

Presidential Permits for Border Crossing Energy Facilities

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Summary

Controversy over the proposed Keystone XL pipeline project has focused attention on U.S. requirements for authorization to construct and operate pipelines and other energy infrastructure at international borders. For the most part, developers are required to obtain a Presidential Permit for border crossing facilities. The agency responsible for reviewing applications and issuing Presidential Permits varies depending on the type of facility. Oil and other hazardous liquids pipelines that cross borders are authorized by the U.S. Department of State. Natural gas pipeline border crossings are authorized by the Federal Energy Regulatory Commission. Electricity transmission facilities are authorized by the Department of Energy. CRS has identified over 100 operating or proposed oil, natural gas, and electric transmission facilities crossing the U.S.-Mexico or U.S.-Canada border.

The authority for federal agencies to review applications and issue Presidential Permits for oil pipelines comes from a series of executive orders. These executive orders have been upheld by the courts as legitimate exercises of the President's constitutional authority over foreign affairs as well as his authority as Commander in Chief. It is worth noting, however, that Congress has enacted statutes applying to cross-border natural gas and electric transmission facilities that require developers of such projects to apply for authorization from executive branch agencies.

In recent years, in the context of the Presidential Permit application for the proposed Keystone XL crude oil pipeline project, Congress has attempted to modify the permitting process for border crossing energy facilities. An Executive Memorandum issued on January 24, 2017, by President Trump inviting TransCanada Corp. to resubmit its Presidential Permit application and pledging expedited review of a resubmitted application for the Keystone XL border crossing facility appears likely to reduce any need for legislative action in order to authorize the border crossing for the Keystone XL pipeline. However, Congress remains interested in overhauling the existing permitting framework, which was created exclusively by the executive branch, in favor of a framework which would be established by statute.

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Introduction

The executive branch of the U.S. federal government has mandated for decades that developers of border crossing energy facilities must first obtain a Presidential Permit. Until recently, this administrative oversight was undertaken with little fanfare. However, controversy over the proposed Keystone XL oil pipeline—a project that would transport oil sands crude from Alberta, Canada, into the United States—has focused attention on federal permitting of energy infrastructure border crossings.¹ Generally, the construction, operation, and maintenance of facilities that cross the U.S.-Mexico or U.S.-Canada border must be authorized by the federal government through the issuance of a Presidential Permit in accordance with requirements set forth in a series of executive orders. This report discusses these executive orders, including the source of the executive branch authority to issue the orders, the standards set forth in the orders, and the projects approved pursuant to the orders.

Oil and Products Pipelines

The executive branch exercises permitting authority over the construction and operation of “pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products” and other products pursuant to a series of executive orders. This authority has been vested in the U.S. State Department since the promulgation of Executive Order 11423 in 1968.² Executive Order 13337 amended this authority and the procedures associated with the review, but did not substantially alter the exercise of authority or its delegation to the Secretary of State.³

Executive Order 11423 provided that, except with respect to cross-border permits for electric energy facilities, natural gas facilities, and submarine facilities:

The Secretary of State is hereby designated and empowered to receive all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required.⁴

Executive Order 13337 designates and empowers the Secretary of State to “receive all applications for Presidential Permits, as referred to in Executive Order 11423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels

¹ For more analysis of Keystone XL pipeline issues, see CRS Report R43787, *Keystone XL Pipeline: Overview and Recent Developments*, by (name redacted) et al.

² Exec. Order No. 11423, *Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States*, 33 *Federal Register* 11741 (August 20, 1968).

³ Exec. Order No. 13337, *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 *Federal Register* 25299 (May 5, 2004).

⁴ Exec. Order No. 11423, 33 *Federal Register* at 11741.

to or from a foreign country.”⁵ Executive Order 13337 further provides that after consideration of the application and comments received:

If the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary’s judgment require, and shall notify the officials required to be consulted ... that a permit be issued.⁶

Thus the Secretary of State is directed by the order to authorize those border crossing facilities that the Secretary has determined would “serve the national interest,” although the text of the Executive Order provides no further guidance on what is considered to “serve the national interest.” Agency documents for a specific permit have discussed the “national interest” determination stating, for example, that “determination of national interest involves consideration of many factors, including: energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.”⁷

One example of a national interest determination is the one made for Enbridge Energy’s Alberta Clipper⁸ crude oil pipeline, which was issued a Presidential Permit by the State Department in August 2009. The 36-inch-diameter pipeline provides crude oil transportation from the oil sands region of Alberta, Canada, to oil markets in the Midwestern United States, crossing the international border in North Dakota. The State Department’s national interest determination concluded that, for this particular project, the addition of crude oil pipeline capacity between Canada and the United States would advance a number of U.S. “strategic interests.”⁹

These included increasing the diversity of available supplies among the United States’ worldwide crude oil sources in a time of considerable political tension in other major oil producing countries and regions; shortening the transportation pathway for crude oil supplies; and increasing crude oil supplies from a major non-Organization of Petroleum Exporting Countries producer. Canada is a stable and reliable ally and trading partner of the United States, with which we have free trade agreements which augment the security of this energy supply.... Approval of the permit sends a positive economic signal, in a difficult economic period, about the future reliability and availability of a portion of United States’ energy imports, and in the immediate term, this shovel-ready project will provide construction jobs for workers in the United States....¹⁰

The State Department also considered the greenhouse gas emissions associated with the project, concluding that “the reduction of greenhouse gas emissions are best addressed through each country’s robust domestic policies and a strong international agreement.”¹¹

The State Department has considerable discretion with respect to making national interest determinations, so its conclusions for one project may not apply to another due to differences in project configuration, energy market conditions, technology, environmental conditions, and other important factors. Thus, Presidential Permit applications even for projects that appear similar are evaluated on a case-by-case basis by the agency and may realize different permit outcomes.

⁵ Exec. Order No. 13337, 69 *Federal Register* at 25299.

⁶ *Ibid.* at 25230.

⁷ U.S. Department of State, *Final Environmental Assessment for the Vantage Pipeline Project*, May, 2013, p. ES-1.

⁸ This pipeline is now referred to by Enbridge as “Line 67.”

⁹ U.S. Department of State, “Permit for Alberta Clipper Pipeline Issued,” Media note, August 20, 2009, <http://www.state.gov/r/pa/prs/ps/2009/aug/128164.htm>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

Natural Gas Pipelines and Electric Transmission

Executive Orders 11423 and 13337 explicitly exclude cross-border natural gas pipelines and electric energy facilities (among others) from their reach. Instead, permitting for these facilities is addressed in the Federal Power Act, the Natural Gas Act, and Executive Order 10485.¹² Executive Order 10485 designates and empowers the now-defunct Federal Power Commission:

- (1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.
- (2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.
- (3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.¹³

In many ways this authority resembles the authority granted to the State Department in Executive Orders 11423 and 13337. However, as mentioned above, those orders do not describe the source of the executive branch permitting authority granted by the orders. Judicial opinions have found that this permitting authority is a legitimate exercise of the President's "inherent constitutional authority to conduct foreign affairs."¹⁴ By contrast, Executive Order 10485 cites federal statutes for the permitting authority granted to the Department of Energy. The order states:

Section 202(e) of the Federal Power Act, as amended ... requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order from the Federal Power Commission authorizing it to do so... Section 3 of the Natural Gas Act ... requires any person desiring to export any natural gas from the United States to a foreign country or to import any natural gas from a foreign country to the United States to obtain an order from the Federal Power Commission authorizing it to do so.

Executive Order 10485 empowered the Federal Power Commission (FPC) to receive applications for and to issue Presidential Permits for cross-border electric facilities. The Department of Energy Organization Act of 1977¹⁵ eliminated the Federal Power Commission, transferring its functions to either the newly created Department of Energy (DOE) or the Federal Energy Regulatory Commission (FERC), an independent federal agency that regulates the interstate transmission of electricity, natural gas, and oil. Section 402(f) of the act specifically reserved import/export permitting functions for DOE rather than FERC. As a result, DOE took over the FPC's Presidential Permit authority for border crossing facilities under Executive Order 10485 pursuant

¹² Exec. Order No. 10485, *Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Electric Power and Natural Gas Facilities Located on the Borders of the United States*, 18 Federal Register 5397 (September 3, 1953).

¹³ Ibid.

¹⁴ *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009). This is discussed in further detail later in this report.

¹⁵ P.L. 95-91, 42 U.S.C. §4101 note.

to the act. The authority to issue Presidential Permits for natural gas pipeline border crossings was subsequently transferred to FERC in 2006 via DOE Delegation Order No. 00-004.00A.¹⁶

Modifications: When is a New or Amended Permit Needed?

As described above, Presidential Permits authorize specific border crossing facilities. Obviously a new facility requires a new Presidential Permit, and a significant overhaul of existing facilities would similarly require a new or amended Permit to authorize the changed facility.¹⁷ On the other hand, at some point a change to a facility is presumably small enough that no new permit would be required. Because every border crossing facility and proposed modification is different, there is no bright line rule about when a proposed modification is significant enough to require a new or amended Presidential Permit. For example, the Presidential Permit issued by the State Department in 2013 for the NOVA Chemicals natural gas liquids pipeline states “the permittee shall make no substantial change in the United States facilities, the location of the United States facilities, or in the operation authorized by this permit until such changes have been approved by the Secretary of State or the Secretary’s delegate.”¹⁸ Thus, whether a Presidential Permit must be amended ultimately will depend on both the nature of the modification and on the exact nature of the authorization found in the existing permit language. However, the relevant agencies have provided some helpful guidance on this subject.

FERC Review of Natural Gas Pipeline Modifications

FERC regulations governing authorization of facilities to construct, operate, or modify natural gas import/export facilities are set forth at 18 C.F.R. Part 153. Applications for Presidential Permits are subject to these regulatory requirements. 18 C.F.R. § 153.5 articulates “who should apply” for such FERC authorizations. The regulation provides that any person proposing to site, construct, or operate natural gas import or export facilities or to “amend an existing Commission authorization, including the modification of existing authorized facilities,” must apply for a permit.

State Department Review of Oil Pipeline Modifications

In February 2007, the State Department’s Bureau of Western Hemisphere Affairs—Office of Canadian Affairs published *Interpretive Guidance on Non-Pipeline Elements of E.O. 13337, Amending E.O. 11423*.¹⁹ As the title indicates, the document is not binding with respect to pipeline facilities, although dialogue with State Department staff indicated that the guidance found in the document would be applied in a similar manner to pipeline facility permitting decisions.²⁰ It may also be informative as applied to how other agencies may view the need for new or amended Presidential Permits for the facilities under their purview. According to the *Interpretive Guidance*, any “substantial modifications of existing border crossings” would fall

¹⁶ Available at <http://www.ferc.gov/industries/electric/indus-act/siting/doe-delegation.pdf>.

¹⁷ For further discussion of the agency review process for Presidential Permit applications, see CRS Report R44140, *Presidential Permit Review for Cross-Border Pipelines and Electric Transmission*, by (name redacted) and (name redacted).

¹⁸ U.S. Department of State, Presidential Permit Authorizing NOVA Chemicals, Inc. to Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, August 16, 2013, p. 1, <http://www.state.gov/documents/organization/213499.pdf>.

¹⁹ 72 *Federal Register* 8245 (February 23, 2007).

²⁰ David. Huitema, Attorney-Advisor, U.S. Department of State, e-mail correspondence, September 26, 2013.

under Executive Order 13337 and thus require a new or amended Presidential Permit. The *Interpretive Guidance* defines “substantial modifications” as

1. An expansion beyond the existing footprint or land port-of-entry inspection facility, including its grounds, approaches, and appurtenances, at an existing border crossing in such a way that the modification effectively constitutes a new piercing of the border;
2. a change in ownership of a border crossing that is not encompassed within or provided for under an applicable Presidential permit;
3. a permanent change in authorized conveyance (e.g., commercial traffic, passenger vehicles, pedestrians, etc.) not consistent with (a) What is stated in an applicable Presidential permit, or (b) current operations if a Presidential permit or other operating authority has not been established for the facility; or
4. any other modification that would render inaccurate the definition of covered U.S. facilities set forth in an applicable Presidential permit.²¹

The *Interpretive Guidance* also provides that projects should be placed in one of three categories: Red (both notification to the State Department and a new or amended permit is required), Yellow (notification required and a new permit may be required), and Green (neither notification nor a permit required). The “Red” category is described in language similar to that found in the document’s definition of a “substantial modification.” The “Yellow” category includes capacity changes, temporary changes due to construction projects and changes in responsibility for ownership, operations, or maintenance, among other things. The “Green” category includes regular maintenance and repair work, exterior changes to a facility within its existing footprint, systems changes (e.g., HVAC, electrical), and changes made at the request or direction of the State Department, among other changes.

Department of Energy Review of Electric Transmission Modifications

DOE regulations provide limited express guidance as to when an electric transmission facility modification is significant enough to trigger a requirement that a new or amended Presidential Permit be obtained. For example, DOE regulations note that a new permit application is required when the border crossing facility changes ownership.²² Recent permitting decisions, however, suggest that any modification that goes beyond regular maintenance and may have reliability impacts would likely require the party to obtain a new or amended Presidential Permit. For example, a new Presidential Permit issued to Energia Sierra Juarez by DOE in August 2012 provided in part that the permit should be amended if/when subsequent phases of a related wind generation project necessitate changes to the facility, including higher capacity transmission lines or other changes that could impact the reliability of the U.S. power grid.²³ Six months earlier, DOE issued a new Presidential Permit to ITC Transmission to account for transformer upgrades at an existing facility.²⁴

²¹ Ibid.

²² 10 C.F.R. §205.323(b).

²³ Presidential Permit available at http://energy.gov/sites/prod/files/PP-334%20ESJ_2.pdf.

²⁴ Presidential Permit available at <http://energy.gov/sites/prod/files/PP-230-4%20ITCTransmission.pdf>.

Executive Branch Authority: Constitutional Issues

The source of the executive branch's permitting authorities in the Executive Orders described above is not explicitly stated in all cases. Powers exercised by the executive branch are authorized by legislation or are inherent presidential powers based in the Constitution. Executive Order 11423 does not reference any statute or constitutional provision as the source of its authority, although it does state that "the proper conduct of foreign relations of the United States requires that executive permission be obtained for the construction and maintenance" of border crossing facilities.²⁵ Executive Order 13337 refers only to the "Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code."²⁷ 3 U.S.C. § 301 simply provides that the President is empowered to delegate authority to the head of any department or agency of the executive branch. Executive Order 10485 cites Section 202(e) of the Federal Power Act as a source of executive branch authority to permit cross-border electricity transmission facilities and Section 3 of the Natural Gas Act as a source of the executive branch authority to permit cross-border natural gas pipelines. It also states that "the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas."²⁶

Federal courts have addressed the legitimacy of cross-border permitting authority not explicitly granted by statute. In *Sisseton-Wahpeton Oyate v. U.S. Department of State*, the plaintiff tribes asked the court to suspend or revoke a presidential permit issued under Executive Order 13337 for the TransCanada Keystone Pipeline.²⁷ The plaintiffs claimed that the issuance of the national interest determination and the border crossing permit for the project violated NEPA and the Administrative Procedure Act (APA). The U.S. District Court for the District of South Dakota determined that even if the plaintiffs' injury could be redressed, "the President would be free to disregard the court's judgment," as the case concerned the President's "inherent constitutional authority to conduct foreign policy," as opposed to statutory authority granted to the President by Congress.²⁸ The court further found that even if the tribes had standing, the issuance of the Presidential Permit was a presidential action, not an agency action subject to judicial review under APA.²⁹ The court stated that the authority to regulate the cross-border pipeline lies with either Congress or the President.³⁰ The court found that "Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs."³¹

In *Sierra Club v. Clinton*,³² the plaintiff Sierra Club challenged the Secretary of State's 2009 decision to issue a permit authorizing the Alberta Clipper. The plaintiff claimed that issuance of the permit was unconstitutional because the President had no authority to issue the permits

²⁵ Exec. Order No. 11423, 33 *Federal Register* at 11741.

²⁶ Exec. Order No. 10485 18 *Federal Register* at 5397 (September 3, 1953).

²⁷ 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009). This Keystone pipeline project preceded the Keystone XL pipeline.

²⁸ *Id.* at 1078, 1078 n.5

²⁹ *Ibid.* at 1081-82.

³⁰ *Ibid.* at 1081.

³¹ *Ibid.*

³² 689 F. Supp. 2d 1147 (D. Minn. 2010).

referenced in Executive Order 13337.³³ The defendant responded that the authority to issue permits for these border crossing facilities “does not derive from a delegation of congressional authority ... but rather from the President’s constitutional authority over foreign affairs and his authority as Commander in Chief.”³⁴ The U.S. District Court for the District of Minnesota agreed, noting that the defendant’s assertion regarding the source of the President’s authority has been “well recognized” in a series of Attorney General opinions, as well as a 2009 judicial opinion.³⁵ The court also noted that these permits had been issued many times before and that “Congress has not attempted to exercise any exclusive authority over the permitting process. Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.”³⁶ Based on the historical recognition of the President’s authority to issue those permits and Congress’s implied approval through inaction, the court found the permit requirement for border facilities constitutional.

As the aforementioned cases show, courts have analyzed the President’s exercise of permitting authority and have held that it is a legitimate exercise of the President’s constitutional authority, and that it does not require legislative authorization. However, they have indicated that congressional inaction plays a role in validating this exercise of executive branch authority, suggesting that these roles could be amended through legislation should Congress choose to do so. During the Obama presidency, Congress considered various bills to amend the presidential permitting process generally,³⁷ or to authorize construction and operation of the Keystone XL border crossing facility.³⁸ The January 24, 2017, Executive Memorandum issued by President Trump and the expected permitting of the Keystone XL pipeline border crossing facility by the State Department in accordance with that Memorandum may supersede the need for the latter. However, Congress may still seek to overhaul the existing permitting framework, which was created entirely by the executive branch, in favor of a framework established by statute.³⁹

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³³ Ibid. at 1162.

³⁴ Ibid.

³⁵ Ibid. at 1163 (citing 38 U.S. Att’y Gen. 163 (1935); 30 U.S. Op. Att’y Gen. 217 (1913); 24 U.S. Op. Att’y Gen. 100 (1902); 22 Op. Att’y Gen. 408 (1899); and *Natural Resources Defense Council (NRDC) v. U.S. Department of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009)).

³⁶ Ibid.

³⁷ See, e.g., S. 1228, 114th Cong. (2015) (would have replaced the President Permit requirement with agency review and certification of border crossings subject to strict deadlines; H.R. 3301, 113th Cong. (2014) (similar to S. 1228, but also would have clarified that no certificate is necessary for modification of such facilities).

³⁸ See, e.g., S. 1, 114th Cong. (2015); H.R. 334, 113th Cong. (2013). Both of these bills would have immediately authorized the construction and operation of the Keystone XL pipeline’s border crossing facilities, superseding the Presidential Permit requirement.

³⁹ Note that the Department of Energy’s 2015 Quadrennial Energy Review recommended “further enhancing North American energy integration,” a goal that might be furthered by a streamlined permit review process for border crossing energy facilities. Department of Energy, *Quadrennial Energy Review: First Installment*, April 2015, at 6-13. Available at <https://energy.gov/epsa/downloads/quadrennial-energy-review-first-installment>.

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