



Transcript of CleanLaw Episode 17: Caitlin McCoy and Robin Just on Keystone XL Presidential Permit, April 11, 2019

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- Robin Just: Welcome to this podcast from the Environmental and Energy Law Program at Harvard Law School. I'm Robin Just, Communications Director. One of the best things about being a non lawyer who works in an office full of environmental lawyers is I get to ask them lots of questions. Today I'm talking with Caitlin McCoy, who has been working to figure out what's going on with the Keystone XL permitting process now that President Trump has issued both a new permit for the pipeline and two new executive orders that relate to pipelines and other energy infrastructure. I hope that my outsider questions help you understand what's happening with Keystone and how these executive orders might change the way transnational pipelines are permitted. We hope you enjoy the podcast.
- Caitlin McCoy: Welcome to another episode of Clean Law. This is Caitlin McCoy, the climate clean air and energy fellow here at the Harvard Law School Environmental and Energy Law program. So we're coming to you with this special episode today. I'm sitting here with Robin Just, who's our Communications Director and her and I were just discussing one of my projects that I'm putting together right now, a blog on the Keystone XL presidential permit and the situation with the executive orders related to trans boundary pipelines. And as we were going through some of what I was working on, we decided that it might be interesting to actually have me pause before I put out my written product and just give everyone a little bit of insight into what I have found so far.
- Caitlin: So this is somewhat of a in progress podcast. I don't have all the answers yet, but hopefully our conversation today, we'll talk through a little bit of the background leading up to what's been happening recently and all of this background can hopefully provide a nice frame for all of us as we follow the news these days and hopefully can be a little teaser, so all of you can look forward to my upcoming blog post.
- Robin: This is shaking things up a little for me to come out from behind the headphones and recorder and actually talk to somebody. And I just thought as I was in your office yesterday asking you a million questions about Keystone because I was curious and you were telling me, I thought, "Wow, I bet other people have these questions too." I'm one of the few people here that doesn't have a law background. I do have some environmental science and regulatory background, but this is all so foreign to me. So I bet there are other people who would benefit, even though you



don't know all of it yet. So when I came in your office yesterday, I think my first question was, how come President Trump has the authority to issue a permit for a pipeline? I guess this has happened before. I hadn't been paying much attention, but what is it exactly that gives him the authority to be able to do that in this case?

Caitlin: Right. So Robin, your question right away gets to what's unique about this whole situation. We're not dealing with a pipeline that's completely inside the United States, like a lot of pipelines that have been in the news, like for example, the ones that go from the Utica and the Marcellus Shale over to the east coast. Those are permitted by FERC, the Federal Energy Regulatory Commission, and then the individual states that those pipelines cross through. But here in this situation, Trans Canada is proposing this Keystone XL pipeline that runs from the tar sands in Canada down through the United States. And so because it crosses an international boundary, it actually falls under the president's inherent foreign affairs powers in the constitution to permit this pipeline. And particularly its crossing over the border is really that key area that gives the president the authority to act in this area.

Robin: I see. So if it was just completely within the US boundaries, there would be no authority for the president to intervene or issue a permit. It would be the states and FERC and anyone else.

Caitlin: So the question about whether the president would have any authority to intervene over a pipeline completely within the United States is actually a good one, and one that is very timely because we just had an executive order yesterday on promoting energy infrastructure and economic growth, which was just posted on the White House's website this morning. I have not had a chance to fully digest it, so I think we're going to have to hold that question maybe perhaps for a mini podcast next week.

Robin: I'll stroll into your office next week and start asking you about that.

Caitlin: Right. But under normal circumstances, when we have a pipeline that's just completely within the US, that's going to be within FERC and the state's jurisdiction, and the president is unlikely to feel the need to intervene there.

Robin: But this isn't the first presidential intervention on this pipeline, right?

Caitlin: That's correct. So, as I think followers of the Keystone XL know, it's had a rather long and tumultuous history being proposed under the Obama administration, so years ago. And this actually, the issue of trans boundary pipelines and presidential authority actually goes all the way back to President Lyndon Johnson. In 1968, he issued an executive order outlining how the permitting for these types of pipelines and facilities should work, and his solution was to delegate the permitting process



to the State Department. So that's why when you read news on the pipeline, it's not just the president issuing executive orders or presidential permits. You also hear that the State Department is involved and that's because President Johnson designated the State Department as in charge of the process for granting these permissions. And then President Bush in 2004 issued an executive order that amended that process a bit and provided a little more detail on the process that the State Department goes through for permitting those pipelines.

Robin: I see. And so the National Environmental Policy Act process that needs to be followed for this, the State Department runs that?

Caitlin: Yes, and that's a key-

Robin: You can see how much I've read our blog.

Caitlin: Yes. And that's a key question, because the National Environmental Policy Act only applies to actions by federal agencies, not by the president. So we don't have NEPA compliance when there is an executive order or a presidential action. So if the president himself is solely issuing permission for a pipeline that goes across the border, no NEPA compliance is needed. But if the State Department is running that process, the State Department is a federal agency and NEPA has to be followed. So that's what's interesting. A trans boundary pipeline doesn't necessarily have to comply with NEPA if issued solely by a president, if the permit or permission is granted solely by the president. But by setting up this process by President Johnson and then President George W. Bush, setting up this process for the State Department to manage it, it became subject to NEPA.

Robin: Previous to President Trump's permit, which was last week, the State Department was running the show and going through the NEPA process. And now President Trump is saying, "This is the permit. We're not doing that anymore. There's no NEPA anymore. Full stop." Is that what's happened basically?

Caitlin: Theoretically, yes.

Robin: Theoretically. So there's a brand new lawsuit about this, but this isn't the first lawsuit about this pipeline, right?

Caitlin: That's correct. And one really interesting case is the case from the DC circuit in 2009 where NRDC challenged the State Department on its compliance with the National Environmental Policy Act in its issuance of a permit for the Keystone XL pipeline. And what the court said in that case was very interesting because what I have had been saying about how the State Department is a federal agency and it needs to comply with NEPA, well the DC circuit actually came to a different conclusion. So the DC circuit looked at the executive order that President George



W. Bush issued in 2004 that provided more detail on how the State Department should permit these types of trans boundary facilities. And in that executive order, President Bush gave pretty much all of the authority to the State Department to run that process, to go to other agencies and consult with other agencies and do what they needed to do to permit a facility like that.

Caitlin: But he left for himself a little slice of authority in there and he said, "If the State Department has a dispute with another agency that they cannot resolve, I will step in and resolve it." And that's interesting because otherwise the power was totally in the State Department's hands to the point where the State Department could go through with issuing the final permit on their own. President Bush didn't say, "And then once you've gone through the process, bring me the permit, I will review it, I will sign off on it." He didn't leave a role for himself there at the very end to check over and give final approval. He allowed the State Department to go all the way through but said, "But just in case you have an inner agency dispute, I will resolve that." Actually the DC circuit found that because he left that little slice of authority for himself, he left that role for himself in the process, that the State Department was still acting within presidential authority.

Caitlin: So even though they had been delegated almost all of the power over the process, the DC circuit said they were still, "Standing in the president's shoes when they were acting." And so the permit that resulted was still a presidential permit and a presidential action, meaning that they didn't need to comply with NEPA.

Robin: I see. So, this executive order that the president used to give himself authority to permit pipelines basically, is that right?

Caitlin: Well, it came from the constitution. He has inherent foreign affairs power.

Robin: I see. Okay. And then the executive order was laying out how to and when to involve the State Department and when the president would become involved again, and that executive order until some other president or if some other president, what do you do? You withdraw, you rescind it-

Caitlin: Revokes it.

Robin: ... you revoke it, then there it is. That's what we have. And so is that why President Trump was enabled to say, "Boom, here's my permit. Nevermind all that other stuff that's been happening. This is what we're doing now"

Caitlin: Well actually what we're doing now is that we have a brand new executive order. Actually we have two brand new executive orders, which were just issued last night in Houston, Texas and just went up on the White House's website this



morning. So I've had a chance to skim over them. But one of them in particular is very relevant to what you just said about revoking the executive orders issued under President Johnson and President George W. Bush. Indeed, that is what happened yesterday in President Trump's executive order called, order on the issuance of permits with respect to facilities and land transportation crossings at the international boundaries of the United States. A little bit of a lengthy name there, but he went ahead and actually explicitly revoked those two executive orders that I mentioned. And so now we have a new process for how to handle these permits. The State Department has not been cut out completely. The State Department still has a role here, but I can talk you through the new process.

Robin: Good. Thank you.

Caitlin: So, he begins the new executive order by saying, "By the authority vested in me as the president by the constitution, including article two, the constitution," which is where that inherent foreign affairs powers that I've been talking about comes from. So he makes it really clear that he is speaking from his authority, his constitutional authority and authority over foreign affairs. So he's really putting himself right in that position. And then he actually gives a little bit of a explanation for why he's doing this in the statement of purpose, which is the first section of the executive order. He explains that presidents have long exercised this authority, but that it has become unnecessarily complicated, is his exact wording, "hindering the economic development of the United States and undermining efforts in the United States to foster goodwill and mutually productive economic exchanges with neighboring countries." That's a direct quote.

Caitlin: So that is the impetus behind this executive order. He wants to revise the process, just as President Bush went ahead and made changes to the process that was set up by President Johnson. Here we have President Trump saying, "I'd like to step in again and overhaul this process for how things work with these permits." And what's interesting is right away in section two he says that he'd like to see this process be run from start to finish in 60 days, which is really fast, and consistent with some of the other things we've seen from President Trump trying to, I'm using air quotes here because you can't see me, streamline a lot of the environmental permitting or just environmental processes that we have that are often time consuming for a reason, because we want to really carefully consider things.

Caitlin: So he goes through and says that this applies specifically to pipelines for the export or import of products in and out of the United States in between a foreign country. But also just to note that this also applies to different facilities for transportation, for example, for bridges. So it has a wider application than just the Keystone XL pipeline, where it's a little broader than just oil pipelines. So anyway, as I said, the Secretary of State, the State Department, they're not cut out



completely. They still have a role here. They have a similar role as they did under the 2004 executive order in seeking opinions from other agencies. So they need to communicate with other agencies about these projects and solicit advice from states, from tribes, from local government officials, and essentially put together a package of information on whether or not the permit for whatever facility this is should be approved.

Caitlin: And so they actually do make a determination and they say, "Yes, this facility or this permit would serve the foreign policy interests of the US, or, "No, it would not serve the foreign policy interests of the US." And then, here's the big departure from the 2004 President Bush order, they actually submit that to the president for final approval. So if you remember when I was talking about the 2004 executive order, President Bush allowed the State Department to really run the process all the way through, including going ahead and issuing the permit if they felt that it served the foreign policy interests of the US. So as the DC circuit said, really allowing them to stand in his shoes and make that determination up to the point of issuing the permit.

Caitlin: Here we see President Trump pulling back on that and saying, "No, you will submit a package of information to me that gives me your assessment, does it or does it not serve the foreign policy interests of the US." And then he says, "Any decision to issue, deny or amend a permit shall be made solely by the president." So here we see that he is the only person who can make the final decision. And so I think that that really eliminates some of the questions about NEPA that have been percolating around Keystone and other future facilities because as I said, the DC circuit had found that the president left himself enough discretion in the 2004 executive order that the State Department didn't have to comply with NEPA, but because that was a decision just out of the DC circuit and not out of the Supreme Court, not all federal courts have to follow that. It's persuasive, but it's not mandatory precedent.

Caitlin: And so that's why we saw litigation happening in the US district court for the district of Montana and a few little bits of it being appealed into the ninth circuit because the State Department was following the NEPA process for Keystone because we didn't have a definitive answer from the Supreme Court saying, "You don't have to follow it." Obviously the DC circuit is a very important court to look to, so I don't want to say it just came from the DC circuit. It sounds a little crazy to say that, but it's not the final word. And so the safest approach up to the point of yesterday for the issuance of this executive order was to go ahead and follow the NEPA process as a federal agency.

Caitlin: But now I think that idea of the president leaving himself discretion, the president has total discretion here now. We can see that the president is the final decision maker on is a permit issued, is a permit not issued? So any gray area in question



about NEPA compliance seems to me at this early point, as I said, I just downloaded the order this morning and read over it. It seems to me that I think we have a definitive answer that there's not going to be a need for the State Department to follow NEPA unfortunately.

Robin: Is that just that? That's the word, that's how it is now and nobody can challenge this in any way?

Caitlin: Well, we did see a challenge to President Trump's new presidential permit for the Keystone pipeline, which was issued last week. So that is being challenged in the US district court for the district of Montana. And so we'll follow that and see how that plays out. But I'm curious to see how the court will view it in light of this new executive order, which completely revokes the other two executive orders and really sets this up as being a truly and solely presidential exercise. Even though the State Department, like I said, is not kicked out of the process altogether. They still have an important role to play here in gathering information and putting this whole package and all these application materials together and submitting it to the president. It's not like the 2004 order where the State Department had the power to actually issue the final permit on their own.

Robin: Does the fact that these executive orders came out after the permit make a difference because the permit was issued under the old rules? Will the courts look at that? Is there any way to say?

Caitlin: I think that's a really good question. And we should follow the litigation and see what the government presents. And maybe that's an argument that the plaintiffs in the case, which I think is the Indigenous Environmental Network, if I remember correctly, will make maybe, that the presidential permit was issued and I believe in that presidential permit, he says, "Notwithstanding the 2004 order, I'm issuing this new presidential permit." So I think that that could be an issue. And I'll be curious to see what the government argues about this new executive order.

Robin: And I know that you'll, once you get this digested and things progress, you'll keep our Keystone post on a rollback tracker updated.

Caitlin: Yes.

Robin: So Caitlin, thank you so much for helping me understand some of what's going on here and just be ready because next week I'll wander into your office and ask about this new executive order.

Caitlin: Yes, yes. Sounds good.

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