

INSIGHTS

House Moves to End Requirement for Presidential Permits

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On July 19, 2017, the U.S. House voted to give lead authority for authorizing cross border oil and gas pipelines to FERC, and to the Secretary of Energy for cross border electric transmission lines. HR 2883, entitled [Promoting Cross-Border Energy Infrastructure Act](#), removes the requirement for such cross border energy infrastructure to obtain Presidential Permits and instead establishes a 120 day review process under the National Environmental Policy Act (NEPA) and the Natural Gas Act to obtain a “Certificate of Crossing.”

Presidential Permits first arose after the Civil War, when Ulysses S. Grant was asked whether to allow a telegraph line to extend into Canada. See R. Hogfoss & C. Little, *After Keystone: A question of presidential permits*, National Law Journal (Apr. 1, 2013). Over the years, the Executive Branch was repeatedly asked to approve other types of cross border infrastructure, including electric transmission lines, oil and gas pipelines, water and sewer lines, etc. There is no existing statute that requires Presidential Permits. That authority evolved solely as an Executive Branch discretionary action.

Since the 1940s for gas and electric transmission and the late 1960s for oil pipelines, the process has been governed by a series of Executive Orders. Presidential Permits first became controversial in regard to the Keystone XL cross border pipeline project, for which the permit approval became a protracted and political. Only a few courts have been asked to review the authority and requirements for issuance of Presidential Permits, and those decisions have questioned both the Constitutionality and proper procedure for such issuance of such permits. Congress clearly has the authority to rescind or modify the use of Presidential Permits through legislation, and that has been an approach suggested before. See R. Hogfoss & C. Little, *After Keystone: A question of presidential permits*, National Law Journal (Apr. 1, 2013)

HR 2883 would replace the requirement to obtain Presidential Permits with an obligation to obtain a “Certificate of Crossing,” which is to be issued by FERC for oil or gas pipelines upon FERC’s final action on NEPA review (or by the Secretary of Energy final NEPA review on electric transmission line crossings). Certificates of Crossing will not be required for modifications to existing or newly certificated pipelines (including reversals of flow or change of ownership). The bill would define “border crossing facility” to include “the portion of an oil or natural gas pipeline or electric transmission facility that is located at an international boundary of the U.S.” It is not clear if this is intended to limit the NEPA review associated with the border crossing, but review of certain prior Presidential Permits [[Cochin PP FR notice](#)] was limited to a short section of the pipeline at the border crossing, as opposed to the entire pipeline (in contrast to

the Keystone XL review). As noted previously, narrowing the scope of the Presidential Permit to the border crossing itself is a more appropriate and streamlined analysis that is more consistent with the history and purpose of Presidential Permits.

After passing the House, the bill was referred to the Senate Committee on Energy and Natural Resources and may have a chance of passing Senate approval, given the Republican support for the bill and Republican control of the Senate.