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Environmental Law at the Borders

J.B. Ruhl

Insights

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Pipelines to the north. Walls to the south. Between President Trump's issuance of a permit for the Keystone XL pipeline crossing from Canada and his promise to build "The Wall," the politics of our national borders rarely have been in as much turmoil as they are today. And as with any infrastructure project, environmental policy has been deeply in play all the way. But the environmental *law* of the borders might surprise you. Indeed, arguably there isn't any for these two projects.

Let's start at the top. Reversing the Obama administration's position, in March 2017 the State Department issued a permit to TransCanada Keystone Pipeline, L.P., authorizing TransCanada to construct, connect, operate, and maintain pipeline facilities at the U.S.–Canadian border in Phillips County, Montana, to import crude oil. *See* U.S. Dep't of State, Presidential Permit (Mar. 24, 2017), *available at* https://keystonepipeline-xl.state.gov/documents/organization/269322.pdf. All indications were that the Obama administration originally was moving in that direction as well, issuing a National Environmental Policy Act (NEPA) environmental impact statement (EIS) in 2011 declaring the project environmentally on par with alternatives. *See* U.S. Dep't of State, Final Environmental Impact Statement for the Keystone XL Project (Aug. 26, 2011). However, although over a dozen major pipelines cross the border with Canada—and over 100 major oil, natural gas, and electric transmission lines cross our northern and southern borders—the Keystone XL pipeline took on a symbolic, if not toxic, profile, and the Obama administration slowed down its process. The State Department eventually issued a supplemental EIS in January 2014 to update its environmental assessment and tee up a final permit decision. *See* U.S. Dep't of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Jan. 2014) (2014 XL FSEIS). Environmental interest group objections, centered around climate change impacts, grew even louder in volume. Ultimately, President Obama announced his agreement with Secretary of State John Kerry's decision to deny the permit. *See* U.S. Dep't of State, Keystone XL Pipeline Determination (Nov. 6, 2015), *available at* https://2009-2017.state.gov/secretary/remarks/2015/11/249249.htm.

When the Trump administration so quickly into its tenure reversed that decision, environmental interest groups cried foul and immediately brought suit. *See Indigenous Envtl. Network v. U.S. Dep't of State*, No. 4:17-cv-00029-BMM (D. Mont., complaint filed Mar. 27, 2017); *Northern Plains Res. Council v. Shannon*, No. 4:17-cv-00031-BMM (D. Mont., complaint filed Mar. 30, 2017). Like any typical infrastructure project permit embroiled in such controversy, NEPA and the Endangered Species Act (ESA) play leading roles in the lawsuits, especially given that the Trump administration prepared no new or supplemental EIS or ESA determinations. But this is not your typical infrastructure project permit.

To begin with, the State Department issued a presidential

permit. Presidents long have taken the position that their authority over foreign relations empowers them to permit or deny border-crossing infrastructure. A complex web of executive orders and agency rules and guidance governs the presidential permit process, with two executive orders being of central importance to oil pipelines. President Johnson in 1968 issued Executive Order 11423 to designate the Department of State as the agency administering the presidential permits program for specified facilities including oil pipelines. 33 Fed. Reg. 11,741 (Aug 16, 1968). Executive Order 11423 references no specific constitutional or statutory authority, asserting instead that "proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country." *Id.* In 2004, President George W. Bush amended Executive Order 11423 with Executive Order 13337, which requires the State Department to issue a presidential permit "if the Secretary of State finds that issuance of a permit to the applicant would serve the national interest." 69 Fed. Reg. 25,299, 25,300 (Apr. 30, 2004). Notably, a different set of executive orders covers natural gas pipelines and electric transmission lines, designating other agencies as the permit administrators, and federal legislation also governs those facilities, whereas no federal statute has been enacted governing oil pipeline siting, much less pipeline border crossings. *See generally* Cong. Res. Serv., Presidential Permits for Border Crossing Energy Facilities, CRS R43261 (Oct. 29, 2013).

On their face, executive orders for oil pipelines describe what looks like a routine infrastructure permitting process, complete with interagency coordination. Indeed, although the executive orders do not mention NEPA or the ESA, the State Department conducts what it describes as a "NEPA consistent review" of permit applications, which includes review "consistent with" the ESA and the National Historic Preservation Act (NHPA). *See* 2014 XL FSEIS, at 7; *see also* U.S. Dep't State, *Environmental Reviews for Presidential Permitting*, https://www.state.gov/e/oes/eqt/reviews/index.htm. By "consistent with," however, the State Department means *not required by*.

The reality of presidential permits for oil pipelines is that they are *presidential* permits. The president issues them through the State Department, but Executive Order 13337 explicitly provides that the president retains the authority to issue a final decision on whether or not to issue the presidential permit. 69 Fed. Reg. 25,299, 25,300. There is sparse case law on the legal implications of this structure. One court has held that nothing about the State Department's role in the presidential permit process changes the presidential character of the action, thus insulating State Department's actions from the requirements of NEPA, the ESA, and the NHPA. See *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009). By contrast, another court held that, while the president's exercise of permitting power is constitutional, the executive order's delegation of the permitting evaluation function to the State Department subjects the agency to judicial review of its NEPA compliance. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010). Under that reasoning, it is not clear what would happen if a court deems the State Department's EIS deficient under NEPA but the president nonetheless issues a border crossing permit under the retained "final decision" authority. Also, presumably the president could nullify the effect of the court's decision by withdrawing delegation of the State Department's permitting functions for any particular permit.

The lawsuits challenging President Trump's permit reassert the claim that the presidential permit is unconstitutional and, if not, that the State Department's actions are subject to the ESA, NEPA, and other environmental statutes. Yet, while dozens of other federal and state environmental programs could apply to the pipeline after it crosses the border, the law as it stands now is that there may be no environmental law of oil pipeline border crossings.

Looking to the south, one finds an equally convoluted legal story leading to the prospect of no environmental law governing President Trump's proposed border wall. The first step in that direction came when Congress in 1996 directed the U.S. attorney general to "install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. I, § 102, 110 Stat. 3009, 3009–554 (codified as amended at 8 U.S.C. § 1103 note). IIRIRA authorized the attorney general to waive the provisions of the ESA and NEPA to the extent "necessary to ensure expeditious construction of the barriers and roads" at the border. 8 U.S.C. § 1103 note. Notwithstanding that construction of improvements to the initial stretch of border fence in San Diego had slowed because of conflict with the California Coastal Commission, the attorney general opted to have the Bureau of Customs and Border Protection comply with NEPA and the ESA.

With the creation of the Department of Homeland Security and consolidation of various authorities into its jurisdiction in response to growing concern about border security, Congress in 2005 amended Section 102 of IIRIRA to grant to the Secretary of Homeland Security authority to waive "all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306 (emphasis added). Note the "all" preceding "legal requirements"—Congress plainly intended the REAL ID Act waiver to extend far beyond the ESA and NEPA, to authorize waiver of any federal, state, or local legislation. *See* H. Rep. 109-72 at 171 (2005). The provision also precludes all judicial review of a waiver except for claims alleging a constitutional violation. REAL ID Act § 102(c)(2). Appeals from a district court's resolution of such constitutional challenges are limited to certiorari review by the Supreme Court. *Id.* § 102(c)(2)(A).

Homeland Security Secretary Michael Chertoff first exercised the REAL ID Act's broad waiver authority when environmental interest groups sued to stop the San Diego portion of the fence by challenging the agency's NEPA EIS and ESA determinations. *See* 70 Fed. Reg. 55,622 (Sept. 22, 2005); 72 Fed. Reg. 2535 (Jan. 19, 2007). After the waiver, the court rejected arguments that the waiver provision is an unconstitutional delegation of authority to the president because it lacks "intelligible principles" to guide the agency's decision. *Save Our Heritage Organization v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008). The environmental groups did not appeal the decision.

Secretary Chertoff invoked the power again in 2007 to waive a long list of federal, state, and local laws to facilitate construction of fencing along the Arizona border. *See* 72 Fed. Reg. 60,870 (Oct. 26, 2007). Environmental interest groups had challenged the Arizona fence project on a variety of grounds, and the federal district court issued a temporary restraining order. The secretary responded with the waiver. The court quickly vacated the temporary restraining order and dismissed claims that Section 102's grant of waiver authority violated separation of powers and other constitutional bounds. The court ruled that the waiver provision is not equivalent to the power to amend or repeal duly enacted laws, that it is not an unconstitutional delegation of legislative power to the executive branch given the sufficient statutory principle that the waiver be "necessary to ensure expeditious construction of the barriers and roads," and that the construction of the border fence pertains to both foreign affairs and immigration control—areas over which the president traditionally exercises independent constitutional authority. *See Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007). The Supreme Court denied certiorari without comment. Secretary Chertoff used the waiver again in 2008 for a 450-mile stretch spanning all four border states. *See* 73 Fed. Reg. 18,294 (Apr. 3, 2008). A lawsuit challenging this massive waiver was dismissed on grounds similar to the *Defenders of Wildlife* decision, with no appeal taken. *See Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196 FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).

The REAL ID Act waiver authority has not been used again since 2008, but neither has the REAL ID Act waiver provision been touched. The upshot is that while all environmental laws could apply to President Trump's proposed wall along our border with Mexico, his administration appears likely to exercise the waiver power to assert that there is no environmental law of the wall.

Energy security and border security are important public policy goals, and it is understandable that the president and Congress would wish that no unreasonable obstacles stand in the way of achieving them. At a time when the growing concentration of power in the executive has raised substantial concern, however, the presidential permit and the REAL ID Act waiver are likely to attract continuing scrutiny and controversy for how much discretion they give the president over deeming what is and is not an unreasonable obstacle. Ironically, whereas many members of Congress are among the most vocal critics of growing executive branch power, Congress has done nothing to check the presidential permit program for oil pipelines and actually created the apparently unbounded waiver power of the REAL ID Act. Opponents of both regimes have thus far made little headway, albeit with only in a handful of district court opinions and one denial of certiorari on the books. With litigation already ensuing over the Keystone XL permit, and any exercise of waiver for more border wall likely to attract a lawsuit in an instant, it looks like the courts are not finished yet.

Mr. Ruhl is the David Daniels Allen Distinguished Chair in Law at Vanderbilt University Law School in Nashville, Tennessee, and a member of the editorial board of Natural Resources & Environment. *He may be reached at jb.ruhl@vanderbilt.edu.*

Jury Trials under Environmental Statutes

Douglas A. Henderson and Justin T. Wong

Under the Clean Water Act (CWA), the Clean Air Act, and other environmental statutes, when and on what issues is a plaintiff—or defendant—entitled to a jury trial? However straightforward this question might sound, it triggers a range of challenging constitutional construction and statutory interpretation issues, often so blurred that parties simply agree to a bench trial.

As for the constitutional requirements, the Seventh Amendment to the U.S. Constitution provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." With respect to environmental cases, the U.S. Supreme Court's decision in *Tull v. U.S.*, 481 U.S. 412 (1987), is the touchstone opinion applying the right to trial by jury articulated by the Seventh Amendment to the CWA and other environmental statutes.

In a decision by Justice William Brennan, the *Tull* Court examined whether a party—in this case, the defendant—had a right to a jury trial on both liability and penalties in an action under the CWA. As for the facts, a landowner placed fill material at various locations but contended the fill had not been placed in jurisdictional "wetlands." Although the U.S. Department of Justice conceded there were triable issues of fact on whether such areas were jurisdictional wetlands, the trial court denied the defendant's request for a jury trial.

In *Tull*, the Supreme Court—after first determining that the CWA did not itself provide a jury trial right—concluded the Seventh Amendment provided a jury trial right for "those actions that are analogous to 'Suits at Common law.'" 481 U.S. at 417. Working from this premise, the Court developed a two-part test to make this determination. First, in evaluating whether a right to jury trial is required, the statutory action must be compared to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. The Seventh Amendment right to a jury trial applies to those statutory rights that are analogous to common law causes of actions decided by English law courts. Second, the remedy sought must be examined to determine whether it is legal or equitable in nature, because only legal actions are entitled to a jury trial. After a lengthy historical analysis of English and Colonial common law actions, the Supreme Court held that a right to a jury trial exists to determine liability under the CWA, but not the amount of penalties or other remedies, if any, which are determined by the court.

In *Tull*, although the United States was the plaintiff opposing a jury trial, the identity of a plaintiff does not change the jury trial analysis. In a North Carolina case, the trial court explained that as far as the right to a jury trial is concerned, private plaintiffs seeking civil penalties in a citizens' suit are no different from the government itself so asserting in a lawsuit. *N.C. Envtl. Justice Network v. Taylor*, 2014 U.S. Dist. LEXIS 177773, at *7 (E.D.N.C. Dec. 29, 2014). At the same