



Executive Actions May Impact the Future of Energy Infrastructure Projects and Domestic Manufacturing

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On January 24, 2017, President Trump signed four presidential memoranda and one executive order establishing new Federal policies for energy infrastructure and domestic manufacturing. Two memoranda outline expedited review procedures for the Dakota Access Pipeline Project (DAPL) and the Keystone XL Pipeline (Keystone); a third memorandum directs the Secretary of Commerce to establish a new requirement that all U.S. pipelines utilize pipe produced in the United States; and the fourth memorandum directs the establishment of a multi-agency effort to streamline permitting for domestic manufacturing facilities. The single executive order issued by the President establishes a new infrastructure streamlining program for White House-identified "High Priority Infrastructure Projects." Collectively, these Presidential Actions juxtapose broad directives with sharp deadlines, resulting in many questions about their scope, authority, and practical impacts.

Presidential Memorandum vs. Executive Order

The difference between a presidential memorandum and an executive order is largely a matter of form over substance. Both instruments direct the actions of executive agencies. Both instruments, if issued under a valid claim of authority and published in the Federal Register, have the force and effect of law. President Trump has directed that all of the actions, including the presidential memoranda, be published in the Federal Register.

Summary of the Five Presidential Actions Signed on January 24, 2017

1. *Memorandum for the Secretary of State, the Secretary of the Army, and the Secretary of the Interior Regarding Construction of the Keystone XL Pipeline:*

The [Keystone XL Memorandum](#) invites TransCanada Keystone Pipeline, L.P. (TransCanada) to resubmit its application for a Presidential Permit to the State Department on behalf of Keystone. The Keystone XL Memorandum further directs the State Department to take all actions necessary and appropriate to reach a final decision on the permit within 60 days of the submission of the application. If a Presidential Permit is granted, then the Keystone XL Memorandum requires other Federal agencies responsible for reviewing the project to expedite their efforts. In order to avoid duplication of work, the Keystone XL Memorandum directs the State Department to consider the Final Supplemental Environmental Impact Statement (FEIS) issued for the project in January 2014 as satisfying the requirements of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and any other law that requires executive department consultation or review. Federal permits approved for the project before President Trump took office are to remain in effect until completion of the project.

2. *Memorandum for the Secretary of the Army Re: Construction of the Dakota Access Pipeline:*

The [DAPL Memorandum](#) directs the Secretary of the Army to instruct the U.S. Army Corps of Engineers (USACE) to provide in an expedited manner all Federal approvals required to complete construction of DAPL. In particular, the DAPL Memorandum urges the USACE to grant Dakota Access an easement to construct under Lake Oahe, the final Federal permit required to complete DAPL at that location. The DAPL Memorandum sets forth a 5-step process for approving the easement, which includes directing the USACE to determine that its previously completed Environmental Assessment (EA) satisfies all applicable requirements of NEPA and to rescind or modify its subsequent decision to require additional environmental reviews for the Lake Oahe crossing.

The DAPL Memorandum only applies to USACE approvals on Federal lands and is careful to state that it does not apply to private property or alter “any Federal, State or local process or condition in effect on the date of this memorandum,” and that “[l]and or an interest in land for the pipeline and facilities described herein may only be acquired consistently with the Constitution and applicable State laws.”

For a review of the legal issues related to DAPL, see our previous Alerts [here](#), [here](#), and [here](#).

3. Memorandum for the Secretary of Commerce Re: Construction of American Pipelines:

The [American Pipeline Memorandum](#) directs the Secretary of Commerce to develop and submit to the President within 180 days a Plan under which all new, retrofitted, repaired and expanded pipelines inside the borders of the United States will be required to use materials and equipment produced in the United States to the maximum extent possible and to the extent permitted by law. For iron and steel products, this would mean that all manufacturing processes, from the initial melting stage through the application of coatings, would have to occur in the United States. Under the American Pipeline Memorandum’s standards, the following would *not* be considered “produced in the United States”: steel or iron material or products manufactured abroad from semi-finished steel or iron from the United States, and steel and iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin.

4. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing: Memorandum for the Heads of Executive Departments and Agencies

This [Domestic Manufacturing Memorandum](#) directs all executive departments and agencies to support the expansion of manufacturing in the United States “through expedited review of and approvals for proposals to construct or expand manufacturing facilities” and “reductions in regulatory burdens affecting domestic manufacturing.” The memorandum directs the Secretary of Commerce to conduct outreach with stakeholders affected by Federal regulations on domestic manufacturing and to coordinate with other agencies. The memorandum requires 60 days for public comments, and then a report to the President 60 days after the end of the comment period. The report is required to identify priority actions; recommend deadlines for completing actions; make recommendations for changes to existing policies that can be implemented immediately; and propose changes to existing regulations or statutes as needed.

5. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects: Executive Order

The [High Priority Infrastructure Projects Executive Order](#) (EO) announces an executive branch policy to streamline environmental reviews for all infrastructure projects, but creates a special mechanism to focus on “High Priority” projects. “High Priority” projects are to be designated by the Chairman of the White House Council on Environmental Quality (CEQ) within 30 days of a request by the Governor of a State or the head of any executive department or agency. The EO does not provide specific criteria for the CEQ Chairman’s determination, only that he or she shall consider the project’s importance to the general welfare, value to the Nation, environmental benefits, and such other factors as the Chairman deems relevant. The EO describes “High Priority” projects as including “[projects] improving the U.S. electric grid and telecommunications systems, and repairs to critical port facilities, airports, pipelines, bridges, and highways.”

Once a project is designated as “High Priority”, the Chairman is directed to coordinate with the head of the relevant agencies to establish expedited procedures for reviews and approvals “in a manner consistent with law.” If an established deadline is not met, the relevant agency head must provide a written explanation to the Chairman explaining the causes of the delay and providing concrete actions to complete the review.

Initial Observations Regarding Scope, Authority, and Practical Implications of the Presidential Actions

The legal effect and practical import of the five Presidential Actions remains unclear. Each action – with the exception of the American Pipeline Memorandum – states that the memorandum or executive order: (1) shall be implemented consistent with applicable law; (2) does not create any right or benefit against the United States; and (3) is subject to the availability of appropriated funds. Additionally, it is unclear what, if any, direct authority the President possesses to implement the requirements of the Presidential Actions.

In the case of the American Pipeline Memorandum in particular, it is notable that a Secretary of Commerce has not yet been confirmed by the Senate. Yet, the American Pipeline Memorandum directs the Secretary to submit a plan to implement its directives within 180 days. It is unclear whether the 180-day period starts upon publication of the EO in the Federal Register. Regardless of the timing or form of the plan, additional questions of authority remain – such as whether and how the American-made requirements apply to natural gas pipelines permitted by the Federal Energy Regulatory Commission (FERC). Similar questions of jurisdiction apply for segments of oil pipelines that are subject only to state and local laws. There are also questions about whether implementation of the American Pipeline Memorandum would violate trade agreements. As a practical matter, it is unknown whether the United States possesses sufficient steel and iron deposits and production and manufacturing capabilities to meet the demands of the pipeline industry.

Similar uncertainties surround the EO on “High Priority” projects. The EO does not explain whether and how a new program would interact with the permit streamlining program established under the Fixing America’s Surface Transportation Act (“FAST Act”), which was signed into law on December 4, 2015. The FAST Act is explained in greater detail in our VNF’s January 16, 2016 [Alert](#). As recently as January 13, 2017, the Office of Management and Budget and CEQ issued detailed joint guidance for implementing the requirements of the FAST Act, including permit streamlining. This guidance does not appear to be subject to the [regulatory freeze](#) announced by the President’s Chief of Staff on January 20, 2017. It is unclear whether and how the EO’s program for high priority projects is intended to integrate with the emerging FAST Act structure. The EO also does not provide any specific direction about consultations with Tribal governments, particularly under the National Historic Preservation Act Section 106 process.

The memoranda addressing the DAPL and Keystone approvals are more specific, but still raise questions. The President stated at the press conference in which he announced the DAPL and Keystone XL Memoranda that both projects would be approved upon renegotiation of terms and conditions. However, neither the Memoranda nor the President’s statements provided detail regarding what the President intends to renegotiate. The DAPL Memorandum also does not address the ongoing litigation between DAPL, various Native American tribes, and USACE, which is described in more detail in VNF’s December 13, 2016 [Alert](#). A hearing is set for January 30, 2017 for the Federal District Court Judge overseeing the litigation to hear arguments concerning the impact of the DAPL Memorandum on the litigation. Any new direction taken by the USACE on granting the easement could result in further legal challenges.

Finally, a host of questions surround the Domestic Manufacturing Memorandum. The Memorandum sets forth an aggressive timeline for the Secretary of Commerce to obtain stakeholder input and report to the President even though the current nominee has not been confirmed by the Senate and key Department of Commerce personnel are not yet in place. Given the diversity of U.S. manufacturing, it is unclear how a singular report will address regulatory concerns facing sectors that range from automobiles to pharmaceuticals.

We may see further clarity on these issues and processes as the President’s plans and policies further develop. The one thing that is certain is that these presidential actions display an administration willing to aggressively and quickly pursue its platform.

For more information

Van Ness Feldman continues to monitor the ongoing actions of the Executive Branch to provide insight during this time of transition. The professionals at Van Ness Feldman possess unique expertise in infrastructure project permitting and regulation and government affairs. The firm can provide specialized and practical strategic counseling on the issues touched upon in this Alert. For further information, please contact [Mona Tandon](mailto:mona@vnf.com) at 202.298.1886 or mxt@vnf.com; [Emily Pitlick Mallen](mailto:emily@vnf.com) at 202.298.1859 or erp@vnf.com; [Maranda Compton](mailto:maranda@vnf.com) at 202.298.1806 or mcompton@vnf.com, [Kyle Danish](mailto:kyle@vnf.com) at 202.298.1876 or kwd@vnf.com; or any member of the firm's [Energy](#), [Native Affairs](#), or [Government Relations](#) practice areas.

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