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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE,

Plaintiffs,

vs.

PRESIDENT DONALD J. TRUMP, UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; GREG SHEEHAN, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official

CV 19-28-GF-BMM

REPLY MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MOTION BY TRANSCANADA KEYSTONE PIPELINE, LP AND TC ENERGY CORPORATION TO DISMISS PLAINTIFFS' AMENDED COMPLANT

capacity as Acting U.S. Secretary of the Interior,

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP, a Delaware limited partnership, and TC ENERGY CORPORATION, a Canadian Public company,

Defendant-Intervenors.

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I. INTRODUCTION

Plaintiffs' opposition to the motions to dismiss is fundamentally based on two premises: First, that the 2019 Permit authorizes "imminent construction" of the 1.2-mile border segment and "greenlights" the entire Keystone XL project, (Pltfs' Br. 12) (Doc. No. 57); and second, that "there is only one congressionally sanctioned pathway to process TC Energy's permit application—the procedure set forth in EO 13,337," (*id*. at 13). Both premises are wrong as a matter of law.

First, the 2019 Permit does not authorize construction and operation of the entire Keystone XL project. It authorizes the project to cross the international border with Canada and approves only a 1.2 mile segment to that point where the first shut-off valve in the United States is located. And even within that border crossing segment, construction is not imminent because Keystone XL must still obtain a right-of-way-grant from the Bureau of Land Management ("BLM") to construct on federal land within that segment. Indeed, construction and operation of Keystone XL is not imminent outside the border crossing segment either. TC Energy needs right-of-way grants from BLM to construct on federal lands beyond the border crossing segment; it must obtain verifications from the Army Corps of Engineers ("Corps") to cross waters of the United States throughout the 875-mile route in the United States; and it needs permission from the Corps to cross the Missouri River downstream of a Corps civil works project. As a result, the harm

that Plaintiffs claim will be inflicted on natural resources, rivers, and "the Indigenous communities dependent on them" (Pltfs' Br. 12) is neither imminent nor traceable to the 2019 Permit. *See infra* ¶ II.A.

Second, the President had the authority to issue the 2019 Permit notwithstanding Executive Order 13337, because no statute governs the issuance of Presidential Permits for transboundary oil pipelines, much less requires that the Department of State ("State") issue them pursuant to that Executive Order. In arguing otherwise, Plaintiffs misread the Temporary Payroll Tax Cut Continuation Act ("Temporary Act"). They also entirely ignore the Keystone XL Pipeline Approval Act that Congress passed to authorize the Keystone XL border crossing without a Presidential Permit or further environmental review by State. *See infra* ¶ II.C.

For these reasons and others discussed in more detail below, Plaintiffs lack standing and the issuance of the 2019 Permit does not violate the Commerce Clause, the Property Clause, or Executive Order 13337. The Amended Complaint should be dismissed.

II. ARGUMENT

A. Plaintiffs Lack Standing

Plaintiffs do not claim that their members have visited, or have concrete plans to visit, the land and use the natural resources in the 1.2 mile border crossing

corridor the 2019 Permit authorized. Instead, they claim they use the Missouri River and land and natural resources elsewhere within the Keystone XL "Project area." FAC ¶¶ 16, 28-30 (Doc. No. 37). Plaintiffs nevertheless claim to be harmed by the Permit's authorization of the border crossing because "within its first 1.2 miles," Keystone crosses an unnamed tributary of a fork of a creek that flows into another creek that flows into a river that "ultimately flows into the Missouri River," so an oil leak into the unnamed tributary at the border possibly could "'flow downstream to the Missouri River,' harming Plaintiffs." Pltfs' Br. 16-17; FAC ¶¶ 16, 28-30. That alleged harm does not give Plaintiffs standing for three separate reasons: this alleged harm is speculative and not "imminent"; it is not "fairly traceable" to the 2019 Permit they seek to challenge; and it cannot be redressed by this Court. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

First, the possibility that there could be an oil spill in an unnamed tributary of a creek in the border corridor that would flow downstream through other creeks and rivers and harm Plaintiffs is too speculative to create standing. Second, this possibility is not imminent or traceable to the 2019 Permit. An oil spill cannot possibly occur before the entire pipeline is built and put into operation. The 2019 Permit does not itself authorize construction and operation of the entire pipeline. As explained in more detail below (*infra* § II.B), authorization of construction and operation of the border segment is expressly conditioned on TC Energy obtaining

all approvals required by state and federal law. Thus, TC Energy will need verifications and permission from the Corps for the pipeline to cross navigable waters and other waters of the United States, and right-of-way grants from BLM for the pipeline to cross federal land in Montana.[1] TC Energy has not received those federal verifications, permission, and right-of-way grants, so it cannot now build the entire pipeline, much less put it in operation.[2]

Plaintiffs nevertheless argue that "[c]onstruction of the pipeline is a direct and imminent result of the 2019 Permit" because the agencies are not "independent decisionmakers," *Clapper*, 568 U.S. at 413, since they "report to Trump, who has already approved Keystone." Pltfs' Br. 19-20. That argument fails. It is contrary to the long-standing and still valid presumption that government agencies will follow the law.[3] Moreover, the 2019 Permit expressly requires TC Energy to obtain the authorizations required by other federal laws.[4]

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[1] *See* Fed. Defs' Mem. In Support of Motion To Dismiss ("U.S. Br.") 22 (Doc. No. 23); TC Energy Mem. In Support of Motion To Dismiss ("First TC Br.") 4-5, 12-14 (Doc. No. 33).

[2] However, after TC Energy filed the Supplemental Motion to Dismiss, it did obtain final approval of the pipeline route through Nebraska. *See In re Application No. OP-0003*, 303 Neb. 872 (2019) (affirming the Public Service Commission's route approval). (Motion for Rehearing, filed Sept. 3, 2019)

[3] *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010).

[4] *See* Presidential Permit, Art. 6(1), 84 Fed. Reg. 13,101, 13,102 (Apr. 3, 2019). The new Executive Order likewise states that it "shall be implemented consistent

Finally, Plaintiffs have not shown that their alleged injuries are redressable by the court. The APA provides no cause of action to enjoin the President's actions. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Although "the President's actions may still be reviewed for constitutionality," and a court may enter "injunctive relief against executive officials" who implement an unconstitutional presidential directive, *id*. at 801-02, that principle is inapplicable here because no agency action is needed to implement the 2019 Permit. The cases Plaintiffs cite do not compel a different result.[5]

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with applicable law." *See* Executive Order No. 13867, § 4(b), 84 Fed. Reg. 15,491, 15,493 (Apr. 15, 2019). There is thus no basis for suggesting that the Presidential permitting process abrogates the agencies' duties under other federal permitting schemes.

[5] Plaintiffs cite (at 20) *Clinton v. City of New York*, 524 U.S. 417 (1998), which involved a constitutional challenge to the Line Item Veto Act. But the Court did not sanction an injunction against the President; it held that plaintiffs' injury could be redressed by a declaratory judgment that the vetoes were unconstitutional. *Id.* at 433, n. 22. Plaintiffs also cite *Hawaii v. Trump*, which is of no precedential value because it was vacated by the Supreme Court, 859 F.3d 741 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (2017). They cite *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1031 (D. Alaska 2019), which did vacate a section of an executive order, but the court failed to discuss *Franklin*, and it could have afforded relief by enjoining the agencies from following the President's unlawful directive, as *Franklin* allows. Finally, Plaintiffs cite this Court's decisions vacating the 2017 Permit under the Administrative Procedure Act, but they do not apply here because, as Plaintiffs argued, the 2017 Permit was issued by an agency (State), and not by the President.

B. Count I Fails To State A Claim For Relief Under The Property Clause

Plaintiffs' Property Clause challenge must be dismissed because it is based on the mistaken premise that the 2019 Permit "dispose[s] of United States property" without Congressional authorization. Pltfs' Br. 32. The Permit's authorization to construct, operate and maintain border facilities is expressly conditioned on TC Energy's acquisition of the "right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate." Art. 6(1), 84 Fed. Reg. at 13,102. Plaintiffs say the word "may" makes the right-of-way grants "permissive, not mandatory," Pltfs' Br. 33, but they are mistaken. The Permit uses the phrase "may become necessary" to make clear that TC Energy must obtain not only the authorizations required by the laws and regulations in effect at the time the Permit is issued, but also any authorizations that may become applicable to the pipeline at any time while the Permit is in effect.[6]

C. Count II Fails To State A Claim For Relief Under The Commerce Clause

The Amended Complaint alleged that the President's issuance of the 2019 Permit "conflicts with Congress' exclusive power to regulate foreign and interstate

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[6] And even if the Permit were ambiguous and could be read as Plaintiffs suggest, the court should adopt the construction that avoids the constitutional question. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

commerce." FAC ¶ 70. But as our Opening Brief explained, that theory of constitutional invalidity cannot give Plaintiffs the injunctive relief they seek against Keystone XL. If the President has no authority to act because Congress has exclusive authority to regulate cross-border pipelines, then Keystone XL could be constructed *without* a Presidential Permit as long as TC Energy obtains the BLM and Corps authorizations required under federal law, and any authorizations required under state and local laws. *See* First TC Br. 16.

In response, Plaintiffs have revised their argument, and now claim that the 2019 Permit violates the Commerce Clause because it was not issued by State pursuant to Executive Order 13337, as Congress supposedly "directed" in the Temporary Act. Pltfs' Br. 24-25; *see also id.* at 26, 28, 29, 31, 34. Plaintiffs misread the Temporary Act, and they entirely ignore the Keystone XL Pipeline Approval Act that Congress passed to authorize the Keystone XL border crossing *without* a Presidential Permit or further environmental review by State.

Congress enacted the Temporary Act in December 2011, after State had failed to issue any decision on the permit application for Keystone XL that had been filed three years earlier. *See* Pub. L. No. 112-78, § 501(a), 125 Stat. 1280, 1289 (2011) (attached as Addendum A). That application had been submitted to State pursuant to Executive Order 13337. As relevant here, the Temporary Act provided that "not later than 60 days after the date of enactment of this Act, the

President, acting through the Secretary of State, shall grant a permit under Executive Order No. 13337" for Keystone XL, unless the "President determines that the Keystone XL pipeline would not serve the national interest" and submits a report to certain congressional committees providing a "justification for [his] determination." *Id.* § 501(a), (b)(2). The Temporary Act further provided that if the President failed to act within 60 days, a permit for Keystone XL "shall be in effect by operation of law." *Id.* § 501(b)(3). The Temporary Act was thus a limited measure to force the President or his delegate at State to act on a Keystone XL permit application that was pending in December 2011. It did not codify the terms of Executive Order 13337 or preclude the President from withdrawing or superseding that Executive Order in the future.

Plaintiffs also err in suggesting (Pltfs' Br. 29) that the Temporary Act reflected a congressional directive that State engage in additional environmental review of Keystone XL. The opposite is true. The Temporary Act deemed the Environmental Impact Statement issued by State in 2011 to comply with NEPA and the NHPA, and expressly stated that "*no further Federal environmental review shall be required*" for a permit to be issued under the Act even if there was a change in the route through Nebraska. Pub. L. No. 112-78, § 501(c)(4), 125 Stat. at 1290 (emphasis added).

Congress reiterated its view that no further environmental review is needed when it passed the Keystone XL Pipeline Approval Act after President Obama denied a permit under the Temporary Act. *See* First TC Br. 16, n.19. Had President Obama not vetoed it, the Keystone XL Pipeline Approval Act would have authorized the Keystone XL border facilities without *any* Presidential Permit. *See* S. 1, § 2(a), 114th Cong. (2015), 161 Cong. Rec. S620, S637 (daily ed. Jan. 29, 2015) (attached as Addendum B). It also would have deemed State's then-current environmental impact statement (the 2014 FSEIS) to satisfy NEPA and "any other provision of law that requires Federal agency consultation or review, (including the consultation or review required under Section 7(a) of the Endangered Species Act …)" even if there was a subsequent change in the route through Nebraska. *See* § 2(a), 2(b), 161 Cong. Rec. at S637-S638.

It is therefore simply not true that President Trump's issuance of the 2019 Permit without further environmental review by State is an unconstitutional attempt "to evade our congressionally enacted bulwarks against environmental harm." Pltfs' Br. 31. Indeed, if the will of Congress had been respected earlier, the Keystone XL border crossing would have been authorized years ago, and there would have been no need for President Trump to take any action at all.[7]

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[7] Plaintiffs further err in arguing that the 2019 Permit is a "headwaters permit," and "Congress intended for environmental review to be conducted at that

D. Count III Fails To State A Claim For Relief Under Executive Order 13337

Finally, Plaintiffs have no claim under Executive Order 13337 because it created no judicially enforceable rights, and the President was entitled to supersede it by issuing the 2019 Permit "notwithstanding Executive Order 13337." 84 Fed. Reg. at 13,101; *see also* TC Energy Mem. In Support of Supplemental Motion to Dismiss 4 (Doc. No. 50); First TC Br. 20-21. Plaintiffs respond that the Executive Order does not in so many words expressly preclude judicial review, Pltfs' Br. 35, but that is not dispositive. "As a general rule, 'there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.'" *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995) (quoting *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993)). Thus, an "executive order is privately enforceable only if it was intended to create a private cause of action." *Chen Zhou Chai*, 48 F.3d at 1339. But Section 6 of Executive Order No. 13337 expressly stated that it was "*not* intended to, and does

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headwaters moment, not piecemeal at each successive permitting juncture." Pltfs' Br. 31. The authorities they cite involve environmental review under NEPA, which does not apply to the President. *Compare Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002) (NEPA "requires the assessment of the cumulative impact of 'individually minor but collectively significant actions taking place over a period of time.'") (quoting 40 C.F.R. § 1508.7)), with 40 C.F.R. § 1508.12 (NEPA definition of "Federal agency" excludes "the President"); *see also* First TC Br. 19.

not, create any right … enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person." 69 Fed. Reg. 25,299, 25,301 (May 4, 2004) (emphases added).

Plaintiffs also claim that Executive Order No. 13337 "bind[s] the President" because it "implement[s] a congressional mandate." Pltfs' Br. 34. But there is no statute governing issuance of Presidential Permits for transboundary pipelines. What is more, Executive Order 13337 did not purport to implement *any* congressional mandate. *Cf. Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996) (executive order that "was never grounded in a statutory mandate or congressional delegation of authority" lacks "the force and effect of law"). The Executive Order was issued pursuant to "the authority vested [in the] President by the Constitution" and 3 U.S.C. § 301, an administrative provision that authorizes the President to delegate functions to agencies. 69 Fed. Reg. at 25,299.

Finally, no subsequent statute mandates compliance with Executive Order 13337 or prohibits the President from revoking or superseding it as he deems appropriate. *See supra* § C. The President thus had the authority to issue the 2019 Permit notwithstanding Executive Order 13337, and Count III must be dismissed.

CONCLUSION

For the foregoing reasons, and those set forth in TC Energy's original and supplemental motions to dismiss, the Court should dismiss the First Amended Complaint for lack of standing and failure to state a cognizable claim for relief.

Dated: September 12, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed in 14-point font, double spaced, and contains 2,761 words, excluding tables, caption, signatures, and certificates of service and compliance.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Jeffery J. Oven