

INSIGHTS

New Executive Order Attempts to Streamline Presidential Permits

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The White House issued a new [Executive Order](#) (EO) on April 10, 2019 intended to ‘revise the process for the development and issuance of Presidential Permits’ for certain cross border energy infrastructure. The EO limits the opportunity and timeframe for federal agencies, states or Indian tribes to comment on Presidential Permit applications for oil, water or sewage pipelines and other border crossing infrastructure such as bridges, rail and surface roads. The new EO clarifies that the ultimate decision to grant or deny such permits remains with the President (that authority was previously delegated to the State Department).

Presidential Permits came into existence after the Civil War, when President Ulysses S. Grant was asked to approve construction of a telegraph line between the U.S. and Canada. The practice continued to evolve so that it now addresses all types of infrastructure crossing to either Canada or Mexico. Presidential Permits remain purely an Executive Branch function (i.e., they are not required or guided by Congress). Congress has the power to rescind or modify the Presidential Permit process, and at least one bill has been introduced to that effect in recent years, but it did not pass. There have been a few judicial challenges to the constitutionality (or even the reviewability) of the [Presidential Permit process](#), but to date those challenges have been unsuccessful.

This new EO addresses the Presidential Permit process for pipelines (oil, water, sewage) and for bridges or surface border crossings. It leaves in place prior EOs that address Presidential Permits for electric transmission line border crossings and natural gas facilities located at borders, which are governed by the Department of Energy and Federal Energy Regulatory Commission, respectively. It also revokes two other EOs that established the prior process for the State Department to review and approve Presidential Permit applications for oil, coal and other fuels (revoking EO 13337, April 30, 2004; EO 11423, Aug. 16, 1968). The new EO asserts that the Presidential Permit process has become ‘*unnecessarily complicated*’ in recent years, and has thus hindered economic development. Without stating out right, the new EO is clearly intended to address the protracted process and lengthy legal challenges to the Presidential Permit application for the Keystone XL pipeline. Toward that end, President Trump issued a new [Presidential Permit to Keystone XL](#) last week, despite ongoing litigation regarding a prior approval. It is unclear whether re-issuance of that Permit changes the nature of the underlying issues in that case.

Under the provisions of this new EO, the State Department must now consult with the President to discuss any application for Presidential Permits (or amendments to existing

Presidential Permits) involving pipelines and other infrastructure. In particular, the consultation is intended to determine whether or not to seek the opinions or input from any other federal agency. If input is sought, the Secretary of State is directed to gather that information in a timeframe not to exceed 30 days. The Secretary also “may,” but is not required, to seek input from states, tribes, local or foreign governments, but that process may also not exceed 30 days. At the conclusion of this process (whether or not any input from agencies, states or tribes is requested or obtained) the Secretary of State is to recommend whether a Presidential Permit should be granted, denied or modified. The entire process, from submittal of an application to final recommendation, is not to exceed 60 days. The President retains sole authority to make the decision to grant, deny or modify. All existing Presidential Permits remain in effect.

This new EO regarding Presidential Permits expressly limits the opportunity and timeframe for federal agencies, states or tribes to have input on applications, and further constrains the State Department’s review. As such, it does streamline the process, but the general purpose and method for issuance of Presidential Permits remains unchanged. Because Presidential Permits are rooted in Executive Orders (and not statute), only Congress or the courts can further revise or revoke the Presidential Permitting process. No current proposal or case is pending.