

# Keystone XL: Reviewability of Transboundary Permits in the United States

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## TABLE OF CONTENTS

I. INTRODUCTION .....	233
A. Background of Keystone XL.....	234
1. The Controversy.....	235
2. The Presidential Permitting Process .....	238
II. CURRENT STATE OF THE LAW .....	239
A. NEPA and the APA.....	239
1. Reviewability of the President’s Actions Under the APA.....	241
2. The President’s Authority to Issue Presidential Permits .....	243
3. Nuts and Bolts of the Presidential Permitting Process: The President Retains the Final Decision-Making Authority.....	244
B. The NEPA Process and Keystone XL .....	246
C. Cases Relevant to Keystone XL .....	247
1. <i>Sisseton v. U.S. Dep’t of State</i> .....	247
2. <i>Natural Resources Defense Council, Inc. v. U.S. Dep’t             of State</i> .....	250
3. <i>Sierra Club v. Clinton</i> .....	252
III. ANALYSIS.....	253
A. Reconciling the Cases.....	253
B. Reconciling <i>Sisseton</i> and <i>NRDC</i> with <i>Franklin</i> .....	255
C. Review of Keystone XL .....	257

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IV. CONCLUSIONS AND POLICY RECOMMENDATIONS..... 258

## I. INTRODUCTION

The controversial Keystone XL pipeline (“Keystone XL” or “pipeline”), if approved, will have effects for years to come. The potential effects are not only environmental. If the pipeline is permitted and constructed, it will affect the United States’ policy on matters such as whether the nation will support the development of “dirty” tar sands oil in neighboring countries, what other sorts of pipelines the government will allow, what sort of review applications for transboundary pipelines will receive, and after the applications are approved, what sort of judicial review the decisions to grant permits may receive.

The issue of judicial review is especially important. Normally, agency decisions are reviewable by the judiciary under the Administrative Procedure Act (“APA”). The President, however, is not an agency for purposes of the APA, so his decisions are unreviewable. The Presidential permitting process governs infrastructure that crosses national boundaries and is undertaken by the United States Department of State (“DOS”), an agency for purposes of the APA, pursuant to an executive order. According to the executive order, the decision to grant transboundary permits shall be made by DOS unless an interagency dispute arises, which has never occurred. If a dispute does arise, the President has final decision-making authority. If DOS’s decision to grant the Presidential permit is not reviewable by the courts because the President retains contingent authority, DOS’s decision is shielded from scrutiny. Then, the agency decision may be driven entirely by political motives, rather than by a transparent, careful, and informed decision-making process.

Courts have issued only three decisions that discuss whether any portion of the Presidential permitting process for transboundary pipelines is a reviewable final agency action under the APA, or whether the action is “Presidential” in nature and unreviewable. These decisions negate the protections provided by the National Environmental Policy Act (“NEPA”) and the APA, and misapply the Supreme Court precedent established in *Franklin v. Massachusetts*. Where DOS issues the decision and the permit, both the Environmental Impact Statement (“EIS”) and the decision to issue the permit should be judicially reviewable. Only when the President actually settles interagency disputes and issues the final decision should the action be considered Presidential in nature and unavailable for judicial review under the APA.

### A. Background of Keystone XL

In September 2008, TransCanada Keystone Pipeline, LP (“TransCanada”) applied for a Presidential permit to build and operate the proposed Keystone XL pipeline.<sup>1</sup> Keystone XL would transport crude tar sands oil from Alberta, Canada, through Montana, South Dakota, and Nebraska.<sup>2</sup> In Nebraska, it would incorporate an existing segment of the original Keystone pipeline, also owned by TransCanada, which runs to a hub in Cushing, Oklahoma.<sup>3</sup> From there, portions of the new extension would carry the oil to two delivery points in Port Arthur, Texas.<sup>4</sup> The total length of Keystone XL would be approximately 1,380 miles, with construction costs estimated at \$7 billion.<sup>5</sup>

The original Keystone pipeline opened in June 2010 and has the capacity to transport approximately 591,000 barrels per day of crude tar sands oil from the Alberta oil sands to refineries in Illinois and Oklahoma.<sup>6</sup> The Keystone XL extension would transport up to 830,000 additional barrels per day of crude tar sands oil to the three delivery points in Oklahoma and Texas.<sup>7</sup> The Keystone XL pipeline would increase Canadian oil exports to the United States by approximately four percent of current demand in the United States.<sup>8</sup> Connecting the tar sands oil in Canada to refineries in Oklahoma and Texas would provide new resources for markets on the East Coast.<sup>9</sup> It also could increase the amount of refined petroleum products available for export.<sup>10</sup>

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1. U.S. DEP’T OF STATE, EXECUTIVE SUMMARY: FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT ES-1 (2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/181185.pdf> [hereinafter EXECUTIVE SUMMARY].

2. *Id.* at ES-3, 4.

3. *Id.*

4. *Id.*

5. *Id.* at ES-2.

6. PAUL W. PARFORMAK, ET. AL., CONG. RESEARCH SERV., R41668, KEYSTONE XL PIPELINE PROJECT: KEY ISSUES 2 (2011) [hereinafter KEY ISSUES #1]; *see* Sisseton-Wahpeton Oyate v. U.S. Dep’t of State, 659 F. Supp. 2d 1071, 1075 (D.S.D. 2009).

7. EXECUTIVE SUMMARY, *supra* note 1, at ES-1, 2. Current estimates call for transport of 700,000 barrels per day, with a capacity of 830,000 barrels if market conditions support such an increase.

8. John M. Broder & Dan Frosch, *Rejecting Pipeline Proposal, Obama Blames Congress*, N.Y. TIMES, Jan. 18, 2012, at A13, *available at* <http://www.nytimes.com/2012/01/19/us/state-dept-to-put-oil-pipeline-on-hold.html>.

9. *Id.*

10. *Id.*

### 1. *The Controversy*

TransCanada and its proponents argue that construction of the pipeline would bring needed jobs to the United States, satiate refineries' and shippers' demands for oil, and improve the United States' energy security and national security.<sup>11</sup> To take advantage of these benefits, TransCanada has asserted that it will salvage the Can\$1.9 billion it has already spent on Keystone XL by building the portions of the pipeline that are entirely within the United States, for which it will need no Presidential permit.<sup>12</sup>

Despite the claimed benefits, opposition to the pipeline has been fierce.<sup>13</sup> Some citizens and state governments oppose the pipeline because it implicates issues of states' rights and individual property rights.<sup>14</sup> Others oppose the pipeline because it encourages development of tar sands in Canada. This requires a notoriously dirty process that, compared with standard oil development processes, will disproportionately contribute to climate change.<sup>15</sup> In addition,

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11. See KEY ISSUES #1, *supra* note 6, Summary, 6–13.

12. Indeed, construction on the southern portion of the pipeline has begun. Kim Murphy, *New Keystone pipeline route proposed; activists block Texas site*, L.A. TIMES, Sept. 5, 2012, available at <http://www.latimes.com/news/nation/nationnow/la-na-nn-keystone-xl-protest-20120905,0,5027929.story>. The President has supported beginning construction on the southern portion of the pipeline. Jackie Calmes, *In Oklahoma, Obama Declares Pipeline Support*, N.Y. TIMES, March 22, 2012, at A21, available at <http://www.nytimes.com/2012/03/23/us/politics/in-oklahoma-obama-declares-pipeline-support.html?ref=global-home>. The permits required for construction within the United States are state permits that TransCanada needs whether the pipeline was transboundary or not; no Presidential permit is required. U.S. DEP'T OF STATE, SPECIAL BRIEFING ON THE KEYSTONE XL PIPELINE (Jan. 18, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm> [hereinafter SPECIAL BRIEFING]; Bradley Olson, *TransCanada May Shorten Keystone XL*, BLOOMBERG (Jan. 19, 2012, 1:04 PM), <http://www.bloomberg.com/news/2012-01-19/transcanada-may-shorten-keystone-xl-bypass-federal-review.html>.

13. See, e.g., Letter from Cynthia Giles, EPA Assistant Administrator for Enforcement and Compliance Assurance, to Jose Fernandez and Kerri-Ann Jones (July 16, 2010), available at [http://yosemite.epa.gov/oeca/webeis.nsf/\(PDFView\)/20100126/\\$file/20100126.PDF](http://yosemite.epa.gov/oeca/webeis.nsf/(PDFView)/20100126/$file/20100126.PDF) [hereinafter EPA Letter]; NATURAL RES. DEF. COUNSEL, TAR SANDS FACTS: THE KEYSTONE XL TAR SANDS PIPELINE HINDERS CLIMATE CHANGE PROGRESS (March, 2012), available at <http://www.nrdc.org/energy/files/keystonexlmyths.pdf> [hereinafter Tar Sands Facts].

14. EPA Letter, *supra* note 13; Tar Sands Facts, *supra* note 13.

15. Tar Sands Facts, *supra* note 13.

TransCanada has a history of spills associated with its other pipelines, creating a risk for environmental disaster, such as catastrophic spills that would damage land, surface water, and groundwater.<sup>16</sup> Finally, opponents also argue that the negative environmental impacts of the pipeline construction alone simply outweigh any benefits.<sup>17</sup>

Some of the pipeline opponents' major concerns seem to have been addressed. TransCanada has agreed to reroute the pipeline to avoid the Sandhills region of Nebraska, under which lies the Ogallala Aquifer.<sup>18</sup> As a result, the potential for contamination of this important groundwater resource has been eliminated. And, although the Inspector General began investigating allegations of conflicts of interest involving DOS, TransCanada, the Canadian government, and the outside firm that performed the environmental assessment for the project, the Inspector General cleared DOS of any bias that may have affected its oversight of the project.<sup>19</sup>

In November of 2011, within days of when DOS's Office of the Inspector General began investigating the conflict of interest allegations,<sup>20</sup> DOS issued a press release stating that it would postpone its decision of whether to issue a Presidential permit until 2013.<sup>21</sup> That is, DOS postponed its decision until after the 2012 Presidential election, citing concerns with Nebraska's lack of a regulatory framework for determining pipeline routes and national concern about the pipeline's

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16. *Id.*

17. See EPA Letter, *supra* note 13; Tar Sands Facts, *supra* note 13.

18. See SPECIAL BRIEFING, *supra* note 12; Olson, *supra* note 12.

19. Opponents had charged that a conflict of interest existed. The contractor DOS hired to perform the EIS that found "no significant impacts" from crossing the Ogallala Aquifer has had numerous prior dealings and a business relationship with TransCanada, and even cited TransCanada in its marketing materials as a "major client." Elizabeth Rosenthal & Dan Frosch, *Pipeline Review Is Faced With Question of Conflict*, N.Y. TIMES, Oct. 7, 2011, at A11, available at [http://www.nytimes.com/2011/10/08/science/earth/08pipeline.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2011/10/08/science/earth/08pipeline.html?_r=2&pagewanted=all).

20. The charges were subsequently cleared by the Inspector General's Report. See U.S. DEP'T OF STATE, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, REPORT NUMBER AUD/SI-12-28, SPECIAL REVIEW OF THE KEYSTONE XL PIPELINE PERMIT PROCESS (Feb. 2012), available at <http://oig.state.gov/documents/organization/183864.pdf> [hereinafter SPECIAL REVIEW].

21. U.S. Dep't of State, Office of the Spokesperson, *Keystone XL Pipeline Review Process: Decision to Seek Additional Information*, U.S. DEP'T OF STATE (Nov. 10, 2011), [www.state.gov/r/pa/prs/ps/2011/11/176964.htm](http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm).

proposed route over the Ogallala aquifer.<sup>22</sup>

Meanwhile, Congress inserted a provision in a temporary payroll tax cut bill passed in December 2011 that gave the Obama administration sixty days to decide whether to approve the Presidential permit for Keystone XL.<sup>23</sup> President Obama, citing a lack of time sufficient to review the project, denied the permit in January of 2012.<sup>24</sup> TransCanada is free to submit a new application, but it is unclear which portions of the original permitting process will carry over to the new application.<sup>25</sup> It is possible that DOS will use significant portions of the Final EIS from the original application when determining whether to issue a permit.<sup>26</sup>

Because of NEPA, the EIS may be the portion of the process most vulnerable to legal challenges, notwithstanding two district court decisions to the contrary.<sup>27</sup> The Inspector General cleared the parties of any bias or conflict related to the EIS, which will make any legal challenges to the Presidential permitting process based on the EIS more difficult because that particular aspect is now off the table. However, the Inspector General also found in his report that DOS's "limited technical resources, expertise, and experience impacted the implementation of the [review] process."<sup>28</sup> Whether the Inspector General's report left the door open to challenges to the sufficiency of the EIS remains to be seen.

The discussion of the legal issues surrounding the Presidential permitting process with regards to the Keystone XL pipeline may be mooted by legislation, though it is unlikely.<sup>29</sup> Republicans recently proposed legislation regarding the pipeline that would attach to a \$260 billion transportation bill.<sup>30</sup> If it had passed, this legislation would have

22. *Id.*

23. Broder & Frosch, *supra* note 8; SPECIAL BRIEFING, *supra* note 12.

24. U.S. DEP'T OF STATE, REPORT TO CONGRESS CONCERNING THE PRESIDENTIAL PERMIT APPLICATION OF THE PROPOSED KEYSTONE XL PIPELINE (Jan. 18, 2012), available at <http://www.state.gov/documents/organization/182453.pdf>; SPECIAL BRIEFING, *supra* note 12.

25. SPECIAL BRIEFING, *supra* note 12.

26. *Id.*

27. See *Sisseton*, 659 F. Supp. 2d at 1071; *NRDC v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

28. SPECIAL REVIEW, *supra* note 20, at 2.

29. The plan for the Keystone XL pipeline is complex and rapidly evolving. For a more in depth treatment, see *Times Topics: Keystone XL Pipeline*, N.Y. TIMES, [topics.nytimes.com/top/reference/timestopics/subjects/k/keystone\\_pipeline/index.html?scp=1-spot&sq=Keystone%20XL&st=cse](http://topics.nytimes.com/top/reference/timestopics/subjects/k/keystone_pipeline/index.html?scp=1-spot&sq=Keystone%20XL&st=cse). (last visited Feb. 28, 2012).

30. See Jennifer Steinhauer, *Democrats Joining G.O.P. on Pipeline*, N.Y. TIMES

expedited final review of the project by the executive branch.<sup>31</sup> The results of the 2012 election make it unlikely that Congressional Republicans could usher the transboundary permit through, circumventing the current process. Therefore, it is likely that DOS will issue a decision regarding Keystone XL during President Obama's second term, and that legal challenges will follow.

## 2. *The Presidential Permitting Process*

Two relevant Executive Orders ("E.O.s") designate DOS to receive applications for Presidential permits for transboundary pipelines.<sup>32</sup> DOS is authorized to issue Presidential permits, but the President retains the final decision to grant a permit in cases where another agency disputes DOS's decision.<sup>33</sup> Two federal district courts have deemed the final decision, regardless if it is made by DOS or the President, unreviewable.<sup>34</sup>

Proponents argue that the process for permitting transboundary pipelines adequately protects the environment because it takes into account environmental factors through its compliance with NEPA.<sup>35</sup> However, if the decision to grant a Presidential permit and its associated EIS is unreviewable under the APA, or if there is no legal requirement for an EIS at all, adequate protection of the environment of the type contemplated by NEPA is not provided.<sup>36</sup>

NEPA and the APA, two laws designed to force informed governmental decision-making, provide inadequate environmental protection where the decisions that depend on them are unreviewable. The lack of clarity in the E.O.s that govern the permitting process leave doubt that compliance with NEPA is even required. Presidential and Congressional actions, however, may solve the problem or at least correct the bottleneck.

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(April 9, 2012), <http://www.nytimes.com/2012/04/20/us/politics/democrats-join-gop-on-pipeline-vote.html>.

31. *Id.*

32. These are E.O. 11423 and E.O. 13337, discussed in depth *infra* Part II(C)(2).

33. Exec. Order No. 13337, 69 Fed. Reg. 25299, 25300 (April 30, 2004) [hereinafter E.O. 13337].

34. *Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105.

35. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

36. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2006); *Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105.



## II. CURRENT STATE OF THE LAW

### A. NEPA and the APA

Congress passed NEPA

[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>37</sup>

In Title I of NEPA, Congress declared that “the continuing policy of the Federal Government . . . [will be] to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>38</sup> As lofty as that language is, the practical effects of NEPA have been less dramatic.

NEPA forms the basis of the EIS by requiring that Federal Government agencies

include, in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental affects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>39</sup>

Section 202 of NEPA established the Council on Environmental

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37. 42 U.S.C. § 4321.

38. *Id.* § 4331.

39. *Id.* § 4332.

Quality.<sup>40</sup> The Council on Environmental Quality developed the guidance and specific regulations under NEPA detailing when and how the EIS should be used.<sup>41</sup> In general, an EIS is an “action-forcing device” that should “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives.”<sup>42</sup> In compiling an EIS, “[a]gencies shall focus on significant environmental issues and alternatives.”<sup>43</sup> Further, an EIS is supposed to be “more than a disclosure document.”<sup>44</sup>

As a practical matter, however, NEPA is largely procedural.<sup>45</sup> It does not demand any specific outcome.<sup>46</sup> NEPA requires informed agency decision-making, not wise agency decision-making.<sup>47</sup> Additionally, NEPA itself created no private cause of action, meaning that a person cannot sue for violations of the statute.<sup>48</sup> Challenges to agencies’ compliance with NEPA must be brought under the APA.<sup>49</sup> To qualify for judicial review, the APA requires that the challenged action be a “final agency action for which there is no other adequate remedy in court.”<sup>50</sup>

The APA created a formal adjudicative procedure to allow judicial review of agency rules and orders.<sup>51</sup> The APA dictates that a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>52</sup> Or, alternatively, a court “must uphold agency action unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’”<sup>53</sup>

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40. *Id.*

41. *Id.*

42. 40 C.F.R. § 1502.1 (2012).

43. *Id.*

44. *Id.*

45. *See* 42 U.S.C. § 4321; Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1112–13 (D.C. Cir. 1971); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989).

46. *Id.*

47. *Robertson*, 490 U.S. at 351.

48. *See* 42 U.S.C. §§ 4321-4370h.; *Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549 (D.C. Cir. 1993).

49. 5 U.S.C. § 551 (2006).

50. *Id.* § 704.

51. *See id.*

52. *Id.* § 706(a)(2).

53. *Id.*

In using the APA to challenge whether an EIS complies with NEPA, first and foremost the entity challenged must be an agency. Additionally, the issuance of the Final EIS for a transboundary pipeline is considered a “final decision” for purposes of APA review, at least according to one federal district court.<sup>54</sup> Finally, in general, an EIS would be “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law” if the agency did not discuss the five requirements outlined in NEPA within its “detailed statement.”<sup>55</sup>

### *I. Reviewability of the President’s Actions Under the APA*

Review of an agency’s compliance with NEPA under the APA is available for final agency actions.<sup>56</sup> The Supreme Court first addressed whether the President is an “agency” for purposes of APA review in *Franklin v. Massachusetts*.<sup>57</sup> In that case, governed by a complex statutory process,<sup>58</sup> Massachusetts was to transfer one of its Congressional seats to the State of Washington because of the results of the 1990 Census.<sup>59</sup> In conducting the 1990 Census, the Commerce Department decided to count overseas military personnel as state residents if they listed a state as their “home of record,” instead of following its prior practice of determining state enumerations by excluding those employees.<sup>60</sup> The process for determining state enumerations involved the Secretary of Commerce reporting the results to the President of the United States.<sup>61</sup> After receiving the results, the President was to “transmit to the Congress a statement showing the whole number of persons in each State,” as ascertained under the census, and the number of Representatives to which each state would be entitled

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54. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1031 n.2 (D. Minn. 2010) (referring to its previous ruling in *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010)).

55. See 5 U.S.C. § 706(2)(a); see also 42 U.S.C. § 4332 (listing the five factors that must be included in a detailed statement).

56. See 5 U.S.C. § 706(2)(a); 42 U.S.C. §§ 4321–4347.

57. See *Franklin v. Massachusetts*, 505 U.S. 788, 790–96 (1992); PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 343 (2011).

58. See 13 U.S.C. § 141(a)–(b) (2006); 2 U.S.C. § 2a(a)–(b) (2006); *Franklin*, 505 U.S. at 790–96; SHANE & BRUFF, *supra* note 57, at 343–44.

59. *Franklin*, 505 U.S. at 790–96; SHANE & BRUFF, *supra* note 57, at 343.

60. SHANE & BRUFF, *supra* note 57, at 343.

61. *Id.* at 343–44; *Franklin*, 505 U.S. at 790–96.

by the method of equal proportions, pursuant to the automatic reapportionment statute.<sup>62</sup> Massachusetts challenged the action of counting overseas personnel as arbitrary under the APA because it argued that the apportionment should be determined by an “actual Enumeration” of persons in each state, pursuant to the Constitution.<sup>63</sup>

In the plurality opinion, four Justices found that because the Secretary’s report to the President did not constitute a “final agency action,” it was not reviewable under the APA.<sup>64</sup> The President’s report to Congress was the only action qualifying as final because that action, and not the Secretary’s report to the President, would directly affect the parties.<sup>65</sup> However, these Justices found that the President’s report to Congress was ultimately unreviewable because the President is not an “agency.”<sup>66</sup>

In making this determination, the Court looked to the text of the APA, which defined an agency as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include – (A) the Congress; (B) the courts of the United States....”<sup>67</sup> The Court said,

The President is not explicitly excluded from the APA’s purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements. Although the President’s actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA.<sup>68</sup>

Thus, the majority of the Court held that the President is not an

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62. *Franklin*, 505 U.S. at 790–96; SHANE & BRUFF, *supra* note 57, at 343–44.

63. *Franklin*, 505 U.S. at 790–96; SHANE & BRUFF, *supra* note 57, at 344 (constitutional provisions at issue were article I, section 2, clause 3 and amendment XIV, section 2).

64. *Franklin*, 505 U.S. at 796; SHANE & BRUFF, *supra* note 57, at 344–45.

65. *Franklin*, 505 U.S. at 797–98.

66. *Id.* at 800–01.

67. *Id.* at 800 (citing Administrative Procedure Act, 5 U.S.C. §§ 701(b)(1), 551(1) (2006)).

68. *Id.* at 800–01.

“agency” under the APA.<sup>69</sup> In addition, no Justices thought that the action of a subordinate administrator is a reviewable final action so long as it is preliminary to implementation by the President and subject to his discretion.<sup>70</sup>

A subsequent case, *Dalton v. Specter*, confirmed the holding in *Franklin*.<sup>71</sup> *Franklin* and *Dalton* both dealt with the President’s statutory authority. But, the *Dalton* Court also explained that the President’s actions, at least those not taken pursuant to statutory authority, could be reviewed for constitutionality.<sup>72</sup> The Constitution grants, or at least does not deny,<sup>73</sup> the President authority in various arenas.<sup>74</sup> One of those arenas is to regulate foreign affairs.<sup>75</sup>

## 2. *The President’s Authority to Issue Presidential Permits*

Two E.O.s govern the Presidential permitting process. President Lyndon Johnson issued E.O. 11423 in 1968, prior to the passage of NEPA.<sup>76</sup> It specifies 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 connecting the United States with a foreign country,” including pipelines, conveyer belts, and similar facilities for the exportation or importation of petroleum and petroleum products.<sup>77</sup> President George W. Bush issued E.O. 13337 in 2004, which amended E.O. 11423’s permitting review process. The amended order does not reference

69. SHANE & BRUFF, *supra* note 57, at 346; *Franklin*, 505 U.S. at 796.

70. SHANE & BRUFF, *supra* note 57, at 346.

71. *Dalton v. Specter*, 511 U.S. 462 (1994).

72. *Id.* at 471–72.

73. This topic is discussed in detail *infra* Part II(A)(2). *See, e.g.*, U.S. Const. art. II, § 2; SHANE & BRUFF, *supra* note 57, at 603–736; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Youngstown Sheet*, 343 U.S. at 635 (Jackson, J., concurring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *see generally* SHANE & BRUFF, *supra* note 57, at 603–736.

74. *See* U.S. Const. art. II, § 2.

75. *Id.*; *Curtiss-Wright*, 299 U.S. at 319; *see generally* SHANE & BRUFF, *supra* note 57, at 584–603.

76. Exec. Order No. 11423, 33 Fed. Reg. 11741, 11741 (August 16, 1968) [hereinafter E.O. 11423]; *see* 42 U.S.C. §§ 4321–4347.

77. U.S. DEP’T OF STATE, INTERPRETIVE GUIDANCE ON EXECUTIVE ORDER 11423 (Feb. 23, 2007), *available at* <http://www.state.gov/p/wha/rls/94946.htm>; E.O. 11423, *supra* note 76, at 11741.

NEPA.<sup>78</sup>

The effect of the two E.O.s is to designate and empower the Secretary of State to receive permits “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 to and from a foreign country.”<sup>79</sup> Whereas E.O. 11423 cites only the “proper conduct of the foreign relations of the United States” as a source of authority, E.O. 13337 cites the “Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code.”<sup>80</sup> 3 U.S.C. §301 states that the President is empowered to delegate authority to the head of any department or agency of the executive branch.<sup>81</sup>

The Constitution does not directly grant the President the authority to regulate foreign commerce and neither has Congress.<sup>82</sup> However, the President’s “inherent” authority in the area has long been recognized.<sup>83</sup> Thus, the source of the executive’s authority to issue Presidential permits ties to both the inherent Presidential authority to regulate foreign commerce and the President’s statutory authority to delegate his authority in this arena.<sup>84</sup>

### *3. Nuts and Bolts of the Presidential Permitting Process: The President Retains the Final Decision-Making Authority*

The Presidential permitting process is straightforward. According to DOS, it will prepare an EIS consistent with NEPA, then determine whether the project is within the national interest,<sup>85</sup> by considering “many factors including energy security; environmental, cultural, and

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78. See E.O. 13337, *supra* note 33, at 25299.

79. *Id.*

80. *Id.*

81. 30 U.S.C. § 301 (2006); E.O. 13337, *supra* note 33, at 25299.

82. See U.S. Const. art. II § 2.

83. See SHANE & BRUFF, *supra* note 57, at 603–736, for a full treatment of this topic. See also *Youngstown Sheet*, 343 U.S. at 585; *id.* at 635 (Jackson J., concurring); *Curtiss-Wright*, 299 U.S. at 318.

84. See E.O. 11423, *supra* note 76; E.O. 13337, *supra* note 33; PAUL PARFORMAC, ET. AL., CONG. RESEARCH SERV., R41668, KEYSTONE XL PIPELINE PROJECT: KEY ISSUES 6 (2012) [hereinafter KEY ISSUES #2].

85. EXECUTIVE SUMMARY, *supra* note 1, at ES–1. As will be developed further *infra* Parts II(C)(2) & III(A), DOS may not be required to perform the EIS by anything other than its own regulations. See 22 C.F.R. § 161.7(c) (2012); KEY ISSUES #2, *supra* note 84, at 26–27.

economic impacts; foreign policy; and compliance with relevant federal regulations.”<sup>86</sup> DOS also consults with eight federal agencies per the requirements set forth in E.O. 13337 paragraph (b)(ii), including the Departments of Energy, Defense, Transportation, Homeland Security, Justice, Interior, Commerce, and the Environmental Protection Agency (“EPA”).<sup>87</sup> If this process proceeds smoothly, DOS then issues a decision that outlines whether the project is within the national interest, and grants or denies the permit.<sup>88</sup>

However, under certain circumstances, the President retains the authority to make a final decision.<sup>89</sup> Paragraph (i) of E.O. 13337 states that “an official required to be consulted . . . shall notify the Secretary of State that he or she disagrees with the Secretary’s proposed determination and requests the Secretary to refer the application to the President.”<sup>90</sup> In these special cases, “the Secretary of State shall consult with any such requesting official and, if necessary, shall refer the application, together with statements of the views of any official involved, to the President for consideration and a final decision.”<sup>91</sup> Otherwise, DOS issues the decision with no requirement for consultation or approval of the President.<sup>92</sup> It should be noted that E.O. 13337 is only a delegation of the President’s authority to DOS; the President is always free to retract the E.O. and the authority it delegates.<sup>93</sup>

Even though the President’s retention of final decision-making authority is contingent upon this specific event of performing a tie-breaker between the Secretary of State and another agency head,<sup>94</sup> courts hearing cases with facts similar to those of the Keystone XL pipeline have interpreted paragraph (i) as being the sort of retention of final decision-making authority that the Supreme Court discussed in *Franklin*—the kind that precludes *any* review.<sup>95</sup> This is despite the fact that the President has never performed the tie-breaking function

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86. EXECUTIVE SUMMARY, *supra* note 1, at ES–1.

87. *Id.*; E.O. 13337, *supra* note 33, at 25299.

88. E.O. 13337, *supra* note 33, at 25300.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.* at 25301; KEY ISSUES #2, *supra* note 84, at 6.

94. E.O. 13337, *supra* note 33, at 25299.

95. *See generally Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105; *Sierra Club*, 689 F. Supp. 2d 1147.

contemplated by paragraph (i).<sup>96</sup>

### *B. The NEPA Process and Keystone XL*

In the case of the Keystone XL pipeline, TransCanada submitted its application for a Presidential permit to the Secretary of State, as required by E.O. 13337.<sup>97</sup> Accordingly, the Secretary was charged with determining whether the Keystone XL pipeline is in the national interest and should be granted a permit.<sup>98</sup> DOS is the lead federal agency for environmental review of the project because the Presidential permit is the most substantial federal decision relating to the project.<sup>99</sup> Other federal and state permits will be required for the construction of Keystone XL pipeline,<sup>100</sup> but those agencies will likely rely on the EIS prepared by DOS.<sup>101</sup>

DOS spent nearly three years preparing its Final EIS for the Keystone XL project.<sup>102</sup> The process included publishing a Notice of Intent to prepare an EIS, twenty “scoping” meetings to establish the potential impacts that the EIS should address, and consultations with

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96. Note that in the case of Keystone XL, after Congress passed a bill in which it mandated a decision on the Keystone XL pipeline within 60 days, DOS presented the decision to the President for final determination. However, that was not the sort of final review contemplated by E.O. 13337 paragraph (i). *See* Broder & Frosch, *supra* note 6; *supra* text accompanying note 21; SPECIAL BRIEFING, *supra* note 12.

97. EXECUTIVE SUMMARY, *supra* note 1, at ES-1.

98. *Id.*; *see* 22 C.F.R. § 161.7(c).

99. EXECUTIVE SUMMARY, *supra* note 1, at ES-1.

100. The federal permitting entities include the Department of Interior-Bureau of Land Management, U.S. Corps of Engineers, Department of Interior-U.S. Fish & Wildlife Service, U.S. Department of Transportation-Pipeline & Hazardous Materials Safety Administration (“OPS”), and U.S. EPA. The state-level permitting entities vary by state: Montana (Department of Environmental Quality-Certificate of Compliance, Public Service Commission, DEQ Permitting & Compliance Division: Water Protection Bureau, Department of Natural Resources & Conservation), Nebraska (Department of Environmental Quality, Department of Natural Resources), Oklahoma (Siting/Compliance Permit DEQ: Division of Water Resources; Water Resources Board, EPA-Region 6, Department of Wildlife Conservation), South Dakota (Public Utilities Commission, Department of Environment and Natural Resources, Department of Game, Fish & Parks), Texas (Siting/Compliance Permit, Railroad Commission of Texas-Technical Permitting Section, Commission on Environmental Quality, EPA-Region 6, Coastal Coordination Council & General Land Office). *See* E.O. 13337, *supra* note 33, at 25299.

101. *Sierra Club*, 746 F. Supp. 2d at 1031-32 n.3.

102. EXECUTIVE SUMMARY, *supra* note 1, at ES-1.



federal and state agencies and Indian tribes.<sup>103</sup> It also included a draft EIS and subsequent comments from the public and the EPA, public meetings to discuss the draft EIS in affected communities along the pipeline route, a supplemental draft EIS that addressed concerns raised by the EPA, subsequent comments from the public and the EPA, and more public meetings.<sup>104</sup>

That DOS undertook an EIS and that other federal and state agencies would rely so heavily upon it suggests that NEPA applies and that the EIS must therefore be reviewable. Additionally, DOS has regulations in place stating that it will prepare Environmental Assessments or EISs for certain projects, including issuing permits for construction of international pipelines as provided under E.O. 13337.<sup>105</sup> However, the question remains whether the entire permitting process would have been immune to judicial review if DOS had not conducted an EIS.<sup>106</sup>

### C. Cases Relevant to Keystone XL

A legal challenge to a pipeline such as the Keystone XL would not be a first in federal courts.<sup>107</sup> There have only been challenges to three substantially similar transboundary pipelines in the United States, which have generally centered on the reviewability of the decision that a pipeline is in the national interest and that a Presidential permit should be issued.<sup>108</sup> Petitioners in two of these cases failed to gain judicial review of the decision to issue the permit.<sup>109</sup> Only in one case, *Sierra Club v. Clinton*, has a federal district court granted review of an EIS performed by DOS. There, review was granted on the basis that the EIS was a final agency action subject to review under the APA.<sup>110</sup> The three cases involving reviewability of the decisions to issue Presidential permits are discussed in turn below.

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103. *Id.* at ES-1, Fig. ES-1.

104. *Id.*

105. See 22 C.F.R. § 161.7(c); KEY ISSUES #2, *supra* note 84, at 26-27.

106. See further discussion *infra* Part III.

107. See *Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105; *Sierra Club*, 689 F. Supp. 2d 1147.

108. *Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105; *but see Sierra Club*, 689 F. Supp. 2d 1147.

109. See, e.g., *Sisseton*, 659 F. Supp. 2d 1071; *NRDC*, 658 F. Supp. 2d 105.

110. See *Sierra Club*, 689 F. Supp. 2d 1147.

*I. Sisseton v. U.S. Dep't of State*

The *Sisseton* opinion was issued on September 28, 2009 by the United States District Court for the District of South Dakota in response to a challenge brought by the Sisseton-Wahpeton Oyate and other Tribes<sup>111</sup> to the decision to issue a Presidential permit for TransCanada's first Keystone pipeline. The Tribes based the challenge on environmental and cultural concerns that the proposed pipeline route was not properly surveyed.<sup>112</sup> The defendants in the case, DOS, Secretary of State Hillary Clinton, and other government officials, moved to dismiss the case, arguing that the Tribes did not have standing to sue.<sup>113</sup> The defendants argued that the plaintiffs were unable to prove that a decision in their favor would result in their injury being redressed because the President, and not DOS, had the final decision-making authority.<sup>114</sup> Furthermore, even if the President had made a final decision, the defendants argued that such a decision was not reviewable under the APA because the President is not an agency.<sup>115</sup>

The court agreed on both grounds.<sup>116</sup> On the matter of redressability,<sup>117</sup> the court said:

Even if the most egregious violations of the NHPA<sup>118</sup> and NEPA have occurred, which they have not, plaintiffs are asking the court to direct the Department [of State] to suspend and/or revoke the Presidential permit. However, even if the court were to do so, the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation.<sup>119</sup>

Clarifying, the court said that the President would be "free to disregard" its judgment.<sup>120</sup> Citing the Supreme Court, the court claimed,

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111. *Sisseton*, 659 F. Supp. 2d at 1076.

112. *Sisseton*, 659 F. Supp. 2d at 1076.

113. *Id.* at 1078.

114. *Id.*

115. *Id.* at 1081–82.

116. *Id.* at 1079–81.

117. This may seem like an issue of ripeness. However, this is not a case where the court feared "premature adjudication." See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). In contrast, the district court held that not even a favorable decision would grant the petitioner relief. *Sisseton*, 659 F. Supp. 2d at 1078.

118. The National Historic Preservation Act.

119. *Sisseton*, 659 F. Supp. 2d at 1078 (citing to *Curtiss-Wright*, 299 U.S. 304) (internal quotation marks omitted).

120. *Id.*

“[i]f the President may completely disregard the judgment of the court, it would only be because it is one the courts were not authorized to render.”<sup>121</sup>

In other words, in determining whether the Tribes had met the redressability prong of the standing requirement, the court said that it must consider the actions of the President.<sup>122</sup> Because the defendants had no control over the President’s actions, it would be purely speculative whether a favorable ruling would redress the Tribes’ claimed injuries.<sup>123</sup> Thus, the court determined that the plaintiffs had not met the requirement.<sup>124</sup>

The court did mention that a NEPA challenge may succeed if it could be connected with a proper claim under the APA.<sup>125</sup> However, the court did not elaborate on what a qualifying claim might be.<sup>126</sup>

The court pointed to *Franklin* in addressing the second issue, namely whether the plaintiffs could challenge a Presidential permit decision under the APA if the President actually made the final decision.<sup>127</sup> According to the district court, plaintiffs could challenge the decision if the President was the final actor in the process because then, his duties are not merely ceremonial or ministerial.<sup>128</sup> The court noted that E.O. 13337 “explicitly states” that the President retains the authority to issue a final decision on whether or not to issue a permit.<sup>129</sup> In that regard, the court insisted the President is the final actor in determining whether the permit should be issued because he is not obligated to approve any applications and “until he does, there is no final action.”<sup>130</sup>

Further, the district court noted that it does not matter that the President acts under his inherent authority rather than his statutory

121. *Id.*

122. *Id.* at 1078–79 (quoting *Ashley v. U.S. Dep’t of Interior*, 408 F.3d 997, 1003 (8th Cir. 2005) (“[When a third such party is involved] the defendant must have control over the third party’s (case-relevant) behavior.”)).

123. *Id.* at 1079.

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.* at 1081.

128. *Id.*

129. *Id.* The court did not specify where in E.O. 13337 it “explicitly states” that the President retains the authority to issue a final decision on whether or not to issue a permit.

130. *Id.*

authority.<sup>131</sup> Congress failed to create a federal regulatory scheme for the construction of oil pipelines and had delegated that authority to the states. Therefore, the President had sole authority to allow pipeline border crossings.<sup>132</sup>

Finally, the court concluded that even if the decision was an agency decision as opposed to a Presidential one, DOS's actions were not an abuse of discretion and its decision was not arbitrary or capricious because it made a good-faith effort to comply with the requirements of the applicable laws.<sup>133</sup>

*2. Natural Resources Defense Council, Inc. v. U.S.  
Dep't. of State*

Just one day after the *Sisseton* opinion, the United States District Court for the District of Columbia issued its opinion addressing the reviewability of the Secretary of State's decision to issue the Presidential permit for the first Keystone pipeline in *Natural Resources Defense Council, Inc. v. U.S. Dep't of State*.<sup>134</sup> In this case, environmental groups brought an action alleging that DOS violated NEPA by conducting an inadequate assessment of environmental impacts and the APA by deciding to issue the permit based on the inadequate assessment.<sup>135</sup>

In a footnote, the court addressed an argument made by the defendants that was similar to the one that DOS successfully advanced in *Sisseton*.<sup>136</sup> Specifically, the defendants argued that the plaintiffs lacked standing because they failed to meet the redressability requirement of the standing analysis because the President could revoke the authority delegated to DOS in E.O. 13337 and issue a permit regardless of the court's decision.<sup>137</sup> However, the court said that DOS's

argument goes too far. Such an argument would defeat standing in nearly any administrative case because agencies always act pursuant to delegated authority, whether from Congress or from the President, that can be subsequently withdrawn. That an agency's delegated power can be revoked is too speculative to defeat standing on

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131. *Id.*

132. *Id.* (quoting *Curtiss-Wright*, 299 U.S. at 319, which states in part that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

133. *Id.* at 1082–83.

134. *NRDC*, 658 F. Supp. 2d 105.

135. *Id.* at 107.

136. *Id.* at 108 n.4.

137. *Id.* at 107–08.

redressability grounds.<sup>138</sup>

Instead, the court looked at the judicial reviewability of DOS's actions under the APA.<sup>139</sup> The plaintiffs argued that the DOS decision was final because it took effect in accordance with E.O. 13337 without any further review by the President.<sup>140</sup> However, the court said that agency action pursuant to a delegation of the President's inherent Constitutional authority over foreign affairs "is tantamount to an action by the President himself."<sup>141</sup> DOS was acting solely on behalf of the President, exercising his purely Presidential prerogatives.<sup>142</sup> The President is not an "agency" for purposes of the APA, so Presidential action is not subject to judicial review under that statute.<sup>143</sup> Because DOS was acting for the President, the court determined that DOS's decision was not subject to review under the APA.<sup>144</sup>

The plaintiffs argued that *Franklin* and *Dalton* could be distinguished on the ground that the challenged agency actions in those cases were "purely advisory and in no way affected the legal rights" of the relevant parties until the President acted.<sup>145</sup> However, the court said that whether an action is final and whether it is presidential are separate matters.<sup>146</sup>

The court acknowledged that *Franklin* was not directly on point. There, according to the Supreme Court, the determinative fact was that the President takes the final action, rather than an agency.<sup>147</sup> In *Franklin*, the Supreme Court distinguished reviewable agency action from unreviewable Presidential action by the nature of the President's authority over agency decisions, not by whether or how the President

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138. *Id.* at 108 n.4. The court also cited *Lemon v. Gerden*, 514 F.3d 1312, 1313, 1315 (D.C. Cir. 2008), for the proposition that courts have routinely upheld standing in NEPA lawsuits, knowing that a favorable decision may not change the outcome: "The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and it considers options that entail less environmental damage, it may still be persuaded to alter what it proposed."

139. *Id.* at 107–13.

140. *Id.* at 108.

141. *Id.* at 109.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 110.

exercised that authority.<sup>148</sup> If the President had significant discretionary authority over agency decisions, the resulting action would be considered a Presidential action not reviewable out of concern for separation of powers.<sup>149</sup> The determinative factor was whether the President's authority to direct the agency is curtailed in any way or whether the President is required to adhere to decisions of the agency.<sup>150</sup> Applying that reasoning, the *NRDC* court said that because the President could always use his authority to direct the agency or even revoke the delegation of authority for it to issue permits, the decision must be "presidential."<sup>151</sup> At a minimum, the President must "acquiesce" to the agency decision, which makes the process Presidential enough to be unreviewable.<sup>152</sup>

Thus, the court determined that DOS's decision was not "final" for purposes of the APA.<sup>153</sup> It also said that the President is not subject to NEPA, which applies only to agency actions.<sup>154</sup> "To treat those decisions as agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action."<sup>155</sup>

### 3. *Sierra Club v. Clinton*

In *Sierra Club v. Clinton*, the plaintiffs challenged the sufficiency of an EIS under NEPA and the APA, and the Constitutionality of the Presidential permitting process with results different than those of the *Sisseton* and *NRDC* courts.<sup>156</sup> The United States District Court for the District of Minnesota dismissed the constitutional claim, but reviewed the EIS for its sufficiency under the APA.<sup>157</sup> The court based its decision on well-established NEPA case law that an EIS is a final agency action subject to review under the APA.<sup>158</sup>

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148. *Id.*

149. *Id.*

150. *Id.* at 111.

151. *Id.*

152. *Id.*

153. *Id.* at 112.

154. *Id.*

155. *Id.* (internal quotation marks omitted).

156. *Sierra Club*, 689 F. Supp. 2d 1147.

157. *Id.*

158. *Id.* at 1156-57 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) and *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006))

The defendants claimed that the Final EIS was unreviewable because the permit, not the EIS, would authorize building the pipeline and thus the Final EIS was not a final action.<sup>159</sup> In response, the court noted that DOS had conceded that issuing the pipeline permit would constitute a “major federal action” under NEPA, had taken on the role of “lead agency,” and had exercised its authority to prepare and issue the EIS.<sup>160</sup>

The court determined that based on the information in the Final EIS, the defendants took a “hard look” at the factors relevant to the stated purpose of the project.<sup>161</sup> The stated purpose was to bring more crude oil to refineries in the United States to meet the demands of refineries and markets, reduce national dependence on less stable oil suppliers by increasing access to Canadian supplies, and meet shipper interest in a pipeline expansion.<sup>162</sup> The court determined that in light of the stated purpose, because the EIS addressed all major issues, it was adequate.<sup>163</sup> The EIS need not consider higher-order impacts of tar sands development, such as increased climate change.<sup>164</sup>

### III. ANALYSIS

If DOS grants a Presidential permit for Keystone XL, legal challenges are likely to follow. How a court would resolve such a challenge is uncertain, but *Franklin* is the guide. All the courts that have decided similar issues are federal district courts in different circuits; none is obligated to follow any other. Further, each court has approached the issues from a slightly different angle and none has read the legal precedents consistently with any other. However, if a court properly applied *Franklin*, it should review DOS’s decision to issue a Presidential

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(“Injury under NEPA occurs when an agency fails to comply with that statute” and “[t]he injury-in-fact is increased risk of environmental harm stemming from the agency’s allegedly uninformed decision-making.”)).

159. *Id.* at 13.

160. *Id.* (citing the Federal Register notice of DOS: 73 Fed. Reg. 16920 (March 31, 2008)).

161. *Id.*

162. *Id.*

163. *Sierra Club*, 746 F. Supp. 2d at 1047.

164. See COUNCIL ON ENVTL. QUALITY, GUIDANCE ON NEPA ANALYSIS FOR TRANSBOUNDARY IMPACTS (July 1, 1997), available at <http://ceq.hss.doe.gov/nepa/regs/transguide.html>.

permit.

### A. Reconciling the Cases

All three cases embraced the President's inherent authority to issue permits for cross-border oil pipelines.<sup>165</sup> The President has the authority to issue such permits, at least while Congress "has failed to create a federal regulatory scheme for the construction of oil pipelines."<sup>166</sup>

*Sisseton* and *NRDC* indicate that courts should not review E.O. 13337 actions because they are Presidential actions, not final agency actions. If this is an accurate portrayal, even if DOS performs the entire permitting process, no NEPA review is required because NEPA applies only to agencies and not to Presidential actions. Further, review of NEPA actions can only be accomplished under the APA, which applies only to agencies, and not to the President.

This raises the question of whether a decision by DOS to forego an EIS would be unreviewable.<sup>167</sup> DOS currently conducts the review pursuant to its own regulations that contain a nod to NEPA, and it has executed an EIS, not only in its reviews for Keystone XL, but also for the earlier Keystone pipeline<sup>168</sup> and for a pipeline that crosses from Alberta to Wisconsin.<sup>169</sup>

However, E.O. 11423 predates NEPA and E.O. 13337 makes no mention of the law. E.O. 13337 requires only that the permit be in the national interest.<sup>170</sup> But, because of DOS's prior conduct and its regulations regarding EISs for permits, not performing an EIS in such circumstances would likely be arbitrary and capricious *if* a court reviewed the decision. A large body of NEPA case law establishes that

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165. *Sisseton*, 659 F. Supp. 2d at 1078, 1078 n.5; *NRDC*, 658 F. Supp. 2d at 106; *Sierra Club*, 689 F. Supp. 2d at 1155; Brian Scott Tomasovic, Disjointed Connections: Presidential Permitting of Tar Sands Oil Pipelines at the U.S.-Canadian Border 32 (Dec. 2010) (unpublished M.A. thesis, University of Texas at Austin), available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-12-2536/TOMASOVIC-THESIS.pdf?sequence=1> [hereinafter Tomasovic Thesis].

166. See *Sisseton*, 659 F. Supp. 2d at 1081. Whether conflict pre-emption would be an issue in the event that Congress did create a federal regulatory scheme is a topic far beyond the scope of this paper. For a discussion of the issue in the context of Keystone XL, see KEY ISSUES #2, *supra* note 84, at 4–6.

167. *Sisseton*, 659 F. Supp. 2d at 1082; *NRDC*, 658 F. Supp. 2d at 108–09.

168. The pipeline mentioned here is the same pipeline at issue in *NRDC* and *Sisseton*. See *NRDC*, 658 F. Supp. 2d 105; *Sisseton*, 659 F. Supp. 2d 1071.

169. The pipeline mentioned here is the same pipeline at issue in *Sierra Club*.

170. See E.O. 11423, *supra* note 76; E.O. 13337, *supra* note 33.



an agency's failure to perform an adequate EIS (or any EIS at all) is reviewable, which the *Sierra Club* court recognized.<sup>171</sup> Note, however, that one of the major factors the court considered in deciding that the EIS was a reviewable agency action was that DOS had conceded it was required to perform one. In *Sisseton* and *NRDC*, the courts determined that under Presidential permitting circumstances, the EIS or decisions relating to it were not reviewable.<sup>172</sup> This raises the question of whether those courts would have reviewed a decision not to perform an EIS.

The intuitive response based on the prior NEPA case law, which does not apply to the President, is that even if the President's decision alone is not reviewable, the quality of the input DOS provides to him and upon which he bases his decision should be reviewable. Making an uninformed decision seems arbitrary and capricious. In any case, DOS appears to have voluntarily subjected itself to NEPA in this instance by the mere fact that it has performed an environmental review during the permitting process, even though it is not required to by NEPA or any other mandate of Congress. That DOS performs an EIS at all seems to be a matter of agency grace that could be dependent only upon the individual environmental policy of the President.

Under *Sisseton*, *NRDC*, and *Sierra Club*, the result is either that the decision to issue a Presidential permit and the associated EIS are wholly unreviewable, or that only the final EIS is reviewable. If DOS keeps its regulations in place and performs an EIS, then so long as it performs the EIS in accordance with NEPA, DOS may legitimately determine that the construction of a transboundary pipeline is "within the national interest," even where it is a disproportionately environmentally destructive project.<sup>173</sup> If courts look at all, they will look only to the EIS to see if it is adequate.<sup>174</sup>

### *B. Reconciling Sisseton and NRDC with Franklin*

There is no dispute that when the President, not DOS, makes the decision to issue a permit, that decision is not reviewable. But, unless the

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171. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1156–57.

172. See *Sisseton*, 659 F. Supp. 2d at 1082; *NRDC*, 658 F. Supp. 2d at 111; *Sierra Club*, 689 F. Supp. 2d 1147.

173. This is the same standard for *any* review of an agency undertaking a major federal action under NEPA. NEPA forces informed agency decisions, not wise ones. *Robertson*, 490 U.S. at 350–51.

174. See *Env'tl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

President actually invokes that authority, DOS's decision should be reviewable.<sup>175</sup> The *Sisseton* and *NRDC* courts did not correctly apply *Franklin* in determining whether DOS decisions pursuant to E.O. 13337 are "presidential."

In determining that DOS's decision in the permitting process was a Presidential action, the *Sisseton* court found that according to E.O. 13337, the President is the final actor in the permitting process.<sup>176</sup> However, E.O. 13337 paragraph (i) only dictates that the President retains authority if, and only if, one of the other actors in the process<sup>177</sup> disputes the DOS decision.<sup>178</sup> The court insisted that the President is thus the final actor and until the President approves the permit, there is no final action.<sup>179</sup> If that were the case, circumstances would be highly analogous to *Franklin*<sup>180</sup> and the *Sisseton* court would have been correct.<sup>181</sup> However, DOS can and does issue permits without the explicit approval of the President. For example, the President made no determination regarding the permit at issue in *Sisseton*; DOS made the decision and no other consultee disputed the determination.<sup>182</sup> In this regard, the circumstances in *Sisseton* are not analogous to those in *Franklin*. The DOS is not merely presenting information to the President and awaiting approval, as the Secretary was in *Franklin*. Rather, the DOS makes a final decision, unless the President must settle a dispute between DOS and one of the other actors in the process.<sup>183</sup> Only in such an instance may the President decide the issue.<sup>184</sup>

In *NRDC*, the court at least recognized that *Franklin* was not directly applicable because in *Franklin*, the agency action did not have any effect until the President affirmatively acted.<sup>185</sup> The court opined that neither *Franklin* nor *Dalton* require that the President actually make a

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175. See *Franklin*, 505 U.S. at 800–01.

176. See *Sisseton*, 659 F. Supp. 2d at 1081.

177. E.g., one the officials required to be consulted under paragraph (b)(ii) of E.O. 13337, *supra* note 33, at 25300.

178. *Sisseton*, 659 F. Supp. 2d at 1081.

179. *Id.*

180. See discussion *supra* Part II (explaining that the Secretary's report to the President was not a final agency action where the President must still make a report to Congress for the process to be final).

181. See *Sisseton*, 659 F. Supp. 2d 1071; *Franklin*, 505 U.S. 788.

182. See *Sisseton*, 659 F. Supp. 2d at 1074–76.

183. See E.O. 13337, *supra* note 33, at 25300.

184. *Id.*

185. *NRDC*, 658 F. Supp. 2d at 110.

decision for the action to be Presidential.<sup>186</sup> However, the Supreme Court in *Franklin* did say that until the President acted, there was “no determinate agency action to challenge,” because “[t]he President, not the Secretary, takes the final action that affects the states.”<sup>187</sup> In reality, in the case of Presidential permits, unless the President is settling an interagency dispute, the Secretary takes the final action.<sup>188</sup> Thus, the court did not make a decision based on anything mandated by *Franklin*.<sup>189</sup> Rather, it opined that the separation of powers issues were “even greater” than those in *Franklin* because the President was acting pursuant to his inherent authority, rather than Congressionally delegated authority.<sup>190</sup> Therefore, the court would review neither the decision nor the EIS.<sup>191</sup>

The *Sierra Club* court was the only court not to address *Franklin* and the only one to decide the matter of EIS reviewability according to applicable case law.<sup>192</sup> It disagreed with the holdings of the other courts “insofar as they hold that any action taken by the State Department pursuant to an executive order, and in particular the preparation of an EIS for a major federal action, is not subject to judicial review under the APA,” because it was part of a Presidential action.<sup>193</sup>

### C. Review of Keystone XL

In *Franklin*, none of the Justices thought that the action of a subordinate administrator was a reviewable final action, so long as it is preliminary to implementation by the President and subject to his discretion.<sup>194</sup> But here, in the case of a Presidential permit, DOS has the authority to make the final decision and issue a permit.<sup>195</sup> In fact, only when “an official required to be consulted . . . disagrees with the Secretary’s proposed determination and requests” it, does the Secretary refer the application to the President “for consideration and a final

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186. *Id.* at 111.

187. *Franklin*, 505 U.S. at 799.

188. See E.O. 13337, *supra* note 33, at 25300.

189. See *NRDC*, 658 F. Supp. 2d at 111.

190. *Id.*

191. *Id.* at 111–13.

192. See *Sierra Club*, 746 F. Supp. 2d 1025.

193. *Sierra Club*, 689 F. Supp. 2d at 1157 n.3.

194. *Franklin*, 505 U.S. at 797–98; SHANE & BRUFF, *supra* note 57, at 344–46.

195. E.O. 13337, *supra* note 33, at 25300.

determination.<sup>196</sup> That the President could wholly revoke the E.O. that delegates permitting authority to DOS does not nullify DOS's authority to make final decisions to issue permits. As the *NRDC* court pointed out, agencies almost always act upon authority that is delegated to them by the President and the President could almost always revoke that authority.<sup>197</sup> But final agency decisions under those circumstances are reviewable regardless.<sup>198</sup>

Not only should the EIS be reviewable; the entire decision to issue a permit should be reviewable unless the DOS decision is preliminary to a decision by the President, which, for all practical purposes, it is not.<sup>199</sup> The President, not the Secretary, took the final action that affects the states in *Franklin*.<sup>200</sup> In the case of a decision to issue a permit for Keystone XL or another transboundary project, however, the reverse is true.<sup>201</sup> Only in exceptional circumstances would the permitting decision fall to the President.<sup>202</sup> In almost all circumstances, DOS takes the action that affects the states and other parties. For example, when the EPA challenged the sufficiency of the Keystone XL Draft EIS, DOS undertook additional review and issued a Supplemental EIS to address those concerns.<sup>203</sup> DOS would have to fail completely to address the parties' concerns for paragraph (i) of E.O. 13337 to apply, which would send the decision to the President for the final determination.<sup>204</sup> Under such circumstances, there is no dispute that the decision would be unreviewable under the APA.<sup>205</sup> Because the President's exercise of the reserved authority to issue a final decision is completely contingent on an associated agency challenging the permit,<sup>206</sup> the DOS decision should be reviewable because it is effectively final.

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196. *Id.*

197. *See NRDC*, 658 F. Supp. 2d at 107–08 n.4.

198. *See id.*

199. *See Franklin*, 505 U.S. at 797–98; E.O. 13337, *supra* note 33, at 25300.

200. *Franklin*, 505 U.S. at 797.

201. *See* E.O. 13337, *supra* note 33, at 25300.

202. *See id.*

203. *See* EPA Letter, *supra* note 13; FACT SHEET: FINAL ENVIRONMENTAL IMPACT STATEMENT, U.S. DEP'T OF STATE (Aug. 26, 2011), <http://www.state.gov/t/pa/prs/ps/2011/08/171084.htm>; U.S. DEP'T OF STATE, FEIS APPENDIX A, RESPONSES TO COMMENTS AND SCOPING SUMMARY REPORT (Sept. 22, 2011), *available at* [http://keystonepipeline-xl.state.gov/archive/dos\\_docs/feis/vol3and4/appendixa/index.htm](http://keystonepipeline-xl.state.gov/archive/dos_docs/feis/vol3and4/appendixa/index.htm).

204. *See* E.O. 13337, *supra* note 33, at 25300.

205. *See Franklin*, 505 U.S. 788; *see* 5 U.S.C. § 706(a)(2).

206. *See* E.O. 13337, *supra* note 33, at 25300.

#### IV. CONCLUSIONS AND POLICY RECOMMENDATIONS

The lingering legal questions in this area beg for further clarification. Either Congress or the President should act to address the confusion around the permitting process and ensure quality environmental review. First, Congress could amend NEPA to clarify that it applies to actions taken by an agency under authority delegated by the President. Second, Congress could legislate to clarify the Presidential permitting process. Third, the President could amend E.O. 13337 to clarify that NEPA applies to the process and establish the standard of review. Granted, accomplishing any of these would not be a simple matter.<sup>207</sup>

Congress could amend NEPA to clarify that it applies to actions taken by an agency under authority delegated by the President. However, because of *NRDC*, courts may still think that compliance with NEPA is voluntary regarding actions that are both major and federal, so long as they are undertaken based on constitutional authority delegated by the President.<sup>208</sup> Thus, NEPA should unequivocally require the President to consider environmental factors in the permitting process, thereby negating any argument that NEPA simply does not apply. NEPA should specify that the President is specifically included within its reach when he undertakes “major federal actions,” without limiting its reach to agencies.

Congress could also legislate to clarify the Presidential permitting process. Even though none of the judges in *Sisseton*, *NRDC*, and *Sierra Club* recognized any challenge to the constitutionality of the Presidential permitting process,<sup>209</sup> and Congress has impliedly authorized it, the process may still be improved.<sup>210</sup> Congress could pass legislation setting forth substantive requirements for permitting all pipelines in the United States, including those crossing the borders from a foreign nation. However, as noted, Congress recently attached riders to bills that would fast-track Keystone XL without addressing the environmental concerns that DOS identified in its process. Congressional power can either strengthen or weaken the process.

Finally, the President could issue another Executive Order that

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207. Politics.

208. See *NRDC*, 658 F. Supp. 2d at 112.

209. See *Sisseton*, 659 F. Supp. 2d at 1078 & n.5; *NRDC*, 658 F. Supp. 2d at 106; *Sierra Club*, 689 F. Supp. 2d at 1155–56.

210. Tomasovic Thesis, *supra* note 165, at 35.

replaces E.O. 13337, clarifies that NEPA applies to the permitting process, and establishes the standard of review.<sup>211</sup> Making clear that NEPA applies as part of the national interest determination and not just as a matter of grace by DOS would make certain that an EIS is a required component of the process. These actions would also establish the level of consideration that environmental factors should receive in the determination of national interest. Further, it may bolster the notion that the EIS is judicially reviewable.

The district courts that have heard challenges to permits for transboundary pipelines have decided the issue of reviewability incorrectly under current case law. NEPA and the APA, two laws designed to force informed governmental decision-making, are not adequate protection of the environment in this circumstance. Neither is relying on agency grace for environmental review. Environmental review should not be optional or dependent upon the individual policy of the President. Congress passed laws such as NEPA with the intent that they would apply to agencies. NEPA applies in the construction of any other pipeline in the United States; that NEPA would not apply merely because the pipeline crosses an international boundary seems absurd. Further, that the process would not be judicially reviewable because a pipeline crosses an international boundary also seems absurd. The most direct remedy is for courts to appropriately address the issue of reviewability of the permits and the EISs.

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211. *See id.*