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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

MEMORANDUM IN SUPPORT OF DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT

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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INTRODUCTION AND BACKGROUND

Plaintiffs bring this action to invalidate the permit that President Trump issued on March 29, 2019 authorizing the construction, operation, and maintenance of 1.2 miles of oil pipeline facilities for the Keystone XL Pipeline ("Keystone XL") at the U.S.-Canadian border (the "2019 Permit"). Plaintiffs contend that, in issuing the 2019 Permit, the President (and certain federal agencies) violated the Foreign Commerce Clause and Property Clause of the Constitution. They also allege violations of Executive Order No. 13337 ("E.O. 13337"), which was issued by President George W. Bush in 2004.

TransCanada Keystone Pipeline LP and TC Energy Corporation ("TC Energy") previously moved to dismiss these claims for lack of standing. It also demonstrated that Plaintiffs' claims fail as a matter of law. Specifically, TC Energy explained that the 2019 Permit did not violate the Property Clause because it did not purport to excuse Keystone XL from complying with all requirements Congress has established governing use of federal land. Issuance of the permit likewise did not violate the Foreign Commerce Clause because Congress has never adopted standards or procedures for determining whether and when oil pipeline facilities should be allowed to cross the nation's borders, much less required the President to comply with environmental laws or the standards and procedures set forth in any Executive Orders when issuing permits for such facilities. Finally, the

President could not violate E.O. 13337, because he was entitled to rescind or revoke that Order at any time and in whatever manner he chose.

On December 20, 2019, this Court denied TC Energy's motion to dismiss, *see* Docket 73 ("December 20, 2019 Order"). The Court concluded that, even if the 2019 Permit authorizes only the construction of 1.2 miles of cross-border facilities for Keystone XL, Plaintiffs had pled facts sufficient to establish an injury, and that the Court can issue relief to redress that injury. December 20, 2019 Order at 16-20. It also concluded that Plaintiffs had pled "plausible" claims that, in issuing the 2019 Permit, the President had violated the Constitution's Foreign Commerce Clause and Property Clause, as well as E.O. 13337. *Id.* at 21-38.

Specifically, the Court stated that "Congress has demonstrated its intent to regulate cross-border pipelines pursuant to its powers under the Foreign Commerce Clause." *Id.* at 29-30. The Court offered two bases for that conclusion. On the one hand, it suggested that it "could be argued that the Congress implicitly approved of the system established by the 1968 Executive Order and the 2004 Executive Order whereby the Secretary of State reviewed cross-border permits and the Secretary of State made the national interest determination." *Id.* at 28. On the other hand, it noted that, "[b]y contrast," Congress had enacted two statutes—the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289 (the "2011 Temporary Act") and the Keystone XL Pipeline Approval

Act, S. 1, 114th Cong. §§ 1-6 (2015)—reflecting "its intent to exercise authority over cross-border pipeline permitting." December 20, 2019 Order at 28-29. Following its discussion of these laws, the Court stated that "Plaintiffs have pled a plausible claim that the President's issuance of the 2019 Permit was *ultra vires*," because he "completely removed the State Department and other federal agencies from considering cross-border permit applications when he issued the 2019 Permit." *Id.* at 29-30.

Although the Court agreed that the 2019 Permit did not excuse TC Energy from obtaining any and all federal and other permits or authorizations needed to construct any portion of the Keystone XL pipeline, *id.* at 31, it concluded that Plaintiffs had stated plausible claims for a violation of the Property Clause. It based that conclusion largely on the 2011 Temporary Act. This statute, the Court concluded, demonstrated Congress' "intent for the State Department to ensure that cross-border pipeline permits comply with all applicable laws and that the pipeline would serve the national interest." *Id.* at 34. Accordingly, the Court found that Plaintiffs had "presented plausible claims" of a violation of the Property Clause because President Trump had "arguably interfered with Congress's constitutional power to manage federal lands by issuing the 2019 Permit without requiring the congressionally-approved comprehensive State Department review process set forth in the 2004 Executive Order." *Id.*

The Court also found that Plaintiffs had stated a "plausible claim that the 2019 Permit violated the 2004 Executive Order." *Id.* at 37. The Court accepted Plaintiffs' claim that the President cannot unilaterally withdraw or supersede an Executive Order "that implement[s] certain statutory foundations," and that E.O. 13337 is such an Executive Order because "Congress has approved of the permitting process set forth in" that Order. *Id.* at 35-36.

Based on the foregoing conclusions, the Court found that Plaintiffs had also stated viable claims against the agency Defendants. The Court stated that, if Plaintiffs were to prevail on their claims under the Foreign Commerce Clause, the Property Clause, and E.O. 13337, then the agency Defendants would be required to "participate in the cross-border pipeline permitting process" set forth in E.O. 13337. *Id.* at 38-39. Finally, the Court denied Plaintiffs' request for a preliminary injunction without prejudice, finding that they had failed to allege any imminent injury.

Although, as noted, the Court repeatedly described Plaintiffs' constitutional claims as "plausible," it stated that those claims warranted "further argument and analysis." *Id.* at 30. In its separate order, the Court directed the parties to provide, in supplemental briefs, what appears to be the "further argument and analysis" identified in the decision on the motion to dismiss. Specifically, the Court directed the parties to address: (1) whether the 2019 Permit authorized construction of

facilities outside a 1.2-mile segment at the U.S. border; (2) the respective constitutional authority of Congress and the President to regulate cross-border oil pipelines and any historical practices pertaining to the same; and (3) TC Energy's argument that, if the President has no authority to issue permits for such pipelines, then the cross-border segment of Keystone XL can be built without any Presidential Permit. *See* Docket 74. In a separate filing today, TC Energy addresses these issues.

As TC Energy explains in that filing, Plaintiffs' constitutional claims depend on the conclusion that the President *has* authority to issue a permit for the Keystone XL pipeline, but that in issuing the 2019 permit, he violated limits Congress supposedly imposed on that power. The latter claim has no merit whatsoever. Nor is there any basis for Plaintiffs' claim that issuance of the 2019 Permit violated E.O. 13337. Because both issues present pure questions of law, and because they are dispositive of Plaintiffs' claim, TC Energy requested in its supplemental filing that the Court dismiss Plaintiffs' claims in light of TC Energy's showing that they have no legal basis. In the event that the supplemental filings cannot be used as a vehicle for such relief, TC Energy hereby submits the memorandum in support of its separate motion for summary judgment.[1]

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[1] TC Energy submits that, for the reasons stated in its motion to dismiss, Plaintiffs lack standing. Without prejudice to that claim, TC Energy will not repeat its standing arguments here. *See City of Los Angeles v. Cty. of Kern*, 581 F.3d 841,

ARGUMENT

I. TC ENERGY IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS UNDER THE FOREIGN COMMERCE CLAUSE AND PROPERTY CLAUSE

Both of Plaintiffs' constitutional claims depend on the theory that Congress has either explicitly or impliedly prohibited the President from issuing permits for cross-border oil pipeline facilities except in compliance with the requirements of prior Executive Orders and/or federal environmental laws.

With respect to the Foreign Commerce Clause, Plaintiffs argue that the 2019 Permit is invalid because "it is 'incompatible with the expressed [*and*] implied will of Congress.'" Docket 57 at 21 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (alterations and emphasis Plaintiffs'). Plaintiffs contend that the 2011 Temporary Act constitutes an explicit direction that Presidents "follow EO 13,337 on Keystone Permitting." Docket 57 at 25. Alternatively, they claim that Congress acquiesced only in the long-standing practice of the State Department issuing permits in compliance with "Congress' comprehensive scheme of statutory environmental protections." *Id.* at 27.

With respect to their Property Clause claim, Plaintiffs relied primarily on the theory that the 2019 Permit authorized construction of the entire Keystone XL

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845 (9th Cir. 2009) (lack of Article III standing "cannot be waived" and "court can, and indeed must, resolve any doubts about this constitutional issue sua sponte").

pipeline and impermissibly excused compliance with all other relevant federal requirements. *See id.* at 33. Plaintiffs also argued that the President "had only one congressionally sanctioned pathway to process TC Energy's permit application—the procedure set forth in EO 13,337"—and violated the Property Clause by "fail[ing] to abide by that process." *Id.* at 34. This Court properly rejected the first of these arguments, December 20, 2019 Order at 31, but deemed the second "plausible," *id.* at 34.

As TC Energy explains below, Plaintiffs' theories that Congress has explicitly or impliedly restricted the President's ability to grant permits for cross-border oil pipeline facilities are untenable. And, insofar as Plaintiffs claim that the President has no authority at all to issue such permits, that theory would not entitle them to any relief; it would simply mean that TC Energy can construct cross-border facilities without presidential permission. TC Energy is therefore entitled to summary judgment with respect to Plaintiffs' constitutional claims.

A. The 2011 Temporary Act Does Not Require The President To Comply With Executive Order No. 13337

In claiming that the 2011 Temporary Act required the President to comply with E.O. 13337, Plaintiffs are effectively arguing that the Act codified that Executive Order. But the Act did no such thing. It imposed a one-time deadline for a single project to force President Obama to act on what Congress viewed (eight years ago) as undue delay with respect to the Keystone XL pipeline application for

a cross-border permit. There is no plausible basis for adopting Plaintiffs' contrary reading.

To begin with, Congress knows how to codify all or parts of Executive Orders, and does so expressly when that is its intent. Thus, for example, in the Iran Freedom Support Act of 2006, Congress provided that, "[e]xcept as otherwise provided in this section, United States sanctions with respect to Iran imposed pursuant to sections 1 and 3 of Executive Order No. 12957, sections 1(e), (1)(g), and (3) of Executive Order No. 12959, and sections 2, 3, and 5 of Executive Order No. 13059 (relating to exports and certain other transactions with Iran) as in effect on January 1, 2006, shall remain in effect." Pub. L. No. 109-293, § 101(a),120 Stat. 1344, 1344-45 ("Iran Sanctions Codification").

Similarly, Congress codified an earlier Executive Branch practice concerning permits for cross-border commercial facilities. As the parties have previously noted, in 1875, President Grant asserted authority over foreign cables entering the United States. In doing so, he considered whether: (1) the country of the foreign cable company allowed U.S. cables "to land and freely connect with and operate through its land"; (2) the foreign cable company was a monopoly; (3) the lines gave "precedence in the transmission of the official messages of the governments of the two countries"; and (4) the two governments had the power "to fix a limit to the charges to be demanded for the transmission of messages" from

their shores. *See* President Ulysses Grant's Seventh Annual Message to Congress, *Rosebud* Docket No. 67-2, pp. 15-16.

In 1921, Congress codified the President's role with respect to such facilities and modified some of the substantive criteria. It provided that no foreign cable could connect to the United States "unless a written license to land or operate such cable has been issued by the President." Act of May 27, 1921, ch. 12 § 1, 42 Stat. 8, 8 ("Kellogg Act"). The President could withhold or revoke a license based on a determination, "after due notice and hearing," that the license would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States." *Id.* § 2, 42 Stat. at 8. Congress further empowered the President to impose conditions "to assure just and reasonable rates," but prohibited the granting of "exclusive rights of landing or of operation in the United States," and preserved the authority of the Interstate Commerce Commission to regulate transmission rates. *Id.*

The 2011 Temporary Act does not bear the slightest resemblance to a codification of an Executive Order or an Executive Branch practice. It is a blunt directive to the President to grant TC Energy's application for the Keystone XL pipeline within 60 days. *See* § 501(a), 125 Stat. at 1289. The Act allowed the President to decline to grant the application if he determined that it "would not

serve the national interest," but required him to explain any such determination to various committees and members of Congress. *See* § 501(b)(1)-(2), 125 Stat. at 1289-90. It further provided that, if the President failed to act within the 60-day period, a permit for the Keystone XL pipeline "shall be in effect by operation of law," provided it satisfied various other conditions. § 501(b)(3), (c), 125 Stat. at 1290-91.

The 2011 Temporary Act includes none of the hallmarks of a codification. It does not provide that "the interagency process and national interest standard in section 1 of Executive Order No. 13337 shall remain in place." *Cf.* Iran Sanctions Codification, § 101(a), 120 Stat. at 1344-45. It does not even institutionalize the President's role in permitting cross-border pipeline facilities, by prohibiting construction of cross-border oil pipeline facilities "unless a written license … has been issued by the President." *Cf.* Kellogg Act, § 1, 42 Stat. at 8. It does not require that the President engage in any process in order to grant a permit, *cf. id.* § 2, 42 Stat. at 8 (authorizing issuance of license "after due notice and hearing"); forbid issuance of a license in any circumstances, *cf. id.* (no "exclusive rights of landing or of operation in the United States"); or empower the President to impose conditions on a permit, *cf. id.*(authorizing conditions "to assure just and reasonable rates"). Simply put, the 2011 Temporary Act does not remotely codify, or mandate compliance with, E.O. 13337.

In nevertheless claiming that the Act "specifically directed the President to comply with EO 13,337 in permitting Keystone," Docket 57 at 28, Plaintiffs rely on the fact that the Act directed the President to "grant a permit *under* Executive Order No. 13,337." *Id.* at 25. But this phrase cannot possibly bear the weight Plaintiffs ascribe to it.

The sentence from which Plaintiffs selectively quote states, in material part:

> Except as provided in subsection (b), 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 the Keystone XL pipeline project *application filed on September 19, 2008 (including amendments)*.

§ 501(a), 125 Stat. at 1289 (emphases added). The italicized language makes clear that Congress was directing the President to issue a permit "under" E.O. 13337 because that was the process being used to evaluate the Keystone XL pipeline's "application." The fact that subsection (a) directed the President to "*grant* a permit"—not simply to "make a decision about the Keystone XL pipeline project application"—demonstrates that, in this provision, Congress was *commandeering* the E.O. 13337 process and *dictating* the outcome Congress desired. It was not binding President Obama (and all future Presidents) to adhere to that process, by

specifying that section 1 of E.O. 13337 "shall remain in place." *Cf.* Iran Sanctions Codification, § 101(a), 120 Stat. at 1344-45.[2]

Indeed, the legislative history underscores this purpose. Opponents of an earlier version of the measure that was included in 2011 Temporary Act, *see* 157 Cong. Rec. 12042 (daily ed. July 26, 2011) H.R. 1938, the North American-Made Energy Security Act (Sec. 3. Expedited Approval Process), objected that Congress was "overriding" the Executive Order. Representative Waxman stated that the permitting process "was established by Executive orders issued by President Johnson and President George W. Bush . . . . *The bill overrides the Executive orders and other Federal law, it short-circuits the decisionmaking process*." 157 Cong. Rec. 12032 (daily ed. July 26, 2011) (statement of Rep. Waxman). He made the same point with respect to the provision that was included in the 2011 Temporary Act itself, saying that it "would have the whole process short-circuited by *demanding* that [President Obama] come to the conclusion [to approve Keystone XL]." 157 Cong. Rec. 19906 (daily ed. Dec. 13, 2011) (statement of Rep. Waxman); *see also id.* at 19918 (the bill would "*usurp* Presidential authority

[2] Similarly, because the phrase on which Plaintiffs rely directs the President, acting through State, to "*grant* a permit under Executive Order No. 13337," § 501(a), 125 Stat. at 1289 (emphasis added), it is plainly not an "instruction that the Secretary of State *evaluate the Keystone permit*," much less do so "based on the procedures set forth in the 2004 Executive Order." December 20, 2019 Order at 33 (emphasis added).

and *approve the Keystone [XL] pipeline* without proper review") (statement of Rep. Stark) (emphasis added).

The rest of the Act provides further confirmation, if any were needed, that it did not mandate compliance with E.O. 13337. First, the action-forcing mechanism Congress chose is the antithesis of a codification of that Executive Order. If President Obama failed to make any decision within 60 days, the permit for Keystone XL would "be in effect by operation of law." § 501(b)(3), 125 Stat. 1290. Thus, Congress dictated that, if the President did nothing, the permit would become operative *without regard to* E.O. 13337's substantive "national interest" standard or its procedural requirements.

Indeed, the Act did *not* state that a permit issued under subsection (b)(3) "satisfies the national interest requirement of E.O. 13337"—language it would have included if it were codifying this standard. Instead, the Act refers to the "national interest" standard only when requiring the President to justify a decision *not* to grant the permit. § 501(b)(2), 125 Stat. at 1290. Thus, far from demonstrating that Congress wanted "the State Department to ensure that … the pipeline would serve the national interest," December 20, 2019 Order at 34, the structure of the 2011 Temporary Act presumed that the Keystone XL pipeline was in the national interest and required to the President to explain why he believed otherwise.

Similarly, the Act does not provide that a (b)(3) permit should be deemed to have satisfied the E.O. 13337's interagency consultation process. In fact, the Act never mentions the inter-agency process that Plaintiffs now claim Congress codified. Instead, it set forth an entirely different process that would have required the President to coordinate review with Nebraska concerning the pipeline's route through that state. *See* § 501(d)(3), 125 Stat. at 1291.

Section 501(b)(2)'s reporting requirement likewise confirms the Act's time-limited purpose. This provision required the President to explain a decision not to grant a permit so that Congress could decide what to do next. And Congress later responded to President Obama's decision to deny the permit by passing a statute directly approving the Keystone XL. Keystone XL Pipeline Approval Act, S. 1, 114th Cong. §§ 1-6 (2015). Significantly, if the 2011 Temporary Act had mandated that any permit for Keystone XL (as well as for all future cross-border oil pipelines) be issued by the State Department in compliance with E.O. 13337, the 2015 Approval Act should and would have stated that, "[N]otwithstanding the requirements of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, 125 Stat. 1280, Title V, and the requirements of Executive Order No. 13337, the application filed on May 4, 2012 by TransCanada Keystone Pipeline, L.P. is hereby approved." The fact that the 2015 legislation included no such

language reflects Congress's understanding that the 2011 Temporary Act had no continuing legal effect.

Finally, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), forecloses Plaintiffs' reading of the 2011 Temporary Act. There, the Supreme Court explained that "[w]e would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Id.* at 800-01. That principle applies with even greater force here, where Plaintiffs do not merely claim that a statute authorizes judicial review of the President's performance of statutory duties, but that a statute (1) overrode a longstanding assertion of inherent presidential authority and (2) dictates how the President performs a function that Congress had left unregulated for decades. Thus, even if the language of the 2011 Temporary Act was ambiguous and could plausibly be read to mandate compliance with E.O. No. 13337—neither or which is true—Plaintiffs' reading would still have to be rejected. Language directing President Obama to "*grant* a permit under Executive Order No. 13337 … for the Keystone XL pipeline project application," § 501(a), 125 Stat. at 1289 (emphasis added), is manifestly *not* a clear statement *prohibiting* Presidents from granting a permit for Keystone XL (or any other oil pipeline) *unless* they comply with the requirements of E.O. 13337. There is simply no plausible basis for

claiming that the 2011 Temporary Act includes the express statement necessary to convert the requirements of E.O. 13337 into binding statutory commands.

B. Congress Has Not Impliedly Required The President To Comply With Executive Order 13337 Or Federal Environmental Laws.

Plaintiffs' alternative theory is that, insofar as Congress acquiesced in the presidential practice of granting permits for cross-border oil pipelines, it did so "subject to the requirements of Congress' comprehensive scheme of statutory environmental protections." Docket 57 at 27. *See also* December 20, 2019 Order at 28 (suggesting that it "could be argued that the Congress implicitly approved of the system established by the 1968 Executive Order and the 2004 Executive Order whereby the Secretary of State reviewed cross-border permits and the Secretary of State made the national interest determination"). This theory is, if anything, even more untenable.

First, it rests on an impermissibly myopic view of the historical record. Congressional acquiescence can be inferred from "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). Plaintiffs attempt to limit the relevant practice to actions taken since August 1968, when E.O. 11423 delegated authority to the State Department to issue permits for cross-border oil pipelines following consultation

with other agencies. *See* 33 Fed. Reg. 11,741 (Aug. 20, 1968). But Presidential Permits for cross-border oil pipelines have been granted since at least as early as 1918. *See* Marjorie Whiteman, *Digest of International Law*, Vol. 9, p. 920 (1968). And prior to E.O. 11423, the President himself granted such permits. *See* 31 Fed. Reg. 6204 (Apr. 22, 1966) (President Johnson signing permit for cross-border oil pipeline). Thus, the relevant "*unbroken*" executive practice is simply one in which some executive branch official grants permits for cross-border oil pipeline facilities. The particular officials who granted such permits, and the particular means by which they did so, have varied since 1918, and thus cannot be considered part of an "unbroken" practice.

Moreover, the only unbroken practice that Congress had "never before questioned," *Dames & Moore*, 453 U.S. at 686, was one in which the executive branch *approved* cross-border pipelines. *See* E.O. 11423, 33 Fed. Reg. 11,741 (noting that "permission has from time to time been sought *and granted* in the form of Presidential permits for … such border crossing facilities as … oil pipelines" (emphasis added)). It was not until the State Department failed to act on the Keystone XL application for over three years that Congress first passed legislation concerning a cross-border permit for an oil pipeline, and the 2011 Temporary Act directed the President to *grant* the application or explain why it

was not in the national interest to do so. Several years later, Congress itself authorized construction of the Keystone XL pipeline.

In short, there is no basis for concluding that, from 1918 until 2019, Congress acquiesced in a process in which the President always delegated issuance of permits for cross-border oil pipeline facilities to the State Department, and that Congress expected and wanted that agency to deny such permits based on a multifactor analysis of the "national interest."

Second, even if it were proper to ignore 50 years of a century-old practice, Plaintiffs' theory rests on a fundamental misconception about congressional acquiescence, which operates to *permit* presidential action, not to *regulate* it. Congressional acquiescence in a long-continued and well-known practice raises "a presumption that the [action] had been [taken] in pursuance of [Congress'] consent." *Dames & Moore*, 453 U.S. at 686 (first two alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). Congress can always override that presumption, by passing legislation to stop a presidential practice or to modify it, as it did with respect to presidential permitting of submarine cables in the Kellogg Act. But Plaintiffs cite no authority for the proposition that Congress' *silence* in the face of an assertion of presidential authority somehow *requires* the President to continue to exercise that purported presidential authority for all times in precisely the same manner. Indeed, under

plaintiffs' theory, E.O. 11423 was itself illegal—prior to 1968, Congress had consented to the President directly issuing permits for cross-border oil pipeline facilities, thereby (on Plaintiffs' view) barring him from delegating that task to State.

Finally, the fact that Congress enacted the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act (ESA) in the years after President Johnson adopted E.O. 11423, *see* Docket 57 at 25, is irrelevant. None of these statutes includes the "express statement" necessary to show that Congress intended to subject the President himself to the requirements of these laws. *Franklin*, 505 U.S. at 800-01.[3] The most that can be said about them, therefore, is that they require the President to make a choice. He can exercise an inherent constitutional power himself, free of the constraints of these statutes (and of judicial review under the Administrative Procedure Act (APA)). Alternatively, he can delegate that power to an agency. This Court has held that, when the President makes the latter choice, the delegate/agency is subject to the

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[3] NEPA applies to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA regulations define "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. The CWA and ESA, like the APA, do not expressly authorize suits against the President. *See* 16 U.S.C. § 1540(g)(1)(A) (ESA: authorizing suit against "any person, including the United States and any other governmental instrumentality or agency"); 33 U.S.C. § 1365(a)(1) (CWA: authorizing suit against "any person (including (i) the United States, and (ii) any other governmental instrumentality or agency").

requirements of NEPA, the CWA, and to ESA, and to judicial review even when it is exercising inherent presidential authority. Order, *Indigenous Envtl. Network v. U.S. Dep't of State*, No. 4:17-cv-00029-BMM (D. Mont. Nov. 22, 2017), Docket 99.[4] Even assuming *arguendo* the correctness of that holding, it necessarily means that the President can choose to avoid the burdens imposed by the foregoing statutes by exercising his constitutional authority directly, which is precisely what President Trump did when he issued the 2019 Permit. There is no conceivable basis for claiming that, simply by enacting generally applicable laws like NEPA, the CWA, or the ESA—none of which expressly applies to the President—Congress somehow (1) barred the President from revoking E.O. 11423 or any similar subsequent Executive Order, (2) barred the President himself from ever issuing a Presidential Permit for cross-border oil pipeline facilities, and (3) required that such Permits only be issued by the State Department (or another agency subject to the foregoing laws).

* * *

In short, the President had the authority to issue a permit for the Keystone XL pipeline's border facilities, and Congress neither explicitly nor impliedly

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[4] As the Court is aware, TC Energy does not agree with the Court's ruling in this regard. Because issuance of the 2019 Permit mooted the litigation in which the Court rendered that ruling, the Ninth Circuit did not have an opportunity to address the issue. TC Energy reserves its right to contest the Court's ruling, should the need arise in the future.

restricted that authority by requiring permits for cross-border oil pipeline facilities to be issued only by the State Department (or any other agency) and only in accordance with any specified procedures or substantive standards, including the requirements of federal environmental laws.

C. Any Claim That The President Lacks Authority To Issue Permits For Cross-Border Facilities Is Self-Defeating

At times, Plaintiffs suggest that the President has no authority to issue cross-border permits for oil pipelines at all. *See* Docket 57 at 23 ("the President's authority to regulate cross-border facilities has long been suspect"); *id.* at 24 (quoting President Cleveland for proposition that "the 'President was without power'" to issue such permits). Any such suggestion, however, is self-defeating. If President has no authority to issue such permits, then any substantive or procedural defects in the 2019 permit are legally irrelevant. The absence of any presidential authority means that TC Energy does not need a presidential permit to construct cross-border facilities for the Keystone XL project. It can build such facilities as long as it complies with all relevant federal and state requirements for such construction. Simply put, Plaintiffs cannot claim that the President has improperly allowed TC Energy to construct cross-border pipeline facilities if he has no authority to permit or block such construction in the first place.

Congress has passed no law barring the construction of oil pipeline facilities across the United States border. Congress authorized the Federal Energy

Regulatory Commission to regulate the construction of gas pipelines under section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A), but did not do the same for oil pipelines. Instead, federal law controls only oil pipeline design and construction standards,[5] rates and access to pipeline transportation,[6] and approvals for the construction of discrete segments of an oil pipeline (if any) that cross wetlands or navigable waters, affect federal civil works projects,[7] or cross federally-owned land[8] or land held in trust for individual Indians or tribes.[9] TC Energy has sought all necessary federal authorizations to construct Keystone XL over federal land and across waters of the United States.

Accordingly, if the Court were to find that the President lacks authority to permit construction of Keystone XL across the international border, then no additional federal authorization is needed. No implicit prohibition on such construction can be derived from notions of federal sovereignty. If such an implicit prohibition existed, it would not have been necessary for Presidents since the

[5] 49 U.S.C. § 60102(a); 49 C.F.R. pt. 195.

[6] *See* 49 U.S.C. § 60502; 49 U.S.C. app. § 1 (1988).

[7] *See* 33 U.S.C. §§ 404, 408, 1344.

[8] *See* 30 U.S.C. § 185; 43 U.S.C. § 1761 (authorizing Interior Department to grant right-of-way).

[9] *See* 25 U.S.C. §§ 323, 324 (authorizing Interior to grant right-of-way across land held in trust for Indian tribes or individual Indians).

Ulysses Grant to have asserted authority to regulate the construction of cross-border facilities.

Indeed, the necessary presumption under the Constitution is the opposite—cross-border facilities are permitted unless barred. As the Supreme Court explained over a century ago, "so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled." *Walling v. Michigan*, 116 U.S. 446, 455 (1886); *id.* (Justice Johnson's "whole argument [concurring in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824)] … is based on the idea that the power to regulate commerce with foreign nations … must necessarily be exclusive, and that where Congress has failed to restrict such commerce, it must necessarily be free"). Here, as noted, Congress has taken various actions with respect to oil pipeline design and safety standards, rates and access, and construction across federal lands and waters. The presumption here, therefore, is that Congress deems oil pipelines built and operated in compliance with these standards to be beneficial to the nation—a presumption further bolstered by its efforts in 2011 and 2015 to approve the Keystone XL pipeline itself. *See supra*.

In short, if the President lacks authority to grant permits for cross-border oil pipeline facilities, the validity of the 2019 permit President Trump granted for the Keystone XL pipeline is legally irrelevant, and TC Energy can construct the cross-

border facilities without any presidential permit, provided of course that obtains permission (which it has sought) to construct those facilities on lands owned by the federal government and across the waters of the United States.

II. ISSUANCE OF THE 2019 PERMIT DID NOT VIOLATE E.O. 13337

Plaintiffs also argue that E.O. 13337 itself bound President Trump. Docket 57 at 34-36. This theory also fails as a matter of law.

Plaintiffs do not—because they cannot—dispute that an Executive Order that is not grounded in any statutory duties can be "withdrawn at any time for any or no reason." *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965); *see also Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 77 (1977) (President "legally could revoke or supersede [an] Executive order at will"). Nor have they challenged TC Energy's showing that, where the President has plenary power to withdraw, revoke, or supersede an Executive Order, he can do so in any manner he chooses—including by simply authorizing action notwithstanding an existing Executive Order. *See Status of Presidential Memorandum Addressing the Use of Polygraphs,* 2009 WL 153263, at *8 (O.L.C. Jan. 14, 2009) ("[T]he President is generally free to amend or revoke instructions to his subordinates in a form and manner of his choosing.").

Nevertheless, Plaintiffs claim that "Executive orders that, as here, implement a congressional mandate can and do bind the President." Docket 57 at 34. E.O.

13337, however, plainly does *not* implement any statutory duty. It cites only the President's inherent constitutional power and 3 U.S.C. § 301. The latter statute does not impose duties on the President, but instead authorizes the President to delegate duties to agencies and states that such delegations can be revoked at will.

For this reason, the various cases Plaintiffs cite are irrelevant. All but one simply concluded that an Executive Order that imposed sufficiently specific, non-discretionary duties on federal officials could be judicially enforced against those officials.[10] None of these cases held that an Executive Order bound the President, and that the President cannot withdraw or supersede an Executive Order.

And the decision in *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013 (D. Alaska 2019), *appeal docketed*, No. 19-35460 (9th Cir. May 29, 2019), demonstrates only that a *statute* can limit the authority of Presidents to revoke prior Executive Orders issued to implement that statute. That case involved the Outer Continental Shelf Lands Act (OCSLA), which authorized the leasing of offshore lands for certain purposes, but also empowered the President to withdraw unleased lands from that authorization. *Id.* at 1016. After examining the statute's

[10] *See Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1214 (11th Cir. 2012); *City of Dania Beach v. FAA*, 628 F.3d 581, 591 (D.C. Cir. 2010); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997); *Wyo. Wildlife Fed'n v. United States*, 792 F.2d 981, 985 (10th Cir. 1986); *Legal Aid Soc'y of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1329-32 (9th Cir. 1979).

text, structure, purpose, and legislative history, the court concluded that Congress had not granted the President the power to revoke a prior withdrawal. *Id.* at 1020-30. Thus, it found that Congress had intended to enable a President who wished to permanently withdraw lands from leasing to tie the hands of future Presidents.

It is indisputable, however, that E.O. 11423 and E.O. 13337 were not issued to implement any statute, much less a statute that precluded revocation of any Executive Orders issued to implement its commands. Like the other cases they cite, therefore, *League of Conservation Voters* has no relevance to whether President Trump could supersede E.O. 13337.

In the end, Plaintiffs' claim that the President violated E.O. 13337 appears to be yet another version of its argument that Congress explicitly or impliedly codified that Executive Order and required future Presidents to comply with its substantive standard and procedures. But for all of the reasons discussed above, there is no merit to those theories. Accordingly, TC Energy is entitled to summary judgment on Plaintiffs' claim that the President violated E.O. 13337.

III. TC ENERGY IS ENTITLED TO SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFFS' CLAIMS AGAINST THE OTHER FEDERAL DEFENDANTS

Plaintiffs' claims against the agency Defendants fail because those claims are entirely derivative of Plaintiffs' legally untenable claims against the President. Indeed, Plaintiffs have explicitly acknowledged the derivative nature of their

claims against the agency Defendants. They argued that, "[b]ecause EO 13,337 was in effect when Trump issued the 2019 Permit, each of these federal agencies had duties to review and consult on the Keystone Project before it could be permitted. Because those agencies failed to fulfill those duties before Trump issued the 2019 Permit, they are properly named by Plaintiffs in this lawsuit." Docket 57 at 37. As TC Energy has shown, however, the President had the power and legal right to supersede E.O. 13337 and issue the 2019 permit "notwithstanding" the requirements of that Order. The moment he did so, the Defendant agencies no longer had any duties "to review and consult on the Keystone Project before it could be permitted." They therefore could not have violated any such duties.[11]

[11] The Court noted Plaintiffs' assertion, in their amended complaint, that BLM had "not demonstrated compliance with applicable federal law." December 20, 2019 Order at 38. Merely alleging that an agency has failed to comply with a federal statute is not a basis for finding a constitutional violation.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of TC Energy on all counts of Plaintiffs' amended complaint.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E) of the United States Local Rules, I certify that this brief contains 6,415 words, excluding caption and certificates of service and compliance, printed in at least 14 point and is double-spaced, including footnotes and indented quotations.

/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