

Intelligence MEMOS



From: Kristen van de Biezenbos
To: Canadians concerned about pipelines
Date: May 22, 2019
Re: **COURTROOMS STILL LOOM FOR KEYSTONE XL**

Late last month, President Donald Trump issued a new permit via executive order to approve the Keystone XL pipeline, sidestepping a federal court ruling that his first approval was flawed.

To briefly recap, Keystone XL has faced numerous hurdles, including an original environmental impact statement (EIS) that was deemed insufficient, a supplemental impact statement (SEIS) that was also deemed insufficient, and finally the denial of a permit by the Obama Administration, based primarily on cumulative impacts that the pipeline, in conjunction with other projects based in the Alberta oil sands, would have on carbon emissions and climate change.

Donald Trump, who had campaigned on the issue, directed the State Department to reverse the previous decision to deny the permit shortly after taking office. However, the District Court for the District of Montana found the permit in violation of both the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA).

After this ruling, I, and most other scholars familiar with US energy and environmental laws, assumed that the State Department would have to go back to the drawing board and issue a new SEIS to support approval of the project, a process that could easily take years. With his re-election campaign ramping up to 2020, President Trump apparently decided that he wasn't willing to wait to fulfill this particular promise. In issuing the new presidential permit, the administration made clear that it views the permit as valid on its face, and not subject to NEPA or the APA.

But given that the previous presidential permit was rejected precisely because it did not meet the requirements of NEPA and the APA, is President Trump correct about this? Can he wipe the slate clean and issue a permit that avoids federal environmental and administrative regulations altogether?

It should be noted that executive power in the US has been expanding, without any constitutional changes, for more than a century. Campaigning candidates may claim that they will reign in unchecked executive privilege, but once in office, none have done so. Additionally, as Congress becomes less and less a lawmaking body and more and more a political morass, presidents have resorted to using the executive agencies (like the State Department) under their direction.

But most presidents, like Barack Obama and his energy policies such as the *Clean Power Plan*, used agencies to carry out their will. Trump is doing Keystone himself, and asserting that his permit is not subject to NEPA (and so no comprehensive EIS will be necessary) or APA (his decision is not reviewable by a court).

Presidents have been issuing cross-border infrastructure permits since the 1800s, and doing so is probably a justifiable exercise of the constitutional presidential authority over foreign affairs.

What's not clear is whether those permits are exempt from NEPA and the APA. The failure of the last presidential permit to abide by those two acts put the brakes on Keystone XL in the first place. There have been conflicting federal court rulings about whether the White House can be defined as an 'agency' and whether the issuance of a presidential permit is reviewable by the courts.

In the meantime, construction remains halted, under the order of the District Court for the District of Montana, pursuant to its ruling that the previous permit did not comply with NEPA and the APA.

The court has not yet responded to requests by the Trump Administration to let construction proceed under the new permit.

Indeed, I would expect legal challenges to the new permit will emerge before construction can begin on the pipeline in 2020. Until then, however, the Trump Administration will likely tout the new permit as a promise fulfilled, whatever the ultimate outcome may be.

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