



MEMORANDUM

August 16, 2013

To: House Energy and Power Subcommittee
[REDACTED]

From: [REDACTED], Legislative Attorney, [REDACTED]
[REDACTED], Specialist in Energy and Infrastructure, [REDACTED]

Subject: **Presidential Permitting of Border Crossing Energy Facilities**

You asked us to provide information and analysis responsive to various questions about the permitting of U.S. energy facilities crossing the international border. Generally, the construction, operation and maintenance of facilities that cross the U.S.-Mexico or U.S.- Canada border must be authorized by the federal government through the issuance of a Presidential Permit in accordance with requirements set forth in a series of Executive Orders. This memorandum addresses each of your questions about these Presidential Permits as they relate to oil¹ and natural gas pipelines and electricity transmission facilities.

What are the background, history and current status of Presidential Permit authority for oil, natural gas and electric transmission facilities?

Oil and natural gas pipelines and electricity transmission facilities that cross international borders must be authorized by the federal government. A series of executive orders grant certain federal agencies the authority to permit these border crossing facilities and set forth the applicable standard of review for applications for these permits.

Oil Pipeline Border Crossing Permits: Executive Orders 11423 and 13337

The executive branch exercises permitting authority over the construction and operation of “pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products” and other products pursuant to a series of executive orders. This authority has been vested in the U.S. State Department since the promulgation of Executive Order 11423 in 1968.² Executive Order 13337 amended this authority and the procedures associated with the

¹ “Oil” in this memorandum includes petroleum and petroleum products as well as other liquid fossil fuels.

² Exec. Order No. 11423, *Providing for the performance of certain functions heretofore performed by the President with respect to certain facilities constructed and maintained on the borders of the United States*, 33 Fed. Reg 11741. (August 20, 1968).

review, but did not substantially alter the exercise of authority or the delegation to the Secretary of State in Executive Order 11423.³

Executive Order 11423 provided that, except with respect to cross-border permits for electric energy facilities, natural gas facilities, and submarine facilities:

The Secretary of State is hereby designated and empowered to receive all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required.⁴

Executive Order 13337 designates and empowers the Secretary of State to “receive all applications for Presidential Permits, as referred to in Executive Order 11423, as amended, 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 or from a foreign country.”⁵ Executive Order 13337 further provides that after consideration of the application and comments received:

If the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary's judgment require, and shall notify the officials required to be consulted ... that a permit be issued.⁶

Thus the Secretary of State is directed by the order to authorize those border crossing facilities that the Secretary has determined would “serve the national interest.”

Note that the source of the executive branch's permitting authority is not explicitly stated within the executive orders. Powers exercised by the executive branch are authorized by legislation or are inherent presidential powers based in the Constitution. Executive Order 11423 does not reference any statute or constitutional provision as the source of its authority, although it does state that “the proper conduct of foreign relations of the United States requires that executive permission be obtained for the construction and maintenance” of border crossing facilities.⁷ Executive Order 13337 refers only to the “Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code.”⁸ Section 301 of Title 3 simply provides that the President is empowered to delegate authority to the head of any department or agency of the executive branch. Courts that have addressed the legitimacy of this exercise of

³ Exec. Order No. 13337, *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 Fed. Reg. 25299 (May 5, 2004).

⁴ Exec. Order No. 11423, 33 Fed. Reg. at 11741.

⁵ Exec. Order No. 13337, 69 Fed. Reg. at 25299.

⁶ *Id.* at 25230.

⁷ 33 Fed. Reg. at 11741.

⁸ 69 Fed. Reg. at 25299.

authority have found that it is a legitimate exercise of “the President's constitutional authority over foreign affairs and his authority as Commander in Chief.”⁹

Natural Gas Pipeline and Electricity Transmission Facility Border Crossing Permits: Executive Order 10485

As discussed above, Executive Orders 11423 and 13337 explicitly exclude cross-border natural gas pipelines and electric energy facilities (among others) from their reach. Instead, permitting for these facilities is addressed in Executive Order 10485.¹⁰ Executive Order 10485 designates and empowers the now-defunct Federal Power Commission:

(1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

(2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.¹¹

In many ways this authority resembles the authority granted to the State Department in Executive Orders 11423 and 13337. However, as mentioned above, those orders do not describe the source of the executive branch permitting authority granted by the orders. Judicial opinions strongly suggest the permitting authority is an exercise of the President’s “inherent constitutional authority to conduct foreign affairs.”¹² By contrast, Executive Order 10485 cites federal statutes which may at least partially form the basis for the permitting authority granted to the Department of Energy by the order. The order states that “section 202(e) of the Federal Power Act, as amended ... requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order from the Federal Power Commission authorizing it to do so” and that “section 3 of the Natural Gas Act ... requires any person desiring to export any natural gas from the United States to a foreign country or to import any natural gas from a foreign country to the United States to obtain an order from the Federal Power Commission authorizing it to do so.” These appeals to statutory authority should be considered and possibly addressed in any legislation seeking to amend the current Presidential Permit process for border crossings for energy facilities.

⁹ *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162 (D. Minn. 2010).

¹⁰ Exec. Order No. 10485, *Providing for the performance of certain functions heretofore performed by the President with respect to electric power and natural gas facilities located on the borders of the United States*, 18 Fed. Reg. 5397 (Sept. 3, 1953).

¹¹ *Id.*

¹² *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009).

The text of Executive Order 10485 empowered the now-defunct Federal Power Commission to receive applications for and issue Presidential Permits for these facilities. The Department of Energy Organization Act of 1977¹³ eliminated the Federal Power Commission and transferred its functions to either the newly created Department of Energy (DOE) or the Federal Energy Regulatory Commission (FERC), an independent regulatory agency within DOE. Section 402(f) of that act specifically reserved import/export permitting functions for DOE rather than FERC. As a result, DOE took over the FPC's Presidential Permit authority for border crossing facilities under Executive Order 10485 pursuant to the act. The authority to issue Presidential Permits for natural gas pipeline border crossings was subsequently transferred to FERC in 2006 via DOE Delegation Order No. 00-004.00A.¹⁴

What is the process for authorizations or for modification of existing border crossing facilities?

The three executive orders discussed above address Presidential Permits for the “construction, operation, maintenance or connection” of oil, natural gas or electric energy facilities at border crossings. They do not explicitly reference modification of these facilities. However, it appears that modifications to the border crossing facilities require the owner/operator of the facility to apply for and receive an amended Presidential Permit from the appropriate federal agency. Presidential Permits authorize a specific type of facility. Most changes to that facility require a change to the permit. Indeed, there are records of several requests for amended Presidential Permits due to facility modifications. Two recent examples include a request from Enbridge Energy, LP to amend their Presidential Permit issued by the State Department for the “Alberta Clipper” pipeline to authorize increased capacity for its pipeline that crosses the US-Canada border,¹⁵ and a request from Kinder Morgan Texas, LLC to amend a Presidential Permit and Natural Gas Act Section 3 permit to increase the authorized capacity of its border-crossing facilities at the U.S.-Mexico border.¹⁶

However, not *all* modifications will necessarily require a new Presidential Permit. At some point, a change to the facility is likely so minor as to not require an amended Presidential Permit. For example there is an ongoing dispute regarding the permitting requirements applicable to a potential reversal of flow and change of oil supply for the existing Portland-Montreal oil pipeline.¹⁷

¹³ P.L. 95-91, 42 U.S.C. § 4101 note.

¹⁴ Available at <http://www.ferc.gov/industries/electric/indus-act/siting/doe-delegation.pdf>.

¹⁵ *Application of Enbridge Energy, Limited Partnership for an Amendment to the August 3, 2009 Presidential Permit for Line 67 to Increase the Operational Capacity of Pipeline Facilities at the International Boundary between Canada and the United States*, available at <http://www.state.gov/e/enr/applicant/applicants/202433.htm>.

¹⁶ Kinder Morgan Texas Pipeline LLC, 143 FERC ¶ 61,245 (June 20, 2013).

¹⁷ See Letter from Sen. J. Shaheen, Cong. C. Shea Porter, and Cong. A. Kuster to Sec. J. Kerry, April 23 2013, available at <http://www.shaheen.senate.gov/news/press/release/?id=8c47e3c2-2038-4af9-bfd4-f014e1a12f00>.

What are the respective roles of the executive and legislative branches in the permitting of border crossing facilities?

As discussed above, executive branch authority to issue Presidential Permits authorizing oil pipelines, natural gas pipelines and electricity transmission facilities as set forth in the Executive Orders appears to be primarily an exercise of the power to conduct foreign affairs as articulated in Article II of the Constitution, although Executive Order 10485 also mentions the Federal Power Act and the Natural Gas Act. The legitimacy of this permitting authority has been upheld by the federal courts.¹⁸ However, the courts have noted that the executive branch is taking action in the absence of congressional action, implying that legislation in this arena would be a legitimate exercise of Congress's authority to "regulate Commerce with the foreign nations" as enumerated in Article I, Section 8 of the Constitution, and would supersede the authority carved out by the executive orders.

For example, in *Sierra Club v. Clinton*, the court noted that "Congress has not attempted to exercise any exclusive authority over the permitting process. Congress's inaction suggests that Congress has accepted the authority of the President to issue cross-border permits."¹⁹ Similarly, the court in *Sisseton-Wahpeton Oyate v. U.S. Department of State* found that "Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs."²⁰ These rulings demonstrate that the courts have recognized these Executive Orders requiring Presidential Permits as legitimate exercises of executive branch authority, but have been careful to note that legislation could supersede the executive orders and establish a new scheme for the permitting of border crossings.²¹

The executive branch appears to possess the ability to act in the area of border crossing permitting pursuant to the power granted to the President to conduct foreign affairs under Article II of the Constitution. The executive branch's ability to act in this area, however, is informed by the previous lack of federal legislation in this area. The absence of legislation up to this point may have "enable[d], if not invite[d], measures on independent presidential responsibility" in which the President has acted in the "absence of either a congressional grant or denial of authority."²² However, if Congress chose to assert its authority in the area of border-crossing facilities, this would likely be considered within its constitutionally enumerated authority to regulate foreign commerce.

¹⁸ See, e.g., *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010); *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009).

¹⁹ *Sierra Club v. Clinton*, 689 F. Supp. 2d at 1163.

²⁰ *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d at 1081.

²¹ For further discussion of the legitimacy of the executive branch authority to issue Presidential Permits for border crossings and the potential role of the legislative branch should it seek to amend the process, see CRS Report R42124, *Proposed Keystone XL Pipeline: Legal Issues*, by Adam Vann, Kristina Alexander, and Kenneth R. Thomas, at p. 3-11.

²² *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

What energy facilities already exist or have been proposed that cross the U.S.- Mexico or U.S.-Canada borders?

Through analysis of federal agency permit records, energy trade data, GIS maps, and company information, CRS has identified over 100 operating or proposed energy facilities crossing the U.S.-Mexico or U.S.-Canada border. The facilities, owners, and approximate border-crossing locations are listed in the tables on the following pages.

Table 1. U.S. Natural Gas Pipelines Crossing the International Border

U.S. Owner/Operator	U.S. Border Location	State	Status
Alliance Pipeline Co.	Sherwood	ND	Operating
Bluewater Pipeline	Marysville	MI	Operating
Centra-Minnesota Pipeline Co.	Baudette	MN	Operating
Centra-Minnesota Pipeline Co.	International Falls	MN	Operating
Centra-Minnesota Pipeline Co.	Warroad	MN	Operating
Connector Pipeline Co.	Regent Station	MT	Operating
El Paso Natural Gas Co.	Douglas	AZ	Operating
El Paso Natural Gas Co.	Penitas	TX	Operating
El Paso Natural Gas Co.	Douglas II	AZ	Operating
El Paso Natural Gas Co.	Nogales	AZ	Operating
El Paso Natural Gas Co.	Willcox Lateral	AZ	Operating
El Paso Natural Gas Co.	El Paso	TX	Operating
Empire State Pipeline	Grand Island	NY	Operating
EnCana Pipelines Ltd.	Whitlash	MT	Operating
EnCana Pipelines Ltd.	Babb	MT	Operating
Encinal Gathering Ltd.	Galvan Ranch	TX	Operating
Great Lakes and Viking Transmission Co.	Noyes	MN	Operating
Great Lakes Gas Transmission Co.	Sault Ste. Marie	MI	Operating
Havre Pipeline Co.	Harve	MT	Operating
Iroquois Gas Transmission	Waddington	NY	Operating
Kinder Morgan Border Pipeline	McAllen	TX	Operating
Kinder Morgan Texas Pipeline	Roma	TX	Operating
Kinder Morgan Border Pipeline Co.	Salineno	TX	Operating
Maritimes & Northeast Pipeline Co	Calais	ME	Operating
NET Mexico Pipeline	Rio Grande City	TX	Applied for Permit
Norteno Pipeline	El Paso	TX	Operating
North Baja Pipeline Co.	Ogilby	CA	Operating
North Country Pipeline	Champlain	NY	Operating
Northern Border Pipeline	Port of Morgan	MT	Operating
Northwest Pipeline	Sumas	WA	Operating
Omimex Resources Inc.	Port of del Bonita	MT	Operating
Omimex Resources Inc.	South Battle Creek	MT	Operating
Panhandle Eastern Pipeline	Detroit	MI	Operating
PG&E Gas Transmission - Northwest	Eastport	ID	Operating
Portal Municipal Gas/Williston Basin PL Co.	Portal	ND	Operating
Portland Natural Gas Transmission	Pittsburg	NH	Operating

U.S. Owner/Operator	U.S. Border Location	State	Status
Reef International Pipeline	Eagle Pass-Tidelands	TX	Operating
Samalayuca Pipeline (El Paso Energy)	Clint	TX	Operating
Sempra Energy Co.	Otay Mesa	CA	Operating
Sierra Pipeline	Sweetgrass	MT	Operating
Sierra Production Co.	Sierra Station	MT	Operating
South Mainline System	Sasabe	AZ	Applied for Permit
Southern California Gas Co.	Calexico	CA	Operating
St Lawrence Gas Co.	Massena	NY	Operating
Tennessee Gas Pipeline Co.	Rio Bravo	TX	Operating
Tennessee Gas Pipeline Co.	Niagara Falls	NY	Operating
Tennessee Gas Pipeline Co.	Alamo	TX	Operating
Texas Eastern Pipeline	Hidalgo	TX	Operating
Vector Pipeline/Great Lakes Transmission co	St Clair River	MI	Operating
Vermont Gas System	Highgate Springs	VT	Operating
West Texas Gas Co.	Eagle Pass-WTG	TX	Operating
West Texas Gas Co.	Del Rio	TX	Operating

Sources: Energy Information Administration, *Natural Gas Imports and Exports, Fourth Quarter Report 2012*, DOE/FE-0563, 2013; Federal Energy Regulatory Commission permit filings; Platt's GIS Database; Company web sites; CRS Analysis.

Table 2. U.S. Oil Pipelines Crossing the International Border

U.S. Owner/Operator	U.S. Border Location	State	Status
Bridger Pipeline LLC	Outlook	MT	Operating
Enbridge	Portal	ND	Operating
Enbridge	Neché	ND	Operating
Enbridge	Neché	ND	Operating
Enbridge	Neché	ND	Operating
Enbridge	Neché	ND	Operating
Enbridge	Marysville	MI	Operating
Enbridge	Marysville	MI	Operating
Enbridge	Erie County	NY	Operating
Inter Pipeline	Toole County	MT	Operating
Kinder Morgan	Sumas	WA	Operating
Kinder Morgan	Hill County	MT	Operating
Magellan Midstream Partners	El Paso	TX	Operating
Plains All American Pipeline	Glacier County	MT	Operating
PMI Services	El Paso	TX	Operating
Portland Pipe Line Corp.	North Troy	VT	Operating
Sunoco Logistics Partners	Marysville	MI	Operating
Tesoro Logistics	Portal	ND	Operating
TransCanada	Walhalla	ND	Operating
TransCanada	Phillips	MT	Applied for Permit

Sources: Department of State permit filings; Canadian Association of Petroleum Producers; Energy Information Administration; Platt's GIS Database, Company web sites; CRS Analysis.

Table 3. U.S. Electric Transmission Lines Crossing the International Border

U.S. Owner/Operator	U.S. Border Location	State	Status
AEP Texas Central	Laredo	TX	Operating
AEP Texas Central	Brownsville	TX	Operating
AEP Texas Central	Eagle Pass	TX	Operating
Bangor Hydro-Electric Co.	Baileyville	ME	Operating
Basin Electric Power Coop.	Tioga	ND	Operating
Bonneville Power Administration	Blaine	WA	Operating
Bonneville Power Administration	Nelway	WA	Operating
Champlain Hudson Power Express	Lake Champlain	NY	Applied for Permit
Eastern Maine Electric Cooperative	Calais	ME	Operating
El Paso Electric	Ascarate	TX	Operating
El Paso Electric	Diablo	NM	Operating
Electric Transmission Texas, LLC	Presidio	TX	Operating
Frontera Generation LP	Frontera	TX	Operating
Highgate Project	Highgate	VT	Operating
ITC Transmission	St. Clair	MI	Operating
ITC Transmission	St. Clair	MI	Operating
ITC Transmission	Detroit	MI	Operating
ITC Transmission	Marysville	MI	Operating
Long Sault, Inc.	Massena	NY	Operating
Maine Electric Power Co.	Houlton	ME	Operating
Maine Public Service	Aroostook	ME	Operating
Maine Public Service	Limestone	ME	Operating
Maine Public Service	Ft. Fairfield	ME	Operating
Maine Public Service	Madawaska	ME	Operating
Minnesota Power	International Falls	MN	Operating
Minnkota Power Cooperative	Roseau County	MN	Operating
Montana Alberta Tie Ltd.	Cut Bank	MT	Permit Issued
New York Power Authority	Massena	NY	Operating
New York Power Authority	Massena	NY	Operating
New York Power Authority	Niagara Falls	NY	Operating
New York Power Authority	Devils Hole	NY	Operating
Niagara Mohawk Power Co.	Devils Hole	NY	Operating
Northern Pass Transmission	Pittsburg	NH	Applied for Permit
San Diego Gas & Electric	Miguel	CA	Operating
San Diego Gas & Electric	Imperial Valley	CA	Operating
Sea Breeze Olympic Converter	Port Angeles	WA	Operating
Sharyland Utilities	McAllen	TX	Operating
Soule Hydro	Hyder	AK	Applied for Permit

U.S. Owner/Operator	U.S. Border Location	State	Status
Tucson Electric	Sahuarita	AZ	Applied for Permit
Twin Rivers Paper Co.	Madawaska	ME	Operating
Vermont Electric Power Co.	Derby Line	VT	Operating
Vermont Electric Transmission Co.	Norton	VT	Operating
Western Area Power Administration	San Luis	AZ	Operating
Western Area Power Administration	Falcon Dam	TX	Operating
Western Area Power Administration	Amistad Dam	TX	Operating
Xcel Energy	Roseau County	MN	Operating
Xcel Energy	Red River	ND	Operating
Xcel Energy	Rugby	ND	Operating

Sources: Department of Energy, Office of Electricity Delivery and Energy Reliability, permit filings; Regional power pool maps; Platt's GIS Database, Company web sites; CRS Analysis.
