

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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NATURAL RESOURCES DEFENSE )  
COUNCIL, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
STATE, et al., )  
 )  
Defendants, )  
 )  
and, )  
 )  
TRANSCANADA KEYSTONE PIPELINE, LP, )  
 )  
Intervenor-Defendant. )  

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Civ. No.: 08-CV-01363 (RJL)

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

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## INTRODUCTION

Defendants U.S. Department of State, et al. (“State Department”) hereby submit this reply to Plaintiff NRDC’s Memorandum in Opposition to Motions to Dismiss of Defendants and Defendant-Intervenor (“Plf. Opp.”) (Docket No. 36). In this case, Plaintiff challenges the State Department’s issuance of a Presidential Permit for the Keystone Pipeline. See First Amend. Comp. ¶¶ 1, 58-59, 71-72. In Defendants Motion to Dismiss (Docket No. 26), Defendants demonstrated that the State Department’s issuance of the Presidential Permit pursuant to Executive Order 13337 is not subject to judicial review because it was issued pursuant to the delegated constitutional authority of the President and not statutory authority, there are no legal standards for the Court to apply in reviewing the issuance of the Permit, and the language of Executive Order 13337 precludes judicial review. Because the Presidential Permit is not subject to judicial review, Plaintiff’s claim should be dismissed for lack of jurisdiction and failure to state a claim upon which relief may be granted.

In response, Plaintiff does not demonstrate that the State Department’s issuance of the Presidential Permit is subject to judicial review. Rather, Plaintiff primarily argues that the Court may independently review the State Department’s “separate obligation under the National Environmental Policy Act (‘NEPA’).” Plf. Opp. at 1. This argument is incorrect as a matter of law. The D.C. Circuit has explicitly rejected the argument that the preparation of an environmental impact statement (“EIS”) under NEPA is “an independent statutory obligation” that may be reviewed under the Administrative Procedure Act (“APA”). Public Citizen v. U.S. Trade Rep., 5 F.3d 549, 552 (D.C. Cir. 1993). The fundamental defect in Plaintiff’s complaint is that the only substantive action challenged, the issuance of the Presidential Permit, is one that is not subject to judicial review. Plaintiff also does not refute Defendant’s argument that, even if

APA review were potentially available, the exceptions for Presidential action and decisions committed to agency discretion by law operate to bar Plaintiff's claims. Finally, Plaintiff lacks standing because it has failed to meet its burden of demonstrating that its alleged injury is likely to be redressed by a favorable ruling of this Court.

## ARGUMENT

### I. THE ISSUANCE OF THE PRESIDENTIAL PERMIT IS NOT JUDICIALLY REVIEWABLE UNDER THE APA

#### A. The Presidential Permit Is Not Reviewable Because It Was Issued Pursuant to the Inherent Constitutional Authority of the President Delegated to the Secretary of State in Executive Order 13337

As Defendants have demonstrated, the Presidential Permit for the Keystone Pipeline is not subject to judicial review because it was issued, not pursuant to any statutory authority, but rather solely pursuant to the President's inherent constitutional authority which was delegated to the Secretary of State in Executive Order 13337. See Def. Mem. at 9, 11-13; In re Surface Mining 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.”); see also Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975) (Secretary of State's exercise of the President's authority delegated through an executive order to approve fisheries regulations pursuant to a treaty was not subject to review under the APA). That the delegation of the President's constitutional authority in Executive Order 13337 contains no limitations on the Secretary of State's authority to issue such permits, except that they be issued if they “would serve the national interest,” further supports the conclusion that judicial review is unavailable. Def. Mem. at 13, 20-23. Finally, this conclusion is further bolstered by the fact that Executive Order 13337 itself expressly states that it “is not intended to, and does not, create any right,

benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States.” Exec. Order 13337 § 6. Courts have found that similar language in other executive orders bars judicial review. See, e.g., State of Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); see also Defendants’ Memorandum in Support of Motion to Dismiss (“Def. Mem.”) at 10, 13-15. (Docket No. 26-2).

In response, Plaintiff ignores most of Defendants’ arguments. Plaintiff does not refute Defendants’ fundamental point that the action taken by the State Department was taken pursuant to the inherent constitutional authority of the President, not statutory authority. Nor, does Plaintiff refute that Executive Order 13337 leaves no standard for the Court to apply in reviewing the decision of the State Department to issue the permit. See § II.B., infra. The only argument that Plaintiff musters to rebut the arguments in Section I of Defendants’ Motion to Dismiss is that the language of Executive Order 13337 does not preclude judicial review under the APA. See Plf. Opp. at 15-16. Plaintiff’s arguments on this point are incorrect. Plaintiff argues that the language in Executive Order 13337 does not bar judicial review of the issuance of the Presidential Permit because, even if the executive order does not create any new rights, it does not render pre-existing legal rights unenforceable under the APA. Pls. Mem. at 15. This assertion is illogical. There is no “pre-existing right” to challenge the issuance of Presidential Permits because historically such permits were issued directly by the President pursuant to his inherent constitutional authority. An action by the President is not subject to judicial review under the APA. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).

Moreover, the relief available in the APA is limited by other legal constraints on judicial review. See 5 U.S.C. § 702 (“Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal

or equitable ground; or (2) confers authority to grant any relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”). Thus, where an underlying action being challenged is not subject to judicial review in federal court, the APA does not separately confer the necessary waiver of sovereign immunity. See Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173-74 (9th Cir. 2007); see also Califano v. Sanders, 430 U.S. 99, 985 n.6 (1977) (“Both [5 U.S.C. § 702 and § 703] seem to look to outside sources of jurisdictional authority.”). Therefore, the authority of a court to review an action under the APA is dependent on other sources of legal authority and does not override the constraints on judicial review contained in those legal authorities.

Here, the relevant source of legal authority for determining whether the issuance of the Permit is subject to judicial review is the Executive Order 13337, which contains an express provision precluding judicial review. Plaintiff also ignores the fact that the stated purpose of Executive Orders 13212 and 13337 was to *expedite* energy projects. See Def. Mem. at 14-15. Permitting judicial review where there was an intent to avoid judicial review would frustrate that purpose. See Indep. Meat Packers Ass’n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975) (“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 federal administrative agencies.”). Thus, the limitation on judicial review operates to bar judicial enforcement of an executive order in the context of an APA challenge. See, e.g., Thomas, 805 F.2d at 187; see also Def. Mem. at 10.

Plaintiff’s citation to additional cases in an attempt to support its argument that judicial review of the Presidential Permit is appropriate are unavailing because it cites no instance in which an action taken pursuant to delegated Presidential authority was reviewed. See Plf. Opp.

at 15-16, 18 n.10. In Chamber of Commerce v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996), the D.C. Circuit *did not* conduct APA review of an executive order issued by the President pursuant to his authority under the Procurement Act. Id. at 1326-27.<sup>1/</sup> The court did, however, conduct non-statutory review to determine whether the President, in issuing the executive order, had acted *ultra vires* in violation of the National Labor Relations Act, the Procurement Act (pursuant to which the executive order had issued), and the Constitution. Id. at 1325, 1327-29. This case does not support judicial review of the State Department's action because there is no non-statutory review claim alleging that the actions of the President or the State Department were *ultra vires*. And, even if Plaintiff brought such a claim, it would fail because the President's issuance of Executive Order 13337 and the State Department's issuance of a permit pursuant thereto were within the President's inherent constitutional authority and were not *ultra vires*.<sup>2/</sup> See Def. Mem. at 11-13.

The other cases cited by Plaintiff to support the availability APA review of Executive Order 13337 and the issuance of the Presidential Permit also are unavailing. See Plf. Opp. at 18-19. In Abbott Labs. v. Gardner, 387 U.S. 136 (1967), the Court considered whether provisions

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<sup>1/</sup> Plaintiff's citation to *dicta* in the Court's opinion regarding the potential availability of judicial review of regulations issued by the Department of Labor pursuant to the statutory authority in the Procurement Act is irrelevant here because no regulation is being challenged and the issuance of the Presidential Permit does not rely on underlying statutory authority for its validity. See Plf. Opp. at 15-16.

<sup>2/</sup> Nat'l Trust for Historic Pres. v. Dep't of State, 834 F. Supp. 443 (D.D.C. 1993) also does not support judicial review of the State Department's EIS. See Plf. Opp. at 3. There, the court found that Department of State's EIS regarding a determination under the Foreign Missions Act was subject to judicial review. Id. at 448. The case is distinguishable because the State Department's decision in that case was made pursuant to a statute, not the inherent authority of the President delegated through an executive order, and the statute did not preclude judicial review. Id.

of the Federal Food, Drug, and Cosmetic Act precluded pre-enforcement judicial review of a regulation regarding drug labels. Id. at 139-40. Based on the language of the statute and the legislative history, the Court determined that judicial review was not precluded. Id. at 140-48. Here, there is no act of Congress from which the Court could glean whether judicial review is intended – the only relevant document is Executive Order 13337.<sup>37</sup> De Jesus Ramirez v. Reich, 156 F.3d 1273 (D.C. Cir. 1998) is likewise irrelevant because the availability of judicial review turned on whether the operative statute permitted judicial review. See id. at 1276.

Accordingly, Plaintiff has failed to demonstrate that APA review is available for the State Department's issuance of the Presidential Permit pursuant to Executive Order 13337.

**B. This Case Does Not Involve A Typical APA Challenge to Agency Action Taken Pursuant to Statutory Authority**

Attempting to skirt the fundamental flaw in its complaint (that the only substantive action challenged in the complaint is one for which judicial review is precluded), Plaintiff advances a general argument that judicial review is appropriate under the APA. See Plf. Opp. at 7-10. Plaintiff makes the point that, in a typical case, the APA provides the requisite right of action and waiver of sovereign immunity necessary for a plaintiff to bring a NEPA challenge to a final agency action. Id. at 7-9. Plaintiff then argues that “this case is no different” than other NEPA cases routinely decided by federal courts. Id. at 9. Plaintiff's analysis attempts to brush over the obvious difference between this case and the ones that it has cited, which is that in all of those cases the challenged agency action was taken pursuant to statutory authority and the

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<sup>37</sup> To the extent that Plaintiff is relying on Abbott Labs. to suggest that the APA provides an independent basis for the Court's jurisdiction, that proposition was later rejected by the Supreme Court. Califano, 430 U.S. at 105 (“[T]he APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.”).

reviewability of the agency's action was not called into question. See Biodiversity Conservation Alliance v. U.S. Bureau of Land Mgmt., 404 F. Supp. 2d 212, 214 & n.1 (D.D.C. 2005) (Leon, J.) (challenge to the Bureau of Land Management's ("BLM") decision under the Federal Land Policy and Management Act ("FLPMA") and other statutes to allow oil and gas exploration); Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147, 150 (D.D.C. 2005) (Leon, J.) (challenge to the National Marine Fisheries Service's issuance of a Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act); Natural Res. Def. Council v. Kempthorne, 525 F. Supp. 2d 115, 117 (D.D.C. 2007) (Leon, J.) (challenge to BLM's issuance of applications for drilling permits under FLPMA). In none of those cases was the challenged action being an action that was not subject to judicial review.<sup>4/</sup>

Plaintiff's reliance on No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981), cited by Defendants to support its view that the Court may review the sufficiency of the State Department's EIS is misplaced for two reasons. See Plf. Opp. at 15 n.8. First, 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. Id. at 345, 352-53. DOI's action was taken pursuant to statutory authority, and would, under normal circumstances, be subject to judicial review. By contrast, Plaintiff in this case does not challenge any action taken pursuant to statutory authority that would be judicially reviewable. Second, the court in

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<sup>4/</sup> Nat'l Ass'n of Home Builders v. U.S. Army Corps. of Eng'rs, 297 F. Supp. 2d 74 (D.D.C. 2003) (Leon, J.), rev'd on other grounds, 417 F.3d 1272 (D.C. Cir. 2005) is not helpful to Plaintiff's arguments. See Plf. Opp. at 9. There, the Court found that it lacked jurisdiction because the Corps' issuance of Clean Water Act nationwide permits did not constitute a final agency action subject to judicial review under the APA. Nat'l Ass'n of Home Builders, 297 F. Supp. 2d at 79-82. Here, Plaintiff's have challenged a final action, the issuance of the Presidential Permit, but it is not subject to judicial review.

No Oilport! found that the President's determination that the construction of a pipeline along a certain route would be in the "national interest" is not subject to judicial review because it involved considerations of foreign policy and national security. Id. at 352. Similarly, the State Department's determination pursuant to the President's delegated constitutional authority that the issuance of the Presidential Permit for the Keystone Pipeline would be in the "national interest," which involved similar considerations of foreign policy and national security, also should not be subject to judicial review.

Plaintiff also suggests 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 16-17 (citing Border Power Plant Working Group v. Dep't of Energy, 467 F. Supp. 2d 1040 (S.D. Cal. 2006)). In that case, the Government did not argue that the Presidential Permit at issue was not subject to judicial review and, therefore, the issue was not before the court. Moreover, that case is distinguishable from the present case because the Presidential Permit at issue in that case was issued pursuant to a different executive order, which was issued, in part, based on the statutory authority in the Federal Power Act and did not contain provisions precluding judicial review. In addition, the challenged actions in that case included BLM's granting of a right of way across federal lands, which were issued pursuant to statute and provided a separate basis for judicial review.

In Border Power Plant, the plaintiffs brought NEPA challenges to an EIS drafted by DOE and the Bureau of Land Management ("BLM") analyzing the potential environmental impacts of DOE's issuance of the permit and BLM's issuance of a right of way across federal lands. See Border Power Plant, 467 F. Supp. 2d at 1044-46; see also Border Power Plant Working Group v.

Dep't of Energy, 260 F. Supp. 2d 997, 1006-08 (S.D. Cal. 2003). Presidential Permits for electrical transmission lines are not subject to Executive Order 13337 (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, as amended by, Executive Order 12038. Executive Order 10485 was issued pursuant to *statutory authority* in the Federal Power Act and the Natural Gas Act, and not solely pursuant to the President's constitutional authority over foreign affairs. See Exec. Order 10485, Preamble; 16 U.S.C. § 824a(e). This factor is critical in determining whether judicial review is appropriate in this case, which involves Executive Order 13337 issued solely pursuant to the constitutional authority of the President. See Def. Mem. at 9-13. In addition, the executive order at issue in Border Power Plant does not contain any provisions excluding judicial review. See Exec. Order 10485. In contrast, Executive Order 13337 contains a provisions expressly precluding judicial review. See Def. Mem. at 13-15. Therefore, the judicial review conducted in Border Power Plant does not provide a basis for determining whether the Presidential Permit for the Keystone Pipeline is subject to judicial review.

Furthermore, even if the Presidential Permit had not been reviewable in the Border Power Plant case, there was a final agency action in that case – BLM's issuance of rights of way – which still would have been subject to judicial review. Those actions also would have given rise, in that case, to a NEPA claim because the EIS covered both the issuance of the Presidential Permit and BLM's issuance of rights of way. See Border Power Plant, 467 F. Supp. 2d at 1044 n.3 (both DOE and BLM relied upon the same environmental analyses). Thus, the case demonstrates that, merely because a Presidential Permit is beyond judicial review, that does not necessarily mean that separate agency actions relating to a pipeline project, such as the issuance

of applicable permits or the granting of rights of way across federal land, would be beyond judicial review. The legal defect in Plaintiff's case is that the only substantive action identified by Plaintiff in its complaint is one that is not subject to judicial review.

Plaintiff also cites Env'tl. Def. Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993) to support the notion that transboundary environmental effects must be subject to judicial review. Plf. Opp. at 17. The issue in Massey – the extraterritorial reach of NEPA – could be an issue that is addressed in merits briefing in this case. See Massey, 986 F.2d at 529-36 (finding that the National Science Foundation was required to consider under NEPA the effects of incinerating food waste in Antarctica, in part, because Antarctica is a sovereignless area).<sup>57</sup> But, the case does not address the question here, which is whether the action being challenged is subject to judicial review. Plaintiff uses Massey to argue that: "It would be incongruous to find that the project's crossing of a border insulates from review the failure to consider the project's environmental effects within the United States." Plf. Opp. at 17. In fact, if the Court were to find that it can review Plaintiff's NEPA claim, the Presidential Permit, in effect, will have *created* the opportunity for judicial review of the pipeline. Because there is no comprehensive federal oversight of oil pipelines, absent a border-crossing, neither the State Department nor any other agency would have issued a permit authorizing construction of the pipeline.<sup>58</sup> This emphasizes

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<sup>57</sup> The decision in Massey has been called into question in subsequent district court cases on the basis that intervening Supreme Court precedents have instructed that the presumption against extraterritorial application of statutes applies even in sovereignless areas. See, e.g., Basel Action Network v. Maritime Admin., 370 F. Supp. 2d 57, 71-72 (D.D.C. 2005). The extraterritorial reach of NEPA in this case is even more questionable because Canada is not a sovereignless area.

<sup>58</sup> It should be noted that, while the pipeline cannot be constructed without a Presidential Permit authorizing the border crossing, as a legal matter, the Presidential Permit authorized only  
(continued...)

the point that judicial review in this case of the State Department's EIS depends entirely on the reviewability of the underlying action – the issuance of the Presidential Permit.

Thus, Plaintiff has failed to demonstrate that the action its has challenged – the issuance of a Presidential Permit for the Keystone Pipeline – is subject to judicial review under the APA.<sup>7</sup>

**C. Because the Issuance of the Presidential Permit is Not Reviewable, the Court May Not Conduct a Review of the State Department's "Separate Obligation" to Comply with NEPA Under the APA**

Having failed to show that the State Department's issuance of the Presidential Permit based on a finding that it would serve the "national interest" is judicially reviewable, Plaintiff also argues that the Court may, nevertheless, review the State Department's NEPA analysis under the APA. See Plf. Mem. at 16 (arguing that the executive order "does not preclude review of NRDC's NEPA claim"); see also id. at 1 (asking Court to review the State Department's "separate obligation" under NEPA). This argument fails because, in order to bring its NEPA claim, Plaintiff must challenge an underlying agency action that is subject to judicial review. Public Citizen, 5 F.3d at 552.

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, the court found that OTR's transmission of a draft of NAFTA to the President was not final agency action which

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<sup>6</sup>(...continued)

the construction and maintenance of border crossing facilities, not the entire pipeline. See Presidential Permit at 1. (Docket No. 26-5).

<sup>7</sup> Plaintiff's remaining arguments in Section I.B.1.b. of its Opposition relate to its argument that the exceptions to judicial review in the APA, 5 U.S.C. § 701(a), do not apply, see Plf. Opp. at 16, 17-18 & n.9, and are addressed in the Government's responses herein to those argument, infra.

could be challenged under the APA. *Id.* 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 *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991)). Here, the substantive action which allegedly affects Plaintiff’s interests is the issuance of the Presidential Permit, which is not subject to judicial review. Therefore, under D.C. Circuit law, the Court cannot conduct a separate review of Plaintiff’s NEPA claim.

**II. EVEN IF THE COURT WERE TO FIND THAT APA REVIEW WERE OTHERWISE AVAILABLE, EXCEPTIONS IN THE APA BAR REVIEW OF PLAINTIFF’S CLAIM**

Even if the Court were to find that the State Department’s NEPA obligation could be separated and potentially reviewed under the APA, well-recognized exceptions to APA review for Presidential action and decisions committed to agency discretion by law would still operate to bar Plaintiff’s claim.

**A. The Issuance of the Presidential Permit Was a Presidential Action, Not an Agency Action, and Therefore Is Not Reviewable Under the APA**

Plaintiff misconstrues Defendants’ argument regarding the application of *Franklin* and *Dalton* to this case. *See* Plf. Opp. at 10-12. Defendants are not arguing that the issuance of the Presidential Permit by the State Department is not a final agency action because it is subject to further action from the President, which was the reason that the Department of Commerce’s transmission of the census report in *Franklin* was not reviewable. *Franklin*, 505 U.S. at 800-01. Rather, Defendants argue that the issuance of the Presidential Permit, pursuant to the President’s

inherent constitutional authority delegated to the Secretary of State in Executive Order 13337, was an inherently Presidential action. See Def. Mem. at 16-19; see also Jensen, 512 F.2d at 1191 (“For 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.”). Unlike the cases referenced by Plaintiff, there is no statutory framework here which delimits certain roles for the President and the agency. Moreover, the President has retained certain authority over the permit in Executive Order 13337 § 1(i), and, because the entire permitting process is based solely on the executive order, the President could terminate the entire process at any time and determine on his own whether to issue or deny the permit. See Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 456 (D.C. Cir. 1965) (noting that an executive order not based on any statute could be “withdrawn at any time for any reason or no reason”). Thus, the issuance of the Presidential Permit is an inherently Presidential action which may not be reviewed under the APA.

**B. If the Issuance of the Permit Is Considered to Be Agency Action, Not Presidential Action, The Decision to Issue the Permit Is Committed to the Discretion of the State Department and Is Not Reviewable Under the APA**

Even if the Court were to disagree with Defendants’ claim that the issuance of the permit was an unreviewable Presidential action, judicial review under the APA is still barred because the decision to issue the permit is committed to the State Department’s discretion by law. See 5 U.S.C. § 701(a)(2). In response to this argument, Plaintiff argues that it is irrelevant whether Executive Order 13337 commits the determination to issue a permit to the State Department’s discretion because Plaintiff is not asking the Court “to apply the Order.” Plf. Opp. at 20. Instead, Plaintiff argues, the “meaningful standards” for the Court’s review are found in NEPA. Id. at 21. As demonstrated above, the fundamental issue before the Court is whether the State

Department's decision to issue the permit is reviewable, and Plaintiff cannot separate review of the permit from review of its NEPA claim. While NEPA and its implementing regulations provide standards for review of a NEPA claim, that is an entirely separate question from whether an agency action has been committed to the discretion of an agency.

In determining whether a decision has been committed to the discretion of an agency by law, one looks to the language of the legal authority giving rise to the agency's action. See Webster v. Doe, 486 U.S. 592, 599-601 (1988).<sup>87</sup> Here, the language used by the President in authorizing the State Department to issue a permit – if it “would serve the national interest” – is similar to the language which courts have found commit certain determinations to the discretion of an agency. Def. Mem. at 20-21. Whether an action involves consideration of national security or foreign affairs is also a factor that courts have considered in determining whether a decision has been committed to the discretion of an agency. Id. at 21-22. The fact that in some instances, without considering the applicability of 5 U.S.C. § 701(a)(2), courts have reviewed agency actions with national security or foreign affairs implications does not disprove this point. See Plf. Opp. at 16, 17-18. Accordingly, even if the issuance of the permit is considered to be agency action, judicial review is barred by 5 U.S.C. § 701(a)(2).<sup>88</sup>

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<sup>87</sup> Plaintiff's brief conflates sections 701(a)(1) and 701(a)(2). See Plf. Opp. at 18 n.9. The cases cited in Plaintiff's footnote 9 were cited by Defendant in its section 701(a)(2) argument and are relevant to the Court's consideration of whether the issuance of a permit, which is based on a determination of whether the permit would serve the “national interest,” was a decision committed to the discretion of the State Department.

<sup>88</sup> Defendants did not raise a section 701(a)(1) argument and express no opinion as to the validity of such an argument. See Plf. Opp. at 13-15. Defendant notes, however, that, as with Plaintiff's section 701(a)(2) argument, Plaintiff cannot rely on NEPA to prove that the issuance of a Presidential Permit is subject to judicial review.

### **III. PLAINTIFF LACKS STANDING BECAUSE IT CAN ONLY SPECULATE THAT ITS ALLEGED INJURY WOULD BE REDRESSED BY A FAVORABLE RULING FROM THIS COURT**

Plaintiff has not demonstrated standing because it has not shown that its alleged injury is *likely* to be redressed by a favorable decision from this Court. The parties agree that the relevant standard is whether it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Plf. Opp. at 21 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). It is the Plaintiff’s burden to demonstrate that the standard is met. See id. Plaintiff simply has not met that burden.

Plaintiff argues that an order directing the State Department to conduct further NEPA analysis would redress its injuries and that the President cannot intervene in the permitting process because to do so “would violate the terms of [Executive Order 13337].” Plf. Opp. at 23-24. Plaintiff’s assumption that the President cannot intervene is wrong. The entire permitting scheme has been established by the President pursuant to his inherent constitutional authority over border crossings. See Def. Mem. at 11-12. 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, 350 F.2d at 456. If the Court were to issue an order directing the State Department to conduct further NEPA analysis, it would be within the President’s power to withdraw Executive Order 13337 and issue a permit to Keystone himself.

It is the Plaintiff’s burden to show that its alleged injuries are likely to be redressed by a favorable decision of this Court and it has failed to do so. And, because redressability hinges on factors beyond the control of the State Department, the relaxed standard applicable to alleged procedural injuries does not apply. See St. John’s United Church of Christ v. FAA, 520 F.3d 460, 463 (D.C. Cir. 2008); see also Salmon Spawning & Recovery Alliance v. Gutierrez, No. 06-

35979, – F.3d –, 2008 WL 4490533, \*4-\*5, \*7 (9th Cir. Oct. 8, 2008) (environmental groups lacked standing to sue the State Department and other agencies regarding alleged violations of the Endangered Species Act for failure to demonstrate redressability because a decision to withdraw from certain treaty obligations was committed to the discretion of the Executive Branch). Standing is a threshold Article III requirement which Plaintiff must meet in order to demonstrate that a live case or controversy exists before this Court. See Lujan, 504 U.S. at 559-60. Plaintiff has not met its burden here and the case should be dismissed for lack of standing.

### CONCLUSION

For the foregoing reasons and for the reasons stated in Defendant’s Motion to Dismiss, the Court should dismiss Plaintiff’s First Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction or, in the alternative, should dismiss Plaintiff’s First Amended Complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 21st day of November, 2008.

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