

Keystone XL Pipeline: Permit Issues and Recent Developments

June 29, 2020

On May 25, 2020, TC Energy (previously named TransCanada) [announced](#) completion of the 1.4-mile segment of the Keystone XL Pipeline crossing the U.S. border from Canada into Montana. The border crossing was authorized under a 2019 [Presidential Permit](#) issued by President Trump, superseding a prior Presidential Permit issued by the U.S. State Department in 2017. Although TC Energy was able to construct this cross-border segment, a federal court [decision](#) on April 15, 2020, vacated and remanded the pipeline's permit from the U.S. Army Corps of Engineers (Corps) to cross waterways and wetlands in the United States. The decision effectively blocks construction of other pipeline segments, pending further Corps action or successful judicial appeal. An overall [decline in oil imports](#) from Canada due to Coronavirus Disease 2019 (COVID-19) also has reduced demand for oil pipeline transportation, at least temporarily. Notwithstanding these setbacks, TC Energy expects to eventually receive all necessary approvals and [intends to construct](#) the entire pipeline by 2023.

Keystone XL Pipeline Project

Keystone XL is intended to transport oil sands crude from western Canada, and shale oil from North Dakota and Montana, to a hub in Nebraska for further delivery to Gulf Coast refineries (**Figure 1**). The project is motivated by historically constrained oil pipeline capacity for Canadian exports, which has depressed [Western Canadian oil prices](#). Development of Keystone XL has been controversial. Pipeline proponents argue for increasing U.S. oil supplies from a stable ally, which they argue offers economic benefits, especially jobs. Opponents express concern about greenhouse gas emissions, continued U.S. dependency on fossil fuels, and the environmental risk of an oil release.

Figure I. Proposed Keystone XL Pipeline Route

Source: CRS, adapted from: U.S. Department of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, January 2014, p. 1.2-3; and *Draft Supplemental Environmental Impact Statement Keystone XL Mainline Alternative Route*, September 2018, p. S-2.

Permit Status and Related Litigation

A series of decisions by the U.S. District Court for the District of Montana in 2018 and early 2019 vacated the 2017 Presidential Permit on the grounds that its environmental review under the [National Environmental Policy Act \(NEPA\)](#) was inadequate, among other reasons. A November 2018 [decision](#) identified a number of shortcomings in the State Department’s NEPA compliance efforts and enjoined the government “from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities” until it addressed those shortcomings. However, in June 2019 the U.S. Court of Appeals for the 9th Circuit [lifted the injunction](#), agreeing with the assertions by the developer and the federal government that the President’s issuance of a new Presidential Permit, and concurrent revocation of the 2017 Permit, mooted the legal dispute over that earlier Permit.

In addition to a Presidential Permit, the Keystone XL project requires other federal agency consultations and approvals under various statutes for specific parts of the pipeline. These [approvals](#) include Corps permits under the [Clean Water Act](#) for construction at regulated water crossings and wetlands as well as rights-of-way granted to cross federal lands from the Bureau of Land Management (BLM). The 2020 decision—also by the U.S. District Court of Montana—vacated the Corps’ [Nationwide Permit 12 \(NWP-12\)](#) to cross U.S. waterways and wetlands due to insufficient consultation under the [Endangered Species Act \(ESA\)](#). The court required the Corps to complete the ESA consultation process prior to reissuing

NWP-12 and prohibited the Corps from authorizing dredge or fill activities under NWP-12 in the meantime. On June 15, 2020, the Corps [filed an application](#) for a stay pending appeal of this decision with the U.S. Court of Appeals for the 9th Circuit.

In addition to the NWP-12 litigation, project opponents have initiated [new litigation](#) challenging the approval of the Keystone XL rights-of-way on BLM lands and on Corps-managed lands in Montana around Fort Peck Dam. Among other things, the litigation challenges the agencies' NEPA compliance. The Trump Administration has asserted that the current Presidential Permit, itself, is not subject to NEPA because the President's action is not an agency action and, thus, not subject to the statute. Nonetheless, State Department officials completed a [Final Supplemental Environmental Impact Statement \(FSEIS\)](#) for the Keystone XL project in December 2019. Project opponents disagree with the subsequent adoption of the State Department's FSEIS by both the BLM and the Corps to comply with NEPA in approving their respective rights-of-way in 2020. If the Corps, BLM, or other federal approvals face continuing legal challenges or regulatory review, it could further affect the timing, cost, and route of the pipeline.

Project Economics

The Keystone XL Pipeline initially was proposed when U.S. [crude oil prices](#) exceeded \$100 per barrel. However, due to global oil market oversupply—including U.S. oil production growth and reduced demand due to COVID-19—prices have fallen below \$50 per barrel as of June 2020. This drop in oil prices has reduced the economic attractiveness of Canadian oil sands crude—which is costly to produce—and, consequently, has caused analysts to question the need for the Keystone XL Pipeline to move it. The pipeline also faces potential competition from the [Trans Mountain Pipeline Expansion](#), which would increase oil sands shipment capacity to Canada's west coast, and the [Enbridge Line 3 replacement](#), which would increase existing capacity to the U.S. Midwest. To help ensure Keystone XL's construction, the Alberta government [recently announced](#) a C\$1.5 billion equity investment in the pipeline to be followed by a C\$6 billion loan guarantee in 2021.

Presidential Permit Revocation

On May 18, 2020, the campaign of Democratic presidential candidate Joseph Biden [reportedly stated](#) that, if elected, he would rescind Keystone XL's Presidential Permit. It appears that a future President would have the authority to do so, as the current permit states that it “may be terminated, revoked, or amended at any time at the sole discretion of the President.” Whether Mr. Biden—if elected to the Presidency—would follow through with a revocation, and what recourse the pipeline owner and customers could have if he did, remain to be seen.

Author Information

Paul W. Parfomak
Specialist in Energy and Infrastructure Policy

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