new locations
- Massive expansion of wind energy
- Growing concerns over climate change and role of fossil fuels
- Need for new energy transport infrastructure for new energy resources in new locations



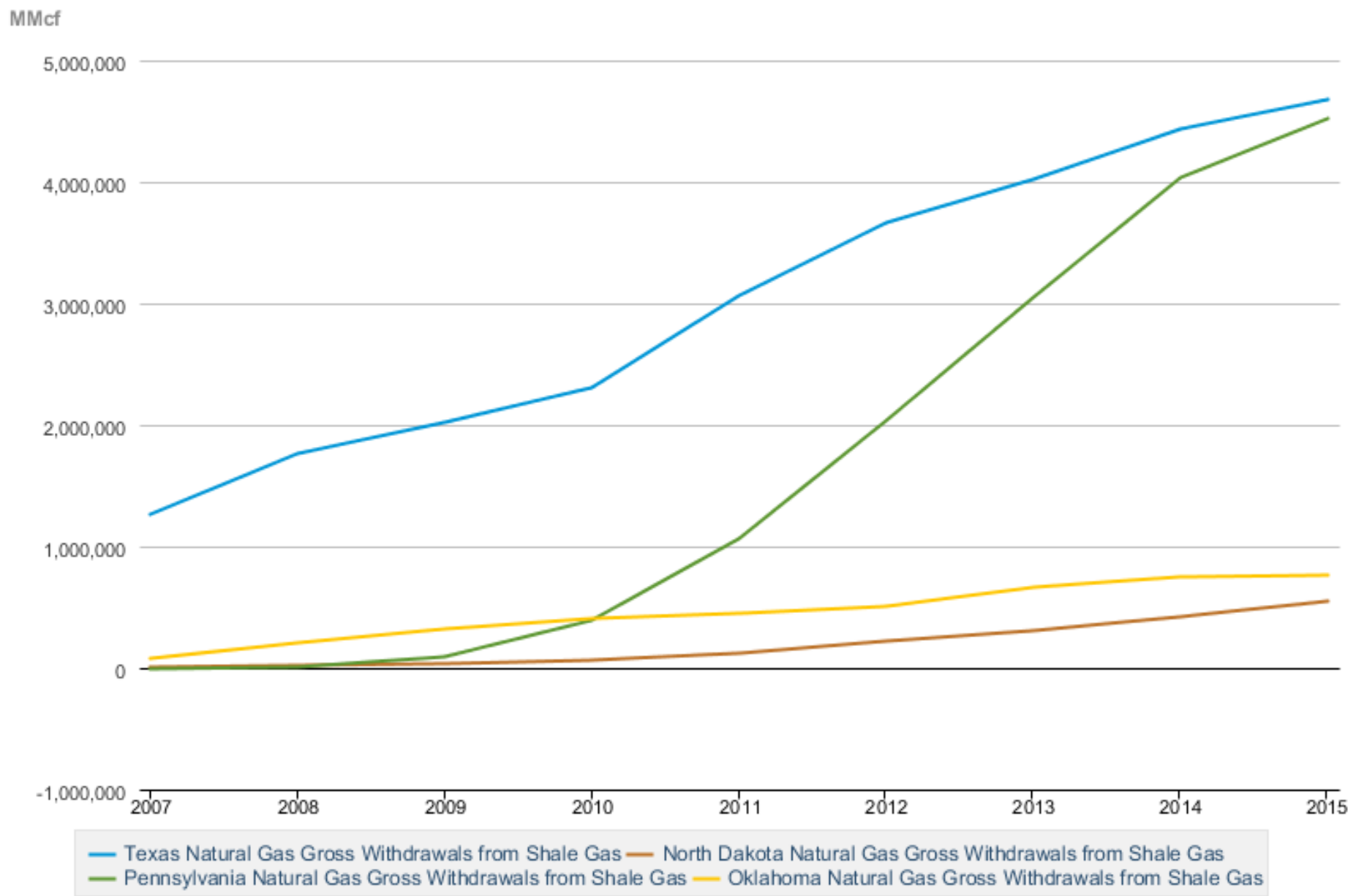
PACWEST

CONSULTING PARTNERS

-  BASINS
-  GAS PLAYS
-  OIL/LIQUIDS PLAYS



Natural Gas Gross Withdrawals and Production



Source: U.S. Energy Information Administration

Crude Oil Production

Mbbl

1,500,000

1,250,000

1,000,000

750,000

500,000

250,000

0

1985

1990

1995

2000

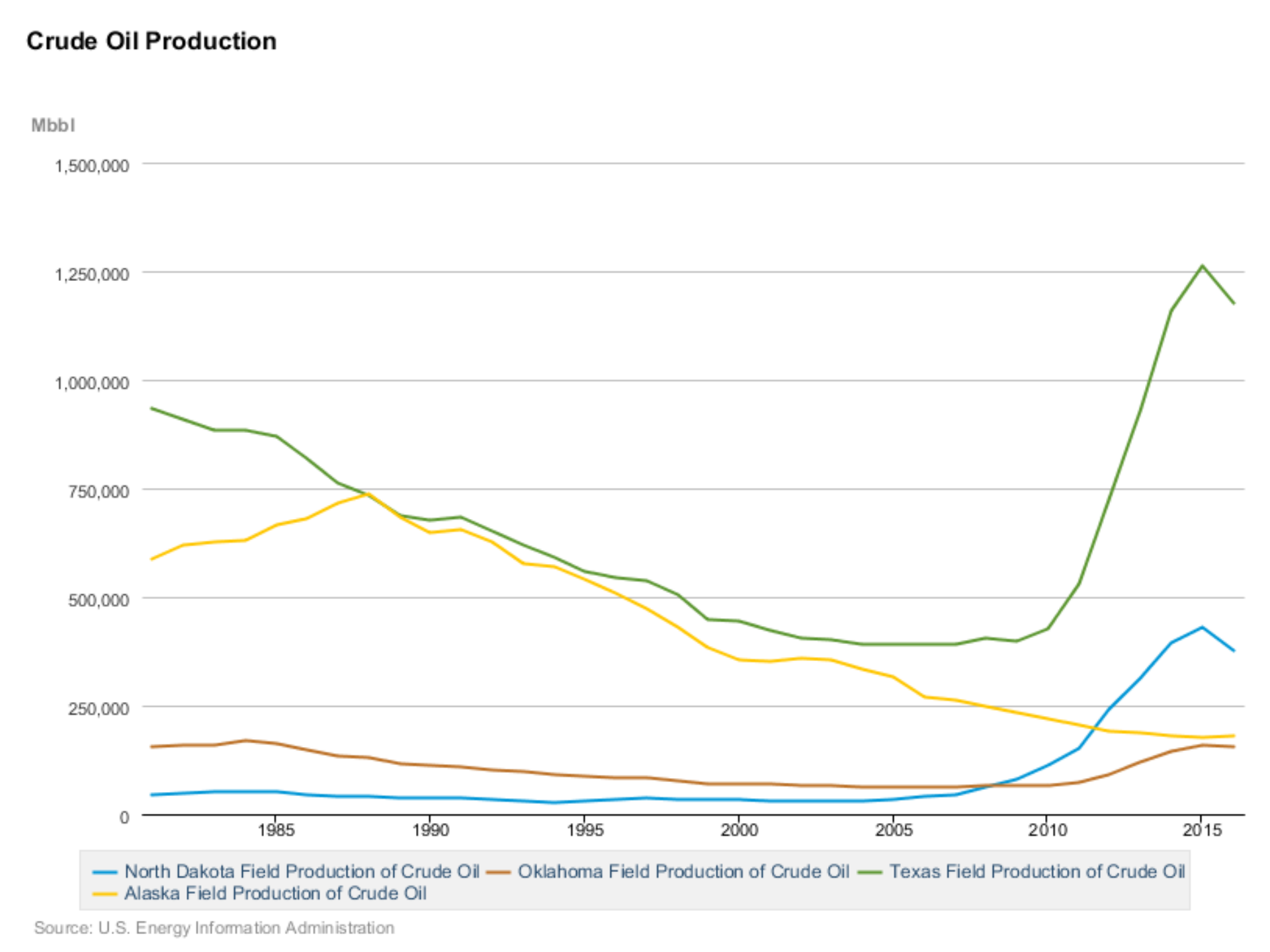
2005

2010

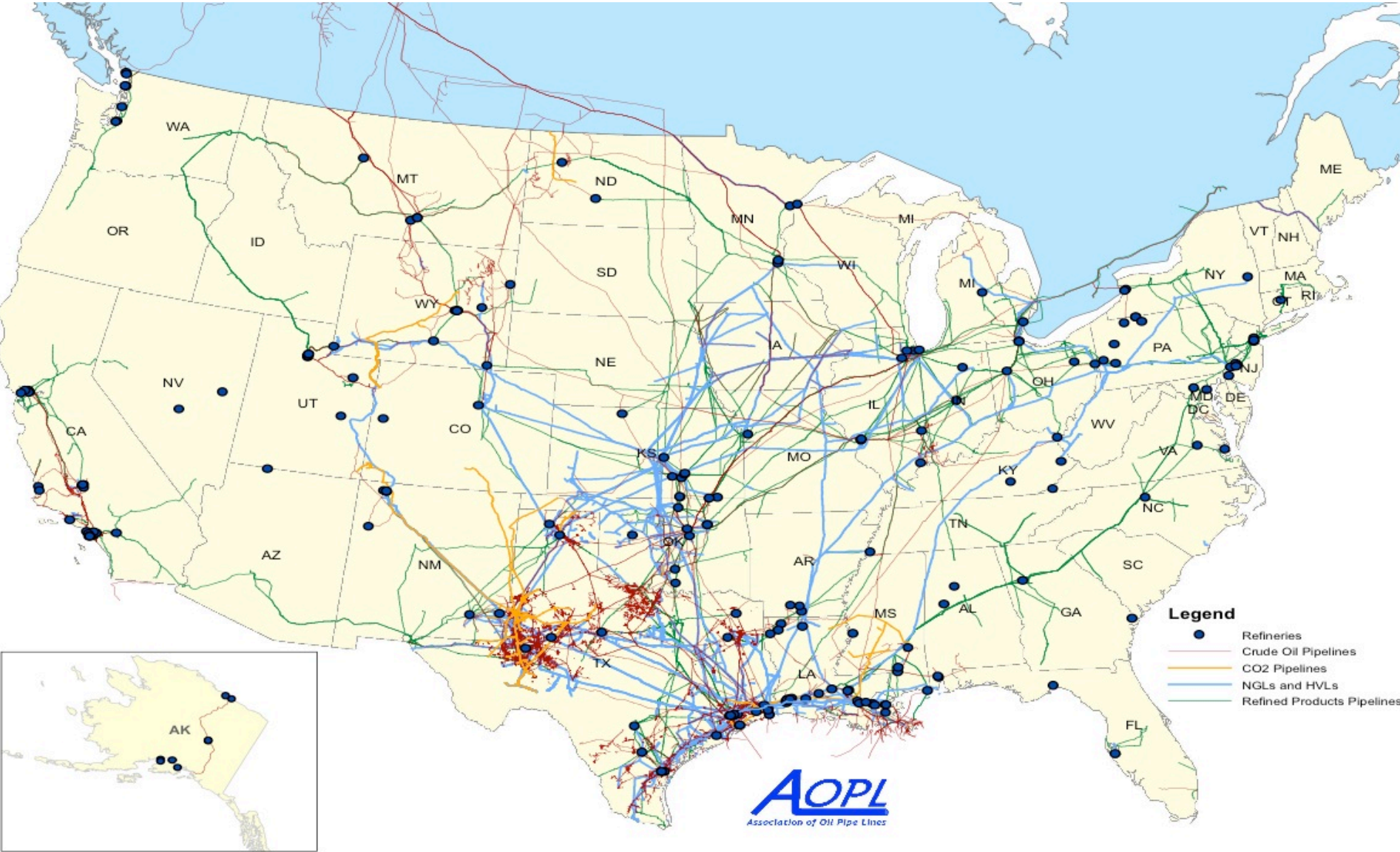
2015

— North Dakota Field Production of Crude Oil — Oklahoma Field Production of Crude Oil — Texas Field Production of Crude Oil
— Alaska Field Production of Crude Oil

Source: U.S. Energy Information Administration

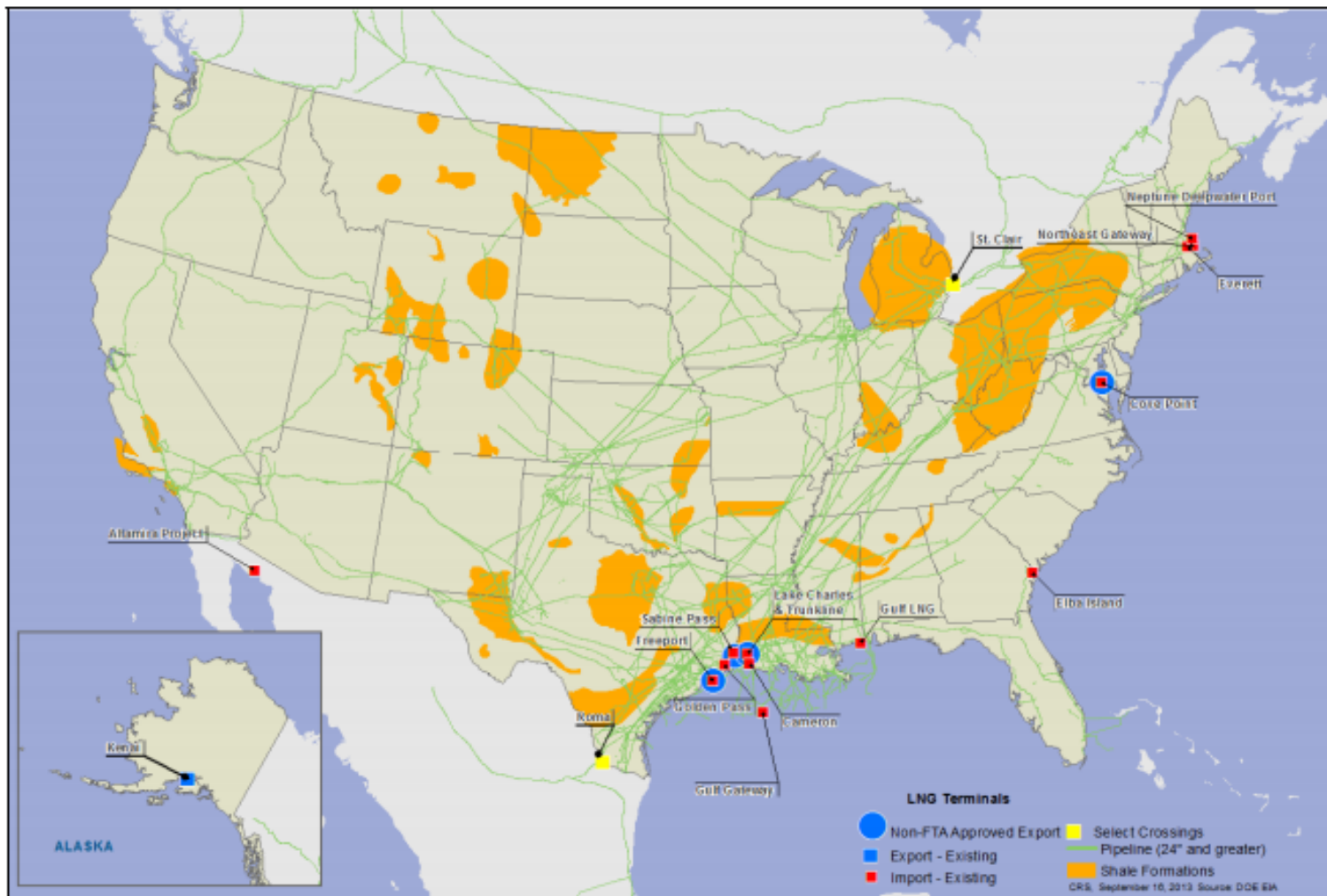


Crude Oil, Refined Products, and CO2 Pipelines



Source: Petroleum Geographics Corporation 2012

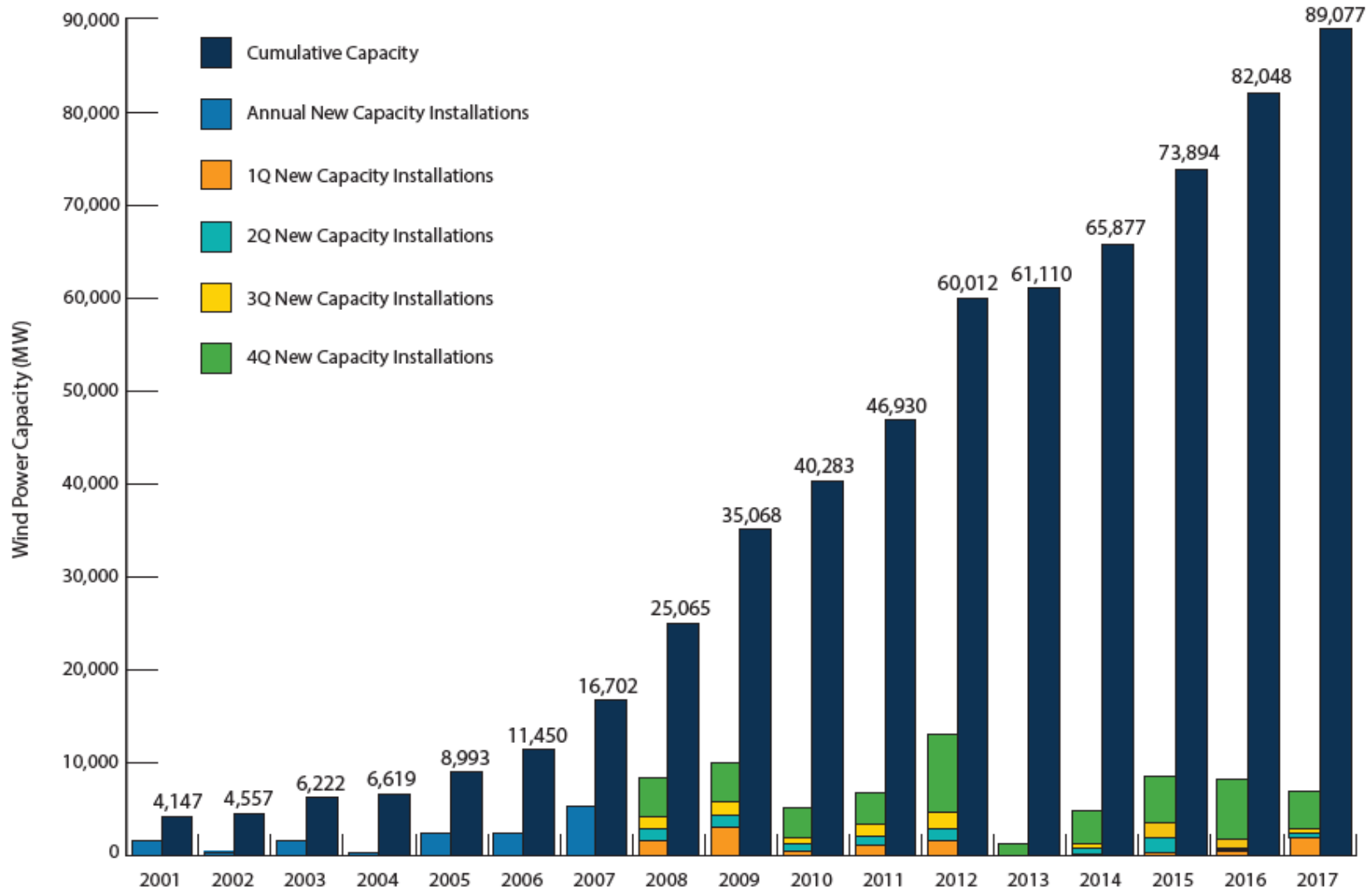
Figure A-I. Select U.S. Natural Gas Import and Export Infrastructure



Source: Compiled by CRS from EIA sources.

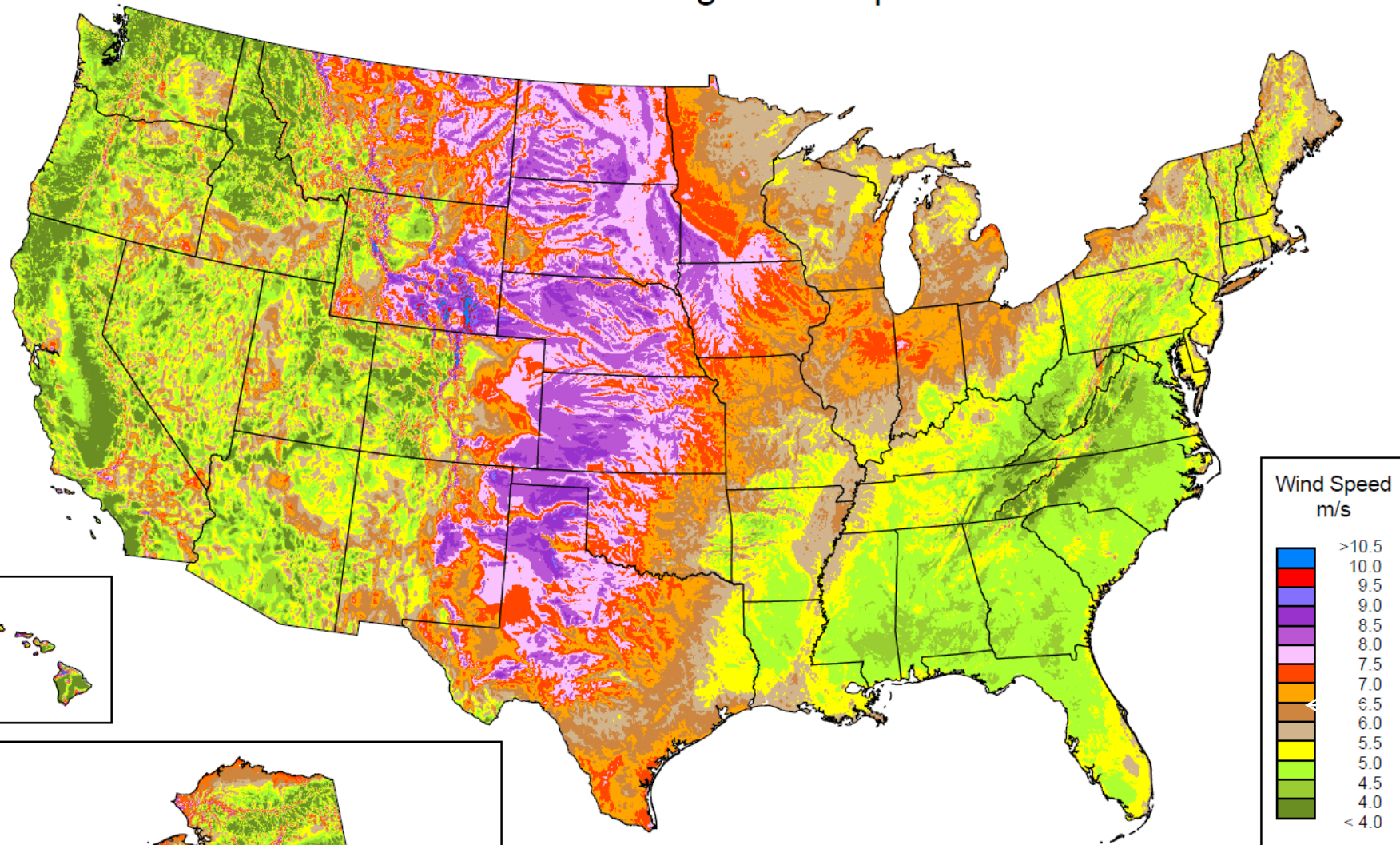
Notes: Hawaii is not shown on this map because it has very limited natural gas infrastructure.

U.S. New Annual and Cumulative Wind Power Capacity Growth



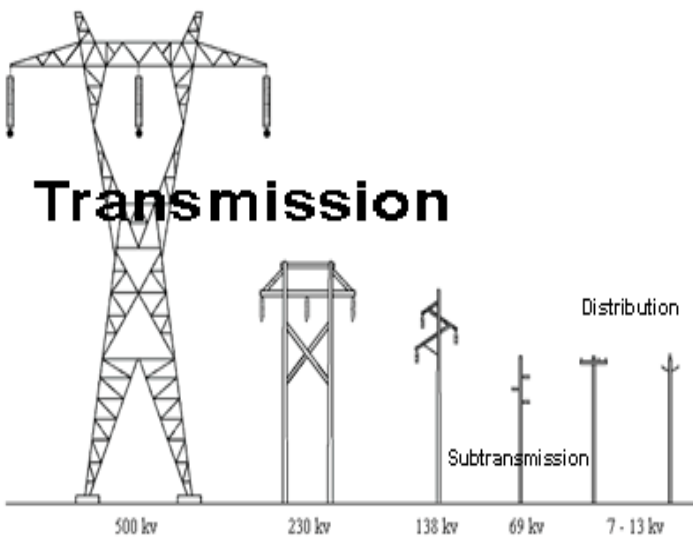
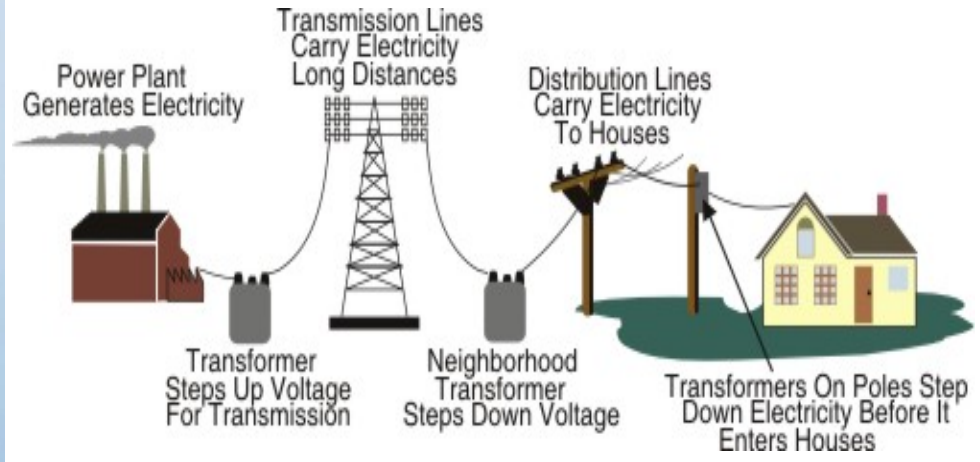
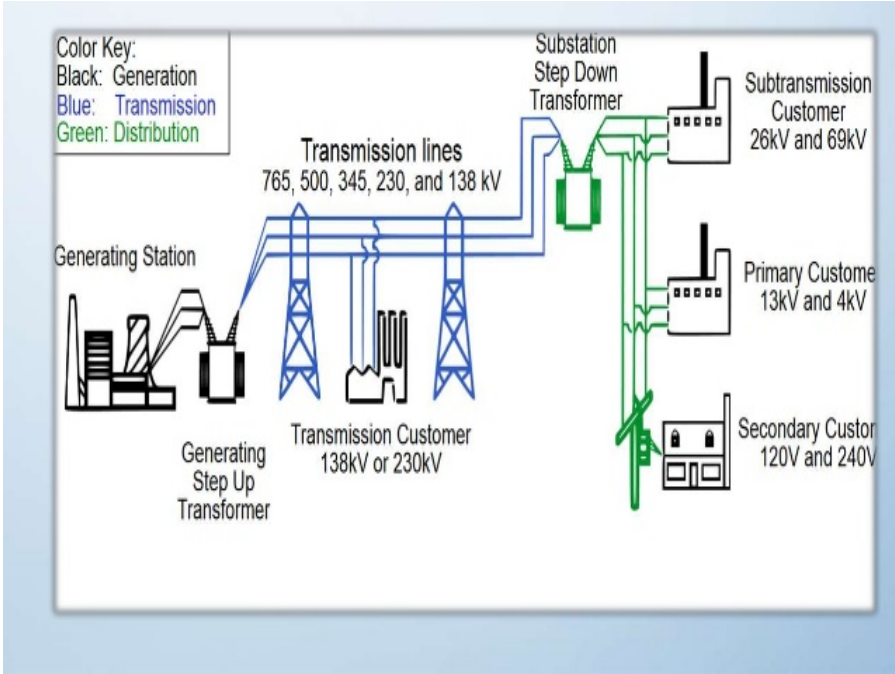
Note: Utility-scale wind capacity includes installations of wind turbines larger than 100-kW for the purpose of the AWEA U.S. Wind Industry Quarterly Market Reports. Annual capacity additions and cumulative capacity may not always add up due to decommissioned and repowered wind capacity. Wind capacity data for each year is continuously updated as information changes.

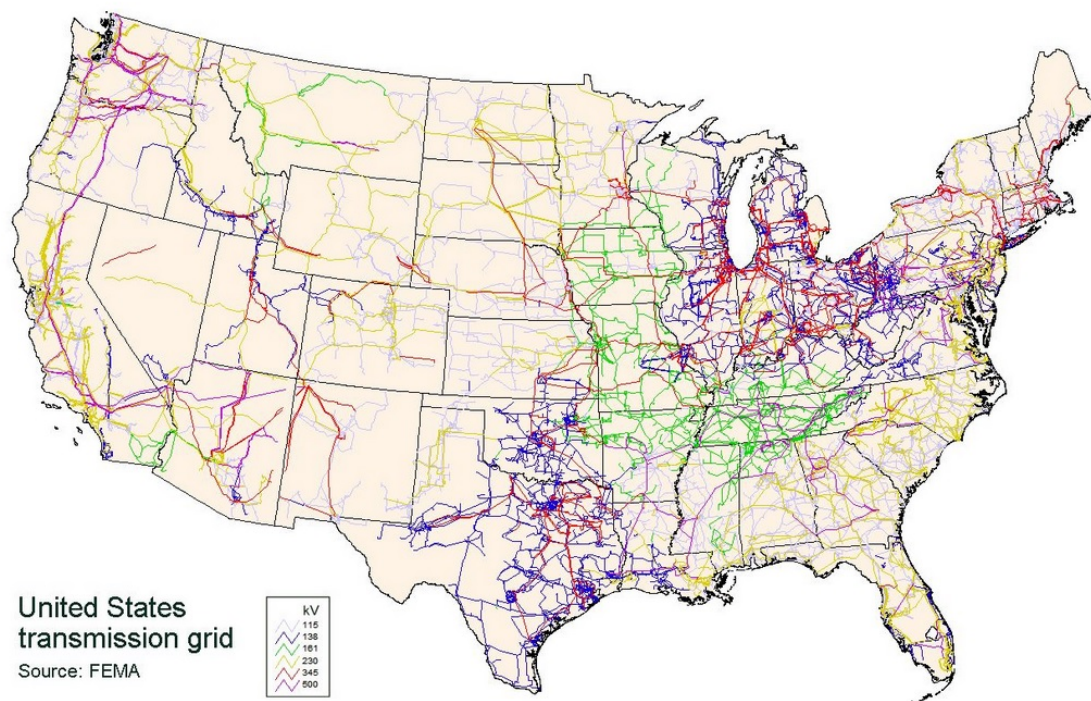
United States - Annual Average Wind Speed at 80 m



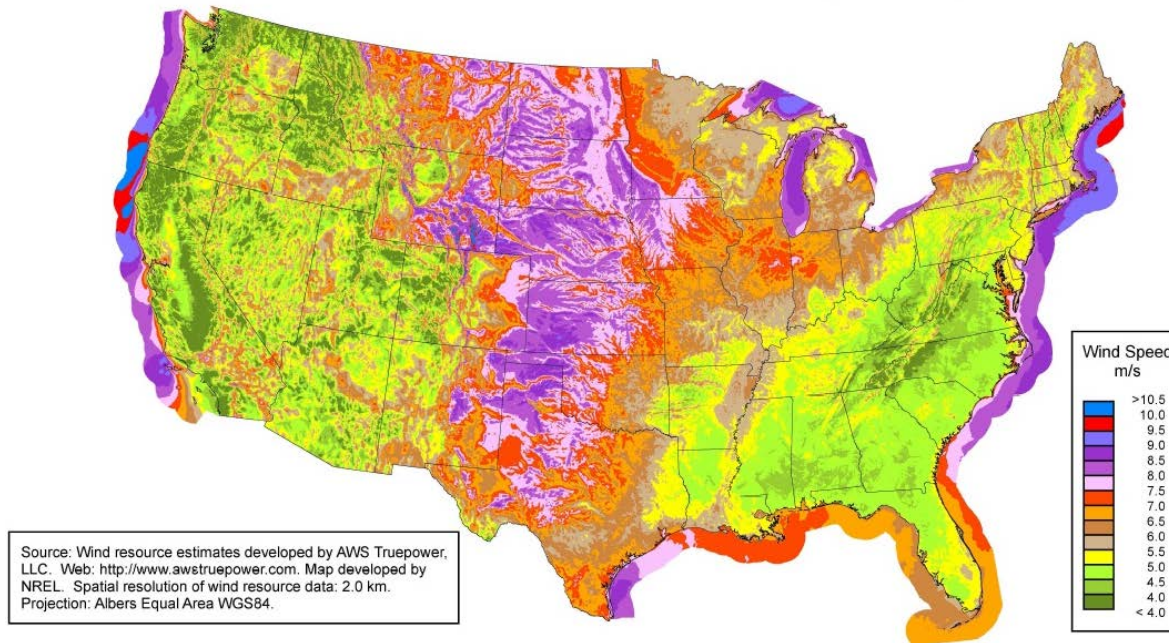
Source: Wind resource estimates developed by AWS Truepower, LLC for windNavigator®. Web: <http://www.windnavigator.com> | <http://www.awstruepower.com>. Spatial resolution of wind resource data: 2.5 km. Projection: Albers Equal Area WGS84.

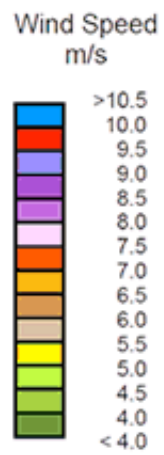
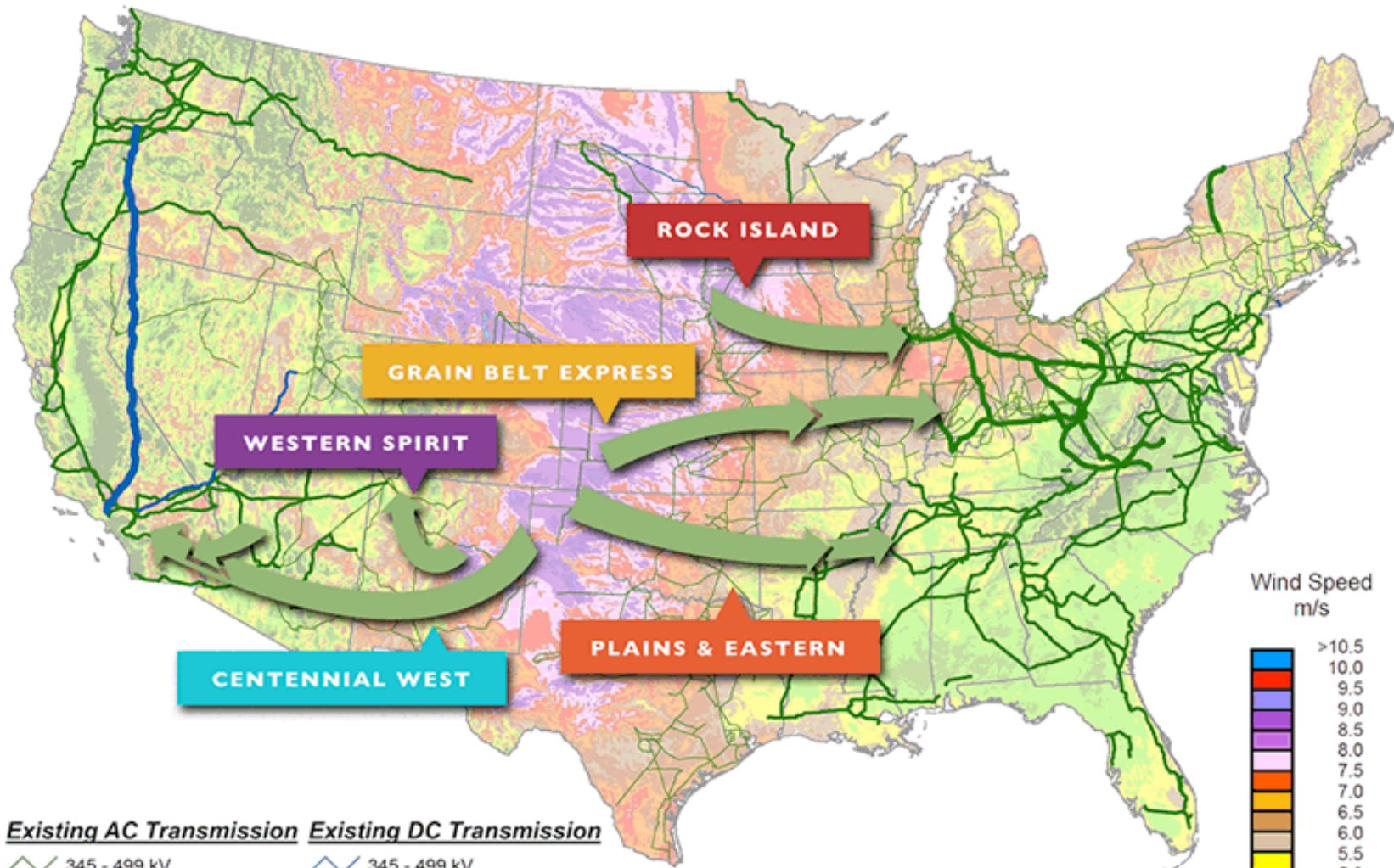
Electric Transmission Lines





United States - Land-Based and Offshore Annual Average Wind Speed at 80 m





Existing AC Transmission **Existing DC Transmission**

- | | |
|---|---|
|  345 - 499 kV |  345 - 499 kV |
|  500 - 699 kV |  500 - 699 kV |
|  700 - 799 kV |  700 - 799 kV |
|  800 - 1000 kV |  800 - 1000 kV |

Eminent Domain Laws for Energy Transport

- Interstate natural gas pipelines (federal since Natural Gas Act of 1938)
- Interstate oil pipelines (state)
- Interstate electric transmission lines (state)
- *Kelo* backlash in the states had not changed these laws

Recent Developments . . .

- New partnerships between environmental groups and property rights advocates to limit eminent domain for fossil fuel infrastructure (oil and gas pipelines)
- Public opposition over use of eminent domain for Keystone XL (oil), Dakota Access (oil), Palmetto (refined petroleum), Sabal Trail (natural gas), Mountain Valley (natural gas), Atlantic Coast (natural gas)
- State law moratoria on eminent domain for oil pipelines
- State court scrutiny of whether eminent domain for oil and gas projects are a “public use”

State Law Moratoria on Oil Pipeline Eminent Domain

- South Carolina (Act 304)
 - Three-year moratorium in 2016 on eminent domain for oil pipelines
 - Prompted by Palmetto Pipeline controversy
- Georgia (H.B. 413)
 - 2016 moratorium on eminent domain for oil pipelines expired in 2017 and replaced by H.B. 413 requiring state permit from EPD and certificate of public necessity from DOT to use eminent domain
 - Prompted by Palmetto Pipeline controversy

Federal Lawsuits Challenging Eminent Domain for Gas Pipelines

- Lawsuits in multiple federal district and appellate courts in 2017 challenging FERC grants of eminent domain for Mountain Valley and Atlantic Coast pipelines under Natural Gas Act and U.S. Constitution (citing *Kelo*)
- Some dismissed, some pending; confusion over which courts have jurisdiction

Judicial Scrutiny of Eminent Domain for Energy Companies

- Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016)
 - Legislature’s delegation of eminent domain authority to natural gas companies to take property for natural gas storage is not a public use under the Fifth Amendment or PA Constitution
 - Law benefitted private gas companies; a “mere incidental benefit” to the public is not enough to constitute a “public use” under *Kelo* or the PA Constitution

Judicial Scrutiny of Eminent Domain for Energy Companies (cont.)

- *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC*, 363 S.W.3d 192 (Tex. 2012)
 - Oil company could not use eminent domain for pipeline to transport CO₂ if pipeline used exclusively for its own private use
- *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners*, 510 S.W.3d 909 (Tex. 2017)
 - Evidence showing “reasonable probability” CO₂ pipeline would serve the public (through contracts with third parties to transport CO₂) sufficient to establish common carrier status and use eminent domain

Transmission Line Eminent Domain Controversies

- State public utility commission and court scrutiny of whether eminent domain is available for transmission lines built by “merchant” companies rather than public utilities
- Outdated state laws
- Is transporting renewable energy a “public use” for a state not importing or exporting the energy (i.e., a “pass through” state)?
- Barriers for Clean Line Energy Partners; Northern Pass Transmission Line; others

Reconsidering Eminent Domain for Energy Projects

- Eminent domain is an incentive to encourage private parties to build infrastructure
- States can determine what types of infrastructure they want to promote through various incentives
- Caution over limiting eminent domain for infrastructure broadly that may impede renewable energy development and other beneficial infrastructure/transportation projects
- Limit or eliminate eminent domain for projects devoted solely to transporting fossil fuels?