

## Legal Sidebar

# Keystone Revival: Executive Memorandum Paves Way for Possible Approval of Keystone XL Pipeline

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The proposed Keystone XL pipeline project, which was halted after the Obama Administration [determined it not to be in the national interest](#), has new life thanks to [an executive memorandum](#) issued January 23, 2017 by President Trump.

[The Keystone XL pipeline would transport oil sands crude](#) from Canada for ultimate delivery to Gulf Coast refineries. In order to construct and operate a border-crossing facility for the Keystone XL pipeline, TransCanada Corporation must obtain a Presidential Permit pipeline in accordance with the requirements of [Executive Order 11423](#), as amended by [Executive Order 13337](#). The Secretary of State grants Presidential Permits after determining that issuance of the permit is “in the national interest.” After two lengthy review processes, the first cut short when [legislation](#) mandated a decision, Secretary of State Kerry issued his [final determination](#) in November 2015 that the project did not meet the “national interest” standard mandated by these Executive Orders. However, on January 23 President Trump issued a series of executive memoranda addressing a variety of issues related to pipeline permitting, construction and operation. One of these [memoranda](#) addresses the Keystone XL project. Although it does not reverse the action taken by the previous administration, it does offer TransCanada the option to re-apply for the needed Presidential Permit and takes steps to expedite the review process.

The executive memorandum first invites TransCanada to reapply for a presidential permit for the border-crossing facility for the Keystone XL project. This provision has no legal effect as TransCanada was already free to reapply, but it is likely to be seen as a signal to TransCanada that the new administration favors the proposed pipeline. Indeed, the rest of the memorandum appears to help pave the road to approval of the needed Presidential Permit. If TransCanada does submit an application to the State Department, the memorandum directs the State Department to “take all actions necessary and appropriate to facilitate its expeditious review,” and to reach a final decision regarding the permit application (including any possible conditions on the issuance of the permit) within 60 days of submission of the application.

Such a compressed review period would be unusual for a new permit application (for example, the previous Keystone XL review lasted over three years), but if TransCanada submits a new application that is identical to its previous application, much of the work usually done during the review process may not be required. To this end the memorandum declares that the [Environmental Impact Statement](#) issued by the State Department in 2014 is sufficient to satisfy the requirements of the [National Environmental Policy Act](#) for the Keystone XL project, assuming the project is identical to the one described in TransCanada’s 2012 permit application. The memorandum also waives interagency notification and consultation requirements set forth in the executive orders, asserting that such notification and consultation would be “unnecessary, unwarranted, and a waste of resources” in this case, presumably due to the work already completed.

In addition to fast-tracking a possible Presidential Permit for Keystone XL, the executive memorandum also addresses other potential federal obstacles to construction and operation of the pipeline. It declares that “any Federal permit or authorization issued before the date of this memorandum for the Keystone XL Pipeline shall remain in effect until the completion of the project.” To the extent any previous authorizations may have expired, the memorandum directs the Army Corps of Engineers to review and issue any needed authorizations for projects that cross “waters of the United

States” on an expedited basis, so long as such authorization is warranted. The memorandum includes a similar directive for the Department of the Interior, ordering the granting of needed rights-of-way over lands managed by the Bureau of Land Management and the issuance of any other necessary approvals in an expedited manner, if the agency determines such approvals are warranted.

Ultimately, this executive memorandum does not by itself enable TransCanada to begin construction of the Keystone XL pipeline. TransCanada must still apply for and obtain necessary authorization from the State Department pursuant to previously issued Executive Orders, and must renew any authorizations previously received from the Army Corps of Engineers or the Department of the Interior to the extent those authorizations do not transfer to a potentially revived Keystone XL effort, as well as any needed state and local authorizations not already obtained. However, the memorandum appears to signal that the new administration may intend to provide TransCanada with the applicable federal authorizations if it still wishes to construct and operate the Keystone XL pipeline.

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