

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA  
CIVIL NO. 09-2622 (DWF / RLE)

SIERRA CLUB, INC., MINNESOTA )  
CENTER FOR ENVIRONMENTAL )  
ADVOCACY, NATIONAL )  
WILDLIFE FEDERATION, and )  
INDIGENOUS ENVIRONMENTAL )  
NETWORK, )

Plaintiffs, )

v. )

HILLARY CLINTON, in her official )  
capacity as Secretary of State, )  
JAMES STEINBERG, in his official )  
capacity as Deputy Secretary of State, )  
UNITED STATES DEPARTMENT )  
OF STATE, Lieutenant General )  
ROBERT L. VAN ANTWERP, in his )  
official capacity as U.S. Army Chief )  
of Engineers and Commanding )  
General of the U.S. Army Corps of )  
Engineers, Colonel JON L. )  
CHRISTENSEN, in his official )  
capacity as District Engineer and )  
Commander of the U.S. Army Corps )  
of Engineers, the UNITED STATES )  
ARMY CORPS OF ENGINEERS, )  
TOM TIDWELL, in his official )  
capacity as Chief of the United States )  
Forest Service, ROB HARPER, in his )  
official capacity as Forest Supervisor )  
for the Chippewa National Forest, and )  
the UNITED STATES FOREST )  
SERVICE, )

Defendants, )

and )

ENBRIDGE ENERGY, LIMITED )  
PARTNERSHIP, )

Intervenor. )

**DEFENDANTS' REPLY IN SUPPORT  
OF MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT**

Hon. Donovan W. Frank  
U.S. District Judge



Defendants United States Department of State (“State Department”), United States Army Corps of Engineers (“Corps”), United States Forest Service (“Forest Service”) *et al.* (collectively “Defendants”) hereby reply to Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the First Amended Complaint (“Plf. Opp.”) (Docket No. 150). As explained in Defendants’ Memorandum in Support of their Motion to Dismiss (“Def. Mem.”) (Docket No. 74) and below, Plaintiffs’ National Environmental Policy Act (“NEPA”) claims should be dismissed for lack of jurisdiction, Plaintiffs’ constitutional claim lacks merit, and Plaintiffs have failed to state viable NEPA claims against the Corps and the Forest Service.

**I. Plaintiffs’ NEPA Claims Against the State Department Should Be Dismissed for Lack of Jurisdiction**

The Court lacks jurisdiction over Plaintiffs’ NEPA claims against the State Department because Plaintiffs have not shown that their alleged injuries are likely to be redressed by a ruling of this court and because they are challenging Presidential action, not agency action.

**A. Plaintiffs Lack Standing for Failure to Demonstrate Redressability**

Plaintiffs argue that an order directing the State Department to conduct further NEPA analysis would redress their injuries and assert that the President is not likely to intervene in the permitting process should the Court overturn the Presidential Permit. Plf. Opp. at 11. Plaintiffs’ assumption that the President would not intervene is speculation. As Plaintiffs recognize, the President has delegated the task of permitting cross-border pipelines to the State Department and the State Department has issued such permits for four decades. See id. Each Presidential Permit is issued based on a finding that the border crossing is in the national interest and, until last year, none of those permits had been challenged in Court. With respect to the Presidential Permit issued to Enbridge, the Deputy Secretary of State found that the permit would “serve the strategic interests of the United States” because, among other reasons, it “increases crude oil supplies from a major non-Organization of Petroleum Exporting Countries producer which is a stable and reliable ally and trading partner of the United States, with which we have free trade agreements which augment the

security of this energy supply.” State Department Record of Decision (“ROD”) at 25, Def. Ex. 1. Given the vital national interests at stake, the President may decide to issue a permit to Enbridge regardless of the outcome of the current litigation.

Further, Plaintiffs’ assertion that the President could not intervene in the permitting process is incorrect. Plaintiffs argue that Presidential intervention in the permitting process “would violate the terms of the Order.” Plf. Opp. at 12. The President, however, is not bound by a Presidential Executive Order. Rather, because the permitting process derives solely from Presidential authority, the entire permitting process could be “withdrawn at any time for any or no reason,” leaving the decision to grant or deny the permit solely with the President. Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 456 (D.C. Cir. 1965). Thus, as the South Dakota Court found, Plaintiffs cannot demonstrate standing because they “do not have control over the President’s behavior.” Sisseton Wahpeton Oyate v. U.S. Dep’t of State, Civ. No. 08-3023, 2009 WL 3153655, \*4 (D. S. Dakota Sept. 29, 2009).

**B. Plaintiffs Lack a Waiver of Sovereign Immunity and Private Right of Action**

As Plaintiffs concede, their NEPA claims are brought pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, and depend upon the APA for a waiver of sovereign immunity and private right of action. See Plf. Opp. at 15. As we demonstrated in our opening brief, the issuance of the Presidential Permit was a Presidential action and therefore not subject to review under the APA. In response, Plaintiffs argue that the Court has jurisdiction because: 1) the State Department’s Environmental Impact Statement (“EIS”) was itself a final agency action subject to judicial review under the APA, or 2) in the alternative, the State Department’s issuance of the Presidential Permit was not a Presidential action. As explained below, neither of these arguments has merit. In addition, Plaintiffs ignore a long line of cases holding that executive orders are generally construed as tools for implementing policy and do not create privately enforceable obligations.

### **1. The State Department's EIS Is Not a Final Agency Action**

The action of the State Department that Plaintiffs are challenging is the issuance of the Presidential Permit. Since that action is a Presidential action, Plaintiffs are now attempting to challenge the underlying NEPA analysis without challenging the Presidential Permit itself. Regardless of how they craft their claims, Plaintiffs' lawsuit challenges the issuance of the Presidential Permit. The State Department's EIS is only a preliminary step leading up to the issuance of the Presidential Permit and therefore is not a final agency action under the APA.

The Eighth Circuit's decision in Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808 (8th Cir. 2006) does not support Plaintiffs' argument that the EIS was a final agency action. As the Court explained in that case, there are two requirements for an action to be deemed final for purposes of APA review: "First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." Id. at 813 (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). In Sierra Club, the Corps' finding of no significant impact ("FONSI") was considered to be a final agency action because it was "the culmination of the agency's NEPA decision-making." Id. at 816. The same is not true in this case because the State Department's EIS was not the culmination of the State Department's decisionmaking process. The EIS contains an analysis of the potential environmental impacts of the Alberta Clipper Project but does not itself prescribe any action. Rather, based on the information provided in the EIS, the State Department subsequently issued a ROD and Presidential Permit, which completed the NEPA decision-making process and is the action that Plaintiffs have challenged in this lawsuit. See Sierra Club, 446 F.3d at 816 ("[P]laintiffs in NEPA cases must point to 'action' at least arguably triggering the agency's obligation to

prepare an environmental impact statement.”) (quoting Found. on Econ. Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)).<sup>1/</sup>

Plaintiffs’ argument is similar to one made by the plaintiffs in Public Citizen v. U.S. Trade Rep., 5 F.3d 549 (D.C. Cir. 1993). In Public Citizen, the plaintiffs sought to require the Office of the U.S. Trade Representative (“OTR”) to prepare an EIS for the North Atlantic Free Trade Agreement (“NAFTA”). Id. at 550-51. Applying the Supreme Court’s decision in Franklin v. Massachusetts, 505 U.S. 788 (1992), the court found that OTR’s transmission of a draft of NAFTA to the President was not final agency action which could be challenged under the APA. 5 F.3d at 551-53. In doing so, the court considered and rejected the argument that “the EIS requirement is an independent statutory obligation for the OTR” and thus is reviewable under the APA. Id. at 552. That is precisely what Plaintiff argues here. Even if the State Department had prepared no EIS, that would not be “sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk.” Id. (citing Found. on Econ. Trends, 943 F.2d at 85). Here, the substantive action which allegedly affects Plaintiff’s interests is the issuance of the Presidential Permit, which is not subject to judicial review under the APA. Because the State Department’s EIS is not a final agency action, the Court cannot conduct a separate review of Plaintiff’s NEPA claim.

## **2. The Issuance of the Presidential Permit Was Presidential Action**

As we demonstrated in our opening brief, the State Department issued the Presidential Permit to Enbridge based solely on the delegated constitutional authority of the President. Thus, the issuance of the permit was Presidential action and therefore, pursuant to well-established Supreme Court precedent, not subject to review under the APA. See Def. Mem. at 13-14, 16-18. Plaintiffs do not dispute that Presidential action is not subject to APA review, but they argue that the issuance of the Presidential permit was not Presidential action.

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<sup>1/</sup> The Supreme Court’s decision in Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1998) is not relevant here. In that case, the Court stated in *dicta* that the Constitutional doctrine of ripeness would not bar judicial review of NEPA challenges to a forest management plan, which does not authorize site-specific action. See id. at 737. Whether the agency action was final for purposes of APA review was not an issue in that case.

Plaintiffs' arguments are without merit. First, Plaintiffs confuse the issue of whether an action is Presidential with the issue of whether an action is final. An action that is delegated by the President to a cabinet level official pursuant to his Constitutional authority is Presidential action, not agency action. Second, Plaintiffs argue that the State Department is an agency for purposes of the APA. But this unremarkable proposition does not resolve the issue in this case, which is whether the action taken by the State Department in this case was a Presidential action.

**a. The State Department Issued the Presidential Permit Pursuant to the President's Delegated Constitutional Authority**

The issuance of the Presidential Permit was not a run-of-the-mill agency action taken pursuant to a statute issued by Congress. Rather, the State Department issued the Presidential Permit pursuant to the President's Constitutional authority over foreign affairs and his power as Commander in Chief. Plaintiffs recognize that the permit was issued pursuant to the President's authority, but they argue that because the President was not specifically involved in the issuance of the permit to Enbridge, the final action was taken by the State Department, not the President. See Plf. Opp. at 17-18, 21-23. But which actor took the final step – the State Department or the President – does not resolve the issue of whether the action was Presidential in nature. The President may delegate certain tasks to officials within the Executive Branch, but that delegation does not change the nature of those actions or make them subject to APA review.

The nature of the action, whether Presidential or agency action, should be determined by the underlying authority for the action and not by who takes the final step. See Natural Res. Def. Council, Inc. v. U.S. Dep't of State, Civ. No. 08-1363 (RJL), 2009 WL 3153702, \*4 (D.D.C. Sept. 30, 2009) (“Whether the President carries out the final action himself and the manner in which he does so are considerations that certainly bear on whether the President's duties are ministerial or discretionary, but there is no reason to think that these considerations alone are determinative.”) (citing Franklin, 505 U.S. at 800). As explained in Natural Res. Def. Council, “The State Department acts solely at the behest of the President

and in accordance with the President's guidance as set forth in Executive Order 13,337." Id. at \*5. But the President retained the authority to resolve inter-agency disputes over a permit, which "signals his belief that the issuance of presidential permits is ultimately a presidential action." Id. Further, no Presidential Permit can issue "without, at the very least, the President's acquiescence." Id. Therefore, "to challenge the issuance of a presidential permit, whether by the President himself or by the State Department as the President's delegee, is to challenge a presidential act, which is not reviewable under the APA." Id.

To decide otherwise would conflict with the constitutional separation of powers concerns raised by the Supreme Court in Franklin. See Franklin, 505 U.S. at 800-01 ("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."); Natural Res. Def. Council, 2009 WL 3153702 at \*5 ("To expose permitting decisions, which are unreviewable if exercised by the President himself, to judicial review under the APA just because the President assigned this power to a subordinate agency would run afoul of the separation of powers concerns that underlie the Supreme Court's decisions in Franklin and Dalton."). And unlike Franklin, Dalton v. Specter, 511 U.S. 462 (1994), and Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986), there is no statutory scheme applicable to the actions of the State Department in issuing a Presidential Permit. Rather, the Presidential Permit was issued solely pursuant to the President's constitutional authority and not delegated statutory authority. Thus, "the separation of powers interests at stake in this case are even greater because the President and his delegee here are acting pursuant to the President's inherent foreign affairs power, not pursuant to any enabling statute." Natural Res. Def. Council, 2009 WL 3153702 at \*5 (citing Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002)).

Despite the fact that two separate district courts found that the issuance of the Presidential Permit for the Keystone Pipeline was Presidential action not reviewable under the APA, Plaintiffs argue that there is no other authority for the proposition that "a final action taken by an agency pursuant to an executive order is not a reviewable final agency

action, but is instead a ‘Presidential action.’” See Plf. Opp. at 22-23. To the contrary, courts have specifically recognized that Presidential action is not subject to review under the APA merely because it has been delegated from the President to an agency official. See Jensen v. Nat’l Marine Fisheries Serv., 512 F.2d 1189, 1190-91 (9th Cir. 1975); Tulare County v. Bush, 185 F. Supp.2d 18, 27-29 (D.D.C. 2001), aff’d, 306 F.3d 1138 (D.C. Cir. 2002).

In Jensen, owners and operators of fishing boats challenged regulations issued by the International Pacific Halibut Commission, which was created by a treaty between the United States and Canada. 512 F.2d at 1190. Pursuant to his foreign affairs power, the President had the authority to approve the regulations, but he delegated the authority to approve the regulations to the Secretary of State in Executive Order 11467. Id. at 1191. Plaintiffs argued that the court had jurisdiction over the case under the APA. Id. The court, however, disagreed, finding that “[f]or the purposes of this appeal the Secretary’s actions are those of the President, and therefore by the terms of the APA the approval of the regulation at issue here is not reviewable.” Id. Further, “[s]ince presidential action in the field of foreign affairs is committed to presidential discretion by law, it follows that the APA does not apply to the action of the Secretary in approving the regulation here challenged.” Id. Thus, this case directly supports the proposition that an action taken by the Secretary of State pursuant to the President’s delegated constitutional power over foreign affairs is not reviewable under the APA.

And in Tulare, various individuals and groups challenged the President’s designation of a national monument under the Antiquities Act, 16 U.S.C. § 431. 185 F. Supp. 2d at 21-22. Among other claims, the plaintiffs argued that the Forest Service’s management of the monument violated NEPA. Id. at 27-28. The court found that it lacked jurisdiction over the NEPA challenge because the plaintiffs were challenging Presidential action: “These counts fail to allege jurisdiction, however, because the Forest Service is merely carrying out the directives of the President, and the APA does not apply to presidential action.” Id. at 29. Further, the court found that “[a]ny argument suggesting that this action is 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.” Id.; see also Alaska v. Carter, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (“The argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd.”). Accordingly, there is ample authority for the proposition that delegated Presidential authority is not subject to review under the APA.

Finally, Plaintiffs also suggest that judicial review in this case is supported by a prior case involving the issuance of a Presidential Permit by the U.S. Department of Energy (“DOE”) for electrical transmission lines crossing the U.S. - Mexico border. See Plf. Opp. at 22 n.14 (citing Border Power Plant Working Group v. Dep’t of Energy, 467 F. Supp. 2d 1040 (S.D. Cal. 2006)).<sup>2</sup> Presidential Permits for electrical transmission lines are not subject to Executive Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004) (the executive order at issue here) and, in fact, are explicitly excepted from its purview. Exec. Order 13337 § 1(a). Rather, they are covered by Executive Order 10485, 18 Fed. Reg. 5397 (Sept. 3, 1953), as amended by, Executive Order 12038, 43 Fed. Reg. 4957 (Feb. 3, 1978). Executive Order 10485 was issued pursuant to Presidential authority and *statutory authority* in the Federal Power Act and the Natural Gas Act. See Exec. Order 10485, Preamble; 16 U.S.C. § 824a(e). That factor distinguishes the Presidential Permit at issue in Border Power Plant from the Presidential Permit challenged here, which was issued solely pursuant to the President’s authority over foreign affairs. In addition, the executive order at issue in Border Power Plant does not contain any provision excluding judicial review. See Exec. Order 10485. In contrast, Executive Order 13337 expressly states that it creates no judicially enforceable obligations. See Def. Mem. at 14-15. Therefore, Border Power Plant does not support judicial review of the Presidential Permit for an oil pipeline issued to Enbridge.

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<sup>2</sup> Plaintiffs are incorrect when they state that the State Department issued the Presidential Permit at issue in Border Power Plant. See Plf. Opp. at 22 n.14. DOE issued the permit, and the issue of whether the permit was judicially reviewable was not raised in the case.

**b. Plaintiffs' Reliance on Cases Defining Agency Action in Other Contexts Does not Show That Judicial Review of the Presidential Permit Is Appropriate**

Plaintiffs argue that the State Department is an agency for purposes of the APA. See Plf. Opp. at 18. Defendants do not dispute that this unremarkable proposition is generally true. None of the cases cited by Plaintiffs, however, demonstrate that, if the State Department acts pursuant to a delegation of the President's Constitutional authority, that action is subject to review under the APA. See Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1227-30 (9th Cir. 2008) (finding that plaintiffs lacked standing to pursue Endangered Species Act ("ESA") challenges related to a treaty, but that plaintiffs could pursue ESA challenges against the State Department that did not affect treaty obligations); Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, 104 F.3d 1349, 1352-53 (D.C. Cir. 1997) (finding that the State Department's issuance of immigrant visas were not judicially reviewable because they were statutorily committed to the agency's discretion by law and because the Executive Branch is generally entitled to deference in matters of foreign policy).

Further, Plaintiffs argue, relying on cases involving the Freedom of Information Act ("FOIA"), that when agencies act pursuant to a Presidential directive in an Executive Order, they are acting as agencies. See Plf. Opp. at 18-21. But none of those cases involve the issue of whether an action delegated by the President and carried out by an agency is subject to judicial review. Rather, those cases involve the separate question of whether agency documents must be produced in response to a FOIA request. See Ryan v. Dep't of Justice, 617 F.2d 781, 788-89 (D.C. Cir. 1980) (finding that documents in the possession of the Attorney General were agency documents potentially subject to production under FOIA); Pacific Legal Found. v. Council on Environmental Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (finding that the Council on Environmental Quality was an agency for purposes of producing documents under FOIA); Soucie v. David, 448 F.2d 1067, 1072-76 (D.C. Cir. 1971) (finding that the Office of Science and Technology was an agency for purposes of

producing documents under FOIA). These cases do not address the issue in this case, which is whether a delegated Presidential action is subject to judicial review under the APA.

**3. Executive Order 13337 Implements Presidential Policy and Does Not Create Privately Enforceable Obligations**

As we demonstrated in our opening brief, executive orders are generally considered to be tools for implementing presidential policy that do not create privately enforceable obligations. See Def. Mem. at 12. Executive Order 13337, pursuant to which the Presidential Permit was issued, is the type of executive order courts have found to be unenforceable because it was issued solely pursuant to Presidential authority, provides no standard for judicial review, and specifically states that it creates no judicially enforceable obligations. Id. at 12-16. Plaintiffs do not attempt to analyze this line of case law and instead argue that those cases are distinguishable because, unlike the plaintiffs in those cases, they “are not seeking to enforce or challenge the State Department’s compliance with the Executive Order.” Plf. Opp. at 24 n.16. This response makes no sense. Plaintiffs have filed a lawsuit challenging the State Department’s issuance of a Presidential Permit pursuant to Executive Order 13337. Because the only final action by the State Department is the issuance of the permit, Plaintiffs necessarily are challenging the State Department’s compliance with Executive Order 13337.<sup>3/</sup>

Indeed, the cases involving executive orders support Defendants’ position that the issuance of the Presidential Permit pursuant to Executive Order 13337 is not subject to review under the APA. See Indep. Meat Packers Ass’n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975). In Indep. Meat Packers, the plaintiffs sued the U.S. Department of Agriculture

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<sup>3/</sup> Plaintiffs’ assertion that they are not challenging the State Department’s compliance with Executive Order 13337 is belied by Plaintiffs’ comments during the NEPA process, which show that Plaintiffs disagree with the policy decision to issue the permit and with the finding that the permit would serve the national interest. See January 30, 2009 Letter at 54 (“We believe that granting a permit for the proposed Alberta Clipper pipeline would not be in the national interest.”) (Docket No. 131-1). Pursuing disagreements over policy, however, is not a valid objective under NEPA. See Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 777 (1983) (“Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.”).

(“USDA”) challenging a regulation regarding beef standards. 526 F.2d at 231-34. The plaintiffs argued, among other things, that the regulation violated Executive Order 11821, which required that the Office of Management and Budget (“OMB”) to evaluate certain economic factors before approving a new rules and regulations. Id. at 231, 234. Plaintiffs alleged that the court had jurisdiction over their claims under the APA, 5 U.S.C. §§ 702, 706. Id. at 231. The court found that the agency’s compliance with Executive Order 11821 was not subject to judicial review because “Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President’s personal economic policies and not as a legal framework enforceable by private civil action.” Id. at 236. The court also noted that the executive order created no private right of action and “to infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of administrative agencies.” Id. at 236. Thus, the court found that the agency’s action taken pursuant to an executive order – the economic analysis – was not subject to judicial review.

Other cases similarly have found that agency actions taken pursuant to executive orders implement Presidential policy and are not subject to judicial review. See, e.g., Chai v. Carroll, 48 F.3d 1331, 1338-40 (4th Cir. 1995) (finding that Executive Order 12,711, which required the Secretary of State and the Attorney general to consider another country’s policy of forced abortion or coerced sterilization in making decisions on applications for asylum, could not be privately enforced); Facchiano Constr. Co. v. U.S. Dep’t of Labor, 987 F.2d 206, 210 (3d Cir. 1993) (finding that construction company had no private right of action to challenge the Department of Labor’s compliance with Executive Order 12549 in issuing an order suspending the company from all government contracts); Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (finding that the State of Michigan and various companies had no private right of action to challenge EPA’s compliance with Executive Order 12291 in issuing air quality regulations). Courts have been particularly reluctant to find that an executive order creates privately enforceable obligations where, as in this case, the executive order was issued solely pursuant to Presidential authority and not underlying

statutory authority. See Indep. Meat Packers, 526 F.2d at 234-36 (an executive order without a statutory basis may not be enforced in a private lawsuit); In re Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) (“[E]xecutive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.”).

The District of Columbia Court reviewing the Keystone permit implicitly relied on the cases discussing executive orders in determining that it lacked jurisdiction. The court found that “the Executive Order’s division of responsibilities is merely a device for managing the President’s decision-making process.” Natural Res. Def. Council, 2009 WL 3153702 at \*5. Further, the court stated, “Nor is this case like those in which courts have allowed APA review of actions pursuant to an executive order that was itself governed by statute and did not preclude judicial review.” Id. Accordingly, the executive order cases are relevant and demonstrate that the State Department’s action in issuing the Presidential Permit pursuant to Executive Order 13337 is not subject to judicial review.

Finally, Defendants have not argued that the Court lacks jurisdiction because the issuance of the Presidential Permit was an agency action committed to agency discretion by law, and therefore Plaintiffs’ arguments on this point are irrelevant. See Plf. Opp. at 23-24. Rather, the issuance of Presidential Permits is committed to the *President’s* discretion due to his Constitutional authority over foreign affairs. Thus, “there is good reason to think that Congress intended to exempt from judicial review presidential discretion of the kind at issue here, whether exercised by the President himself or by his delegee.” Natural Res. Def. Council, 2009 WL 3153702 at \*6 n.7.

## **II. Plaintiffs’ Claim That the Issuance of the Presidential Permit Was Unconstitutional Should be Dismissed for Failure to State a Claim**

Plaintiffs’ arguments that the President lacks the Constitutional authority to issue a permit allowing a pipeline to cross an international border are without merit. First, Plaintiffs rely heavily on the proposition that Congress could pass legislation relating to international oil pipelines. The flaw in this argument is that Plaintiffs point to no legislation that is relevant in this case. Second, in the absence of Congressional action, Presidents have issued

permits for border crossings for over a century, and the State Department has issued such permits for oil pipelines for over four decades. Thus, at the very least, Congress has acquiesced in the practice of the President.

**A. Congress Has Not Regulated International Oil Pipelines**

Plaintiffs argue that Congress has exclusive regulatory authority over international oil pipelines due to its authority over foreign commerce and therefore the President lacks the authority to issue a permit allowing a pipeline to cross the international border. See Plf. Opp. at 34-38, 42-44. Plaintiffs have not demonstrated, however, that Congress has passed legislation that exclusively regulates oil pipelines or that conflicts with the President's authority to authorize a border crossing for a pipeline. Rather, all that Plaintiffs have shown is that, in certain instances, Congress has passed legislation relating to domestic pipelines. See United States v. Ohio Oil Co., 234 U.S. 548, 559-62 (1914) (upholding an order of the Interstate Commerce Commission requiring the submission of a rate schedule for existing oil pipelines); Alaska v. Brown, 850 F. Supp. 821, 825-28 (D. Alaska 1994) (upholding a provision of the Export Administration Act prohibiting transport of oil through the Trans-Alaska Pipeline System unless certain Presidential findings were approved by Congress); see also No Oilport! v. Carter, 520 F. Supp. 334, 352 (W.D. Wash. 1981) (finding that the President's findings under the Public Utilities Regulatory Policies Act involved considerations of national security and foreign affairs and therefore were not subject to judicial review).<sup>4</sup> The Congressional enactments at issue in those cases are not at issue here.

Plaintiffs incorrectly argue that the federal government has a comprehensive scheme for regulating oil pipelines. See Plf. Opp. at 45. But the fact that the Corps and the Forest Service have issued permits for the Alberta Clipper Pipeline does not indicate that oil pipelines are regulated in a comprehensive manner. See Spiller v. Walker, No. A-98-CA-

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<sup>4</sup> In No Oilport!, the court reviewed the adequacy of an EIS prepared by the Department of the Interior ("DOI") regarding the effects of DOI's granting of a right of way across federal lands. 520 F. Supp. at 345, 352-53. Similarly, in this case, the Court has jurisdiction to review the NEPA compliance of the Corps and the Forest Service, but the State Department's issuance of a Presidential Permit based on a national interest determination is not subject to judicial review.

255-SS, 2002 WL 1609722, \*2 (W.D. Tex. 2002) (noting that an oil pipeline required permits from federal agencies, including the Corps, and therefore was a major federal action requiring the preparation of an environmental impact statement). Natural gas pipelines, for example, are subject to approval by the Federal Energy Regulatory Commission (“FERC”). See 15 U.S.C. § 717f. In contrast, no federal agency exercises comparable approval authority for the construction of oil pipelines. Rather, a builder of a pipeline must seek approval from various federal and state agencies, including obtaining a certificate of need from the state public utilities commission. See EIS at 1-18 - 1-25, Plf. Ex. 3; see also Corps ROD at 4 (describing the Minnesota Public Utilities Commission’s issuance of a Certificate of Need to Enbridge), Def. Ex. 3.

Plaintiffs’ reliance on Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) is misplaced. In Youngstown, the Court found that the President had no authority either under the Constitution or a statute to seize the steel mills. Id. at 585-88. And, as Justice Jackson pointed out in his concurring opinion, the seizure of the steel mills by the President violated specific Congressional enactments. See id. at 662-66 (Jackson, J. concurring). In contrast, the issuance of the Presidential Permit falls under the President’s authority over foreign affairs or, at the very least, it falls into “the zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.” Id. at 637 (Jackson, J. concurring). Given the significance of a border crossing to the nation’s foreign affairs and national security and the lack of any action by Congress, it would be absurd to suggest that the President could not make a determination as to whether to allow the border crossing.

Because the Presidential Permit was issued solely pursuant to the President’s Constitutional authority, the cases cited by Plaintiffs which address whether the President violated certain Congressional enactments or exceeded Congressionally delegated authority are simply irrelevant. See United States v. Guy W. Capps, Inc., 204 F.2d 655, 659-60 (4th Cir. 1953) (finding that the President could not avoid compliance with regulations prescribed by Congress in entering into executive agreements with a foreign nation); Target Sportswear,

Inc. v. United States, 875 F. Supp. 835, 841-46 (Ct. Int'l Trade 1995) (finding that the President did not act outside the scope of his authority in prescribing interim regulations regarding textile imports); United States v. Yoshida Int'l, Inc., 526 F.2d 560, 580-84 (C.C.P.A. 1975) (finding that the President acted within the scope of his authority in imposing an emergency tariff on Japanese goods). Plaintiffs also cite no authority for the proposition that the issuance of a Presidential Permit for a border crossing is outside the President's authority. See Valentine v. United States, 299 U.S. 5, 18 (1936) (finding that the President did not have the authority to issue an extradition order); Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (finding that the Secretary of State did not have the authority to issue regulations regarding the issuance of passports).

**B. In the Absence of Congressional Action, Presidents Have Exercised Their Constitutional Authority to Issue Permits for Cross-Border Pipelines**

To date, Congress has declined to regulate international oil pipelines, and the President alone has assumed the authority to issue permits for border crossings for oil pipelines. This authority is based on the President's authority over foreign affairs and his authority as Commander in Chief. See Executive Order 11423 at 1; ROD at 26, Def. Ex. 1; Pres. Permit art. 8 (authorizing the United States to take control of the border crossing when "the national security of the United States demands it"), Def. Ex. 2. Contrary to Plaintiffs' assertions, the President's authority to issue Presidential Permits for border crossings is well established. See Plf. Opp. at 38-41. The authorities upon which Defendants rely are not merely "two articles," as Plaintiffs claim, but rather two editions of the Digest of International Law, which is an authoritative statement of U.S. practice in international law compiled by the U.S. Government. See Hackworth, Dig. Int'l Law, Vol. IV (1942); Moore, Dig. Int'l Law, Vol. II (1906), Def. Exs. 5 & 6.<sup>51</sup> The President's authority to issue permits for border

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<sup>51</sup> John Bassett Moore was a former Assistant Secretary of State, and Green Haywood Hackworth was a Legal Advisor of the Department of State. See Def. Exs. 5 & 6. Various versions of the digest are cited as authoritative sources by courts, including in the opinions relied upon by Plaintiffs. See Valentine, 299 U.S. at 8 n.1 (citing Moore, Dig. Int'l Law, Vol. IV); Kent, 357 U.S. at 125 n.8 (citing Hackworth, Dig. Int'l Law (1942)); United States v. Pink, 315 U.S. 203, 229 (1942) (citing Moore, Dig. Int'l Law (1906) &

crossings is further documented in Whiteman, Digest of International Law, Vol. 9 (1968), which was published post-Youngstown. See Def. Ex. 25.<sup>9</sup> The Whiteman Digest further documents the history of the issuance of Presidential Permits for border crossings of all kinds. See id. at 917-32. The digest also documents the issuance of Presidential Permits for eight oil pipelines between 1941 and 1966. Id. at 920-21. In addition, the State Department's records reveal the existence of several other Presidential Permits for oil pipelines, including permits signed by President Kennedy in 1962 and President Johnson in 1968. See Def. Ex. 26.

The history of the issuance of Presidential Permits does not support Plaintiffs' arguments that the practice is unconstitutional. See Plf. Opp. at 38-40. Congress authorized the landing of a telegraph cable from Cuba in 1867. See Moore at 453, Def. Ex. 6. In 1869, however, in the absence of Congressional action, President Grant authorized the landing of a telegraph cable from France subject to certain conditions. Id. at 454-55. That practice was continued by subsequent Presidents. See id. at 461 ("It thus appears that from 1869 to August, 1893, during the terms of Grant, Hayes, Garfield, Arthur, Cleveland (first term), and Harrison, it was held by the Presidents and their Secretaries of State that the Executive has the power, in the absence of legislation by Congress, to control the landing, and, incidentally, regulate the operation of foreign submarine cables in the protection of the interests of this Government and its citizens.") (quoting 22 U.S. Op. Atty. Gen. 13, 25 (1898)).

In 1896, in a case in which the United States sought to enjoin the landing of a telegraph cable, Judge LaCombe stated:

It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the general government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem

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Hackworth, Dig. Int'l Law (1940)).

<sup>9</sup> Def. Exs. 25 & 26 are attached to the Declaration of Luther L. Hajek, submitted herewith. Marjorie Whiteman was an Assistant Legal Advisor at the Department of State. Def. Ex. 25 at 1.

to fall within the province of the executive to decide.

United States v. La Compagnie Francaise des Cables Telegraphiques, 77 F. 495, 496 (1896). Therefore, this case supports the authority of the President to authorize a border crossing in the absence of congressional action. See Hackworth at 462 (“Against this established rule [of Presidents authorizing border crossings], supported by the opinion of the only United States judge who has passed upon the question . . . .”) (quoting 22 U.S. Op. Atty. Gen at 25), Def. Ex. 5.

In 1921, Judge Hand denied the United States’ motion to enjoin the landing of a telegraph cable on the grounds that the cables were authorized by existing acts of Congress. United States v. Western Union Telegraph Co., 272 F. 311, 323 (S.D.N.Y. 1921), aff’d, 272 F. 893 (2d Cir. 1921), rev’d, 260 U.S. 754 (1922). Judge Hand agreed with Judge LaCombe, however, that in the absence of Congressional action, the President could act to approve or deny a physical connection to the territory of the United States and such an action would not be a justiciable matter. Id. at 318-19. The decision was upheld by the Second Circuit and, following a subsequent appeal to the Supreme Court, was vacated per stipulation of the parties. 260 U.S. at 754. Congress subsequently enacted legislation regarding the landing of submarine cables, but it has not done so in the area of cross-border pipelines.<sup>7</sup>

The President’s constitutional authority to issue permits for border crossings was recognized in a later case involving a Presidential Permit for cross-border electrical transmission lines to connect to a power plant in Canada. See Green County Planning Bd. v. Fed. Power Comm’n, 528 F.2d 38 (1975). In that case, a county planning board challenged the construction of the electrical transmission lines and connecting facilities under the Federal Power Act (“FPA”). Id. at 45-46. But the court held that jurisdiction did not lie

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<sup>7</sup> Congress has passed legislation regarding certain types of border crossing facilities. See Plf. Opp. at 40, 43. These congressional acts recognize the President’s authority to approve such facilities. See Submarine Cable Landing Licensing Act of 1921, 47 U.S.C. § 35 (recognizing the President’s authority to grant or revoke licenses for the landing of cables if such action will maintain “the rights or interests of the United States . . . or will promote the security of the United States”; International Bridge Act of 1972, 33 U.S.C. § 535b (recognizing the President’s authority to approve the construction of bridges at U.S. borders).

under the FPA because, due to the passage of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(d), the electrical transmission lines were authorized solely pursuant to Presidential authority under Executive Order 10485. Id. at 42-43, 46. The court explained that Executive Order 10485 “delegates an executive function to the FPC, a function rooted in the President’s power with respect to foreign relations if not as Commander in Chief of the Armed Forces.” Id.

Further, the lengthy history of Presidential Permits and the fact that Congress has passed legislation relating to certain types of border crossings belie Plaintiffs’ unsupported assertion that Congress is not aware of the issue and therefore has not acquiesced to the President’s authority. See Plf. Opp. at 45-46 (citing Wilderness Soc’y v. Morton, 479 F.2d 842 (D.C. Cir. 1973)). Rather, the Congressional silence in this area indicates that Congress has acquiesced to the President’s authority to approve border crossings. See Youngstown, 343 U.S. at 610-11 (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); see also Am. Insur. Ass’n v. Garamendi, 539 U.S. 396, 429 (2003) (“In sum, Congress has not acted on the matter addressed here. Given the President’s independent authority ‘in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.’”) (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).

The attorney general opinions on this issue are well reasoned and support the President’s authority to issue cross-border permits. As Acting Attorney General Richards explained in his 1898 opinion, the President must be allowed to approve or deny a border crossing in the absence of Congressional action:

The attitude taken by [President Cleveland’s State] Department under Mr. Gresham has resulted in the landing of two foreign cables upon our shores without permission of this Government and subject to no limitations or restrictions whatever. Must this condition continue? Is the President powerless to act until Congress legislates?

22 U.S. Op. Atty. Gen at 25. Further, the authority of the President to act to preserve the integrity of the United States borders is well founded in the Constitution:

The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander in chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws are faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress.

Id. at 25-26. This reasoning carries as much force now as it did in 1898, and the Attorney General's 1898 opinion and subsequent opinions relying on it are cited approvingly in more recent editions of the Digest of International Law after the Youngstown decision. See Whiteman at 921, Def. Ex. 25.

Finally, Plaintiffs are simply incorrect that the President's authority was exceeded in this case because the State Department is regulating the entire pipeline. See Plf. Opp. at 46-47. The Presidential Permit only authorizes the construction of pipeline facilities at the Canadian border. See Pres. Permit at 1, Def. Ex. 2. The State Department's authority to regulate the pipeline extends only to the "first mainline shut-off valve or pumping station in the United States." Id.; State Department ROD at 26, Def. Ex. 1. The fact that the State Department analyzed the length of the pipeline in the EIS does not demonstrate that the State Department is regulating the entire pipeline. Rather, because NEPA requires an analysis not merely of the action itself, but also of the direct and indirect effects of those actions, the State Department conducted a thorough review of those effects. As is clear from the EIS, however, various other federal and state agencies regulate other aspects of the pipeline, not the State Department. See EIS at 1-18 - 1-25, Plf. Ex. 3.

### **III. Plaintiffs' Challenge to the Southern Lights LSr Environmental Assessment Should Be Dismissed as Moot**

In their Fifth Claim for relief, Plaintiffs challenge the environmental assessment for the Southern Lights LSr Pipeline. First Amend. Comp. ¶¶ 105-11. Because the LSr Pipeline has already been constructed and is operational, a NEPA challenge to that pipeline is moot. Def. Mem. at 19. The fact that Plaintiffs have brought separate claims challenging the validity of the NEPA analysis for the Southern Lights Diluent Pipeline does not change the

fact that the challenge to the already completed LSr Pipeline is moot.

**IV. Plaintiffs Have Failed to State Claims Against the Corps and the Forest Service**

Plaintiffs are incorrect that the pleading requirements allow them to merely assert that a particular government action violates a particular law without supplying details to support that claim. See Plf. Opp. at 31-32. Rather, based on recent Supreme Court precedent establishing a more rigorous pleading requirement, a complaint must do more than provide “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964–65 (2007). Although Plaintiffs’ briefing has attempted to more fully describe the alleged NEPA violations of the Corps and the Forest Service, their complaint does not do so. Plaintiffs should be required to re-plead those claims so that the Corps and the Forest Service are on sufficient notice of the claims against them.

Respectfully submitted this 2nd day of December, 2009.

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