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After Keystone: A question of presidential permits

by Robert E. Hogfoss and Catherine D. Little

The Keystone XL Pipeline Project, as proposed, would transport oil from Alberta, Canada, to Nebraska through a pipeline crossing an international border. Various environmental and citizen groups have challenged the project. Whether it will be allowed to proceed now depends on issuance of a "presidential permit." Before Keystone, presidential permits were virtually unknown to the general public. This article will present some background on presidential permits and discuss how the Keystone experience may influence the presidential permit process in the future.

TransCanada Corp. initially proposed the Keystone Project in 2005. The Canadian National Energy Board first approved the Canadian portion of the project in September 2007. Public opposition in the United States, however, caused the owners of the project to change the proposed pipeline route to avoid the environmentally sensitive Nebraska Sand Hills region. With that change of route, the state of Nebraska conducted a supplemental environmental review and approved the project in January 2013.

Proponents argue the project will help reduce U.S. reliance on sources of energy outside of North America, that oil sands occur naturally and are no more environmentally harmful than traditional oil sources, and that newly constructed pipelines are safer than older pipelines. Project opponents argue that the Canadian oil sands present a unique risk of environmental harm, that the proposed pipeline route will result in damage to sensitive areas, and that climate change is the critical issue for review.

The Obama administration postponed its decision on the presidential permit during the 2012 election year by calling for a federal Supplemental Environmental Impact Statement (SEIS). The U.S. State Department recently issued its SEIS for public comment. See 78 Fed. Reg. 15,011, 15,012 (March 8, 2013). The SEIS concludes that the route will not cause significant environmental harm when compared with other alternatives, but reserves for the president the ultimate decision on whether to issue a presidential permit that will "serve the national interests."

History of Presidential Permits

As the name suggests, presidential permits are a creation of the executive branch alone, with no legislative authorization and limited judicial review to date. Presidential permits are intended to provide executive branch review of trans-border facilities and commercial activities between the United States and either Canada or Mexico. No statute authorizes their creation or use, and few regulations govern their review or issuance.

Presidential authority to approve trans-border facilities dates back to the late 1800s, with President Ulysses Grant issuing the first approval to allow telegraph cables between the United States and Canada. Decades later, President William McKinley was asked similarly to approve cross-border communication cables between the United States and Canada. In 1935, another attorney general opinion confirmed President Franklin Roosevelt's executive authority to issue a license for a cross-border petroleum pipeline from the United States to Mexico. Then, in 1939, the Roosevelt administration issued an executive order prohibiting construction or operation of electric transmission or natural gas facilities without first receiving a permit from the president.

In 1968, permitting authority for oil pipelines, among other facilities, was officially delegated to the State Department under President Lyndon Johnson's Executive Order 11,423 and amended by another executive order in 1994 to include requirements to consult with various federal departments. In 2004, an executive order by President George W. Bush established the State Department's procedures for reviewing presidential permit applications for oil pipelines. Those procedures include referral of the application and request for consulting agency reviews within 90 days and directions to approve those applications that serve the national interest.

The State Department is currently responsible for issuing presidential permits for oil pipelines, while the Federal Energy Regulatory Commission (FERC) issues such permits for natural gas pipelines, and the Department of Energy (DOE) issues presidential permits for electric transmission lines. Both FERC and DOE have promulgated regulations governing their presidential permit process.

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The first presidential trans-border approval was issued more than a century before the National Environmental Policy Act (NEPA) was enacted, in 1970. (See 42 U.S.C. 4321-4370h.) NEPA is a broad statute that requires review of environmental impacts and reasonable alternatives of major federal actions "significantly affecting the quality of the human environment." Pipeline and other energy projects that require federal permits, impact federal lands or use federal funds are subject to review under the act, regardless of whether a presidential permit is required.

The State Department promulgated regulations to implement its NEPA obligations in 1980. The department also has elected to combine its presidential permit deliberation with NEPA review in those circumstances where the department finds a significant impact to the environment. The resulting process, which combines presidential permit deliberations with NEPA review, has been the subject of discussion by the courts.

Judicial Review of Presidential Permits

Presidential permits are solely an executive branch creation. In order to be lawful, Executive branch action must be authorized by either Congress or the Constitution. Although presidential permits are not referenced in Article II of the Constitution, such actions have been held to be part of the president's "inherent constitutional authority to conduct foreign affairs."

Assuming that the executive branch's issuance of presidential permits is constitutional, the question becomes whether an affected party can seek judicial review of State Department (or FERC or DOE) grant or denial of a presidential permit involving energy interests. The ability of a federal court to review a decision concerning presidential permits would presumably be

founded on federal-question jurisdiction, with standards of review provided by the Administrative Procedure Act (APA).

The APA definition of "agency" expressly excludes certain entities, including Congress and the courts, but it does not expressly exclude the president. The U.S. Court of Appeals for the D.C. Circuit and the South Dakota federal district court have found that the act does not apply to presidential permits because the president is not an "agency," and the State Department's actions in evaluating presidential permits for cross-border oil pipelines are presidential in nature. A Minnesota federal district court, however, has held that when the State Department issues a record of decision under NEPA in connection with an application for a presidential permit, it is acting as an "agency" and thus subject to judicial review under APA standards.

There is little case law on these issues. As it now stands, both applicants and opponents of presidential permits may be left having to rely on the deliberative process of the NEPA, but with no avenue for judicial review. American jurisprudence, and the Administrative Procedure Act, disfavors situations where there is final agency action but no review afforded in court. The courts to date have focused on whether a presidential permit constitutes "final agency action" subject to review under APA standards. If a presidential permit is based on a NEPA process and decision, then judicial review is arguably allowed; if the permit is decided separately from NEPA, judicial review may not be granted.

What's Next for Presidential Permits?

Presidential permits have a long history, but have no statutory basis, few regulatory guidelines and only a handful of federal district court opinions that offer guidance on decision-making or review. The attention associated with Keystone has raised questions as to whether the presidential permit process can be made more transparent and reviewable.

Congress may exercise its own constitutional authority to enact legislation to better define the presidential permit process, including provisions for judicial review. Alternatively, the executive branch could better define the permitting process. If neither Congress nor the administration elect to address the issues, however, the courts will likely be asked again to address the threshold issues of constitutionality and reviewability.

Any attempt to improve the presidential permit process will have to address the scope of the permit in issue. Decisions limited to whether the border crossing itself "serves the national interests" are more likely immune from judicial review, while decisions including NEPA analysis beyond the border crossing are more likely subject to review, under NEPA and other statutes.

Robert E. Hogfoss and Catherine D. Little are partners in Hunton & Williams' Atlanta office. Their practice focuses on energy and environmental law, and their clients include oil and natural gas pipelines, although they have not worked on the Keystone XL matter. Hogfoss can be reached at rhogfoss@hunton.com; Little can be reached at clittle@hunton.com.