

 [Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [Texas Lawyer](#)

Three Key Energy Developments from President Trump in Week One

Natalie Regoli and Brian Polley, Texas Lawyer

January 30, 2017

In his first week in the White House, President Trump penned a series of executive actions including several targeting the energy industry. Meant to fulfill a "day one" promise of Trump's campaign for president, critics widely view these executive actions as the first in a series of steps intended to reverse former President Obama's environmental agenda. Here, we offer a summary of these actions and we identify some of the key legal issues that may delay or prevent their implementation.

Keystone XL Pipeline: In his January 24 "Presidential Memorandum Regarding Construction of the Keystone XL Pipeline," President Trump invited TransCanada Keystone Pipeline, L.P. ("TransCanada") to re-submit its application to the State Department for a Presidential permit allowing construction and operation of the Keystone XL Pipeline. In that memorandum President Trump called the planned project "a major pipeline for the importation of petroleum from Canada to the United States." TransCanada first proposed Keystone XL in July 2008 as a 1200-mile conduit to deliver oil produced in the tar sands of Alberta to refineries of Nebraska and Texas. The pipeline would open previously inaccessible tar sands oil to production, which prompted climate activists to lobby the Obama Administration to deny approval of the pipeline. They succeeded. The State Department, which had to approve the pipeline since it would cross the U.S.-Canada border, announced in November 2015 that Keystone XL did not serve "the national interest" because it would not lower oil prices or create American jobs. TransCanada's plans were suspended indefinitely. Then came the election of 2016 and President Trump.

The same executive memorandum also instructed the soon-to-be Secretary of State Rex Tillerson, a former ExxonMobil CEO, to review the application on an expedited basis and make a final permitting decision within 60 days. TransCanada says it re-submitted its Keystone XL application on January 26, just two days after President Trump's memo was issued.

Dakota Access Pipeline: Also on January 24, President Trump issued the "Presidential Memorandum Regarding Construction of the Dakota Access Pipeline." In this memorandum, the President instructed the Secretary of the Army to order the head of the Army Corps of Engineers (the "Corps") to review and approve, to the extent permitted by law, requests for approvals to construct the Dakota Access Pipeline ("DAPL"). DAPL is intended to deliver crude from the Bakken and Three Forks formations in North Dakota to an oil terminal in Illinois. The memorandum also directs the Corps's director to "consider...whether to rescind or modify the memorandum" from late 2016 that approved a request for a new environmental impact statement related to a water reservoir that DAPL will cross when completed.

Unlike Keystone XL, DAPL is fully constructed except for a section planned to cross beneath under Lake Oahe, a reservoir controlled by the Corps located upstream of the Standing Rock Sioux reservation. Critics of the DAPL project point out that the reservoir is the tribe's only source of drinking water and they have vigorously opposed permitting construction of the pipeline underneath the reservoir, insisting that the danger of contamination in the event of a leak is too great. The tribe and their climate change activist allies successfully halted the completion of DAPL late last year when the Corps announced it would undertake the new environmental review, a process that could take years.

Other Pipelines and Manufacturing: An additional pair of executive orders promulgated by President Trump on January 24 involve:(i) constructing new pipelines in the United States, and (ii) reducing regulatory requirements on domestic manufacturing companies. The pipeline executive order directs the Secretary of Commerce to consult with other executive departments and agencies to develop a plan under which all new pipelines, as well as expansions and repairs of existing pipelines, use only materials and equipment made in the United States. The intent is to require pipeline builders to use only iron and steel produced in America, rather than iron or steel sourced from abroad, from the initial melting stage to the final application of coatings. The manufacturing executive order essentially directs all executive branch agencies to speed up environmental reviews for "high priority infrastructure projects" as much as possible under existing law. These orders may have a significant impact on the energy industry, but they have received less attention than those for Keystone XL and DAPL, likely because they are less controversial and they direct executive agencies in a way that more closely resembles executive orders issued by past presidents.

Some administrative law experts have expressed skepticism, at least with respect to the Keystone XL and DAPL memoranda. "Trump can't, with the stroke of a pen, just make the Dakota Access pipeline happen... He doesn't have that authority. It's his agency's [the Corps's] authority, and he can't revoke the laws that the agency just found that it has to comply with," says Sarah Krakoff, a natural resources law professor at the University of Colorado Boulder. It is also worth noting that although executive orders and memoranda have the force of law, they cannot run counter to enacted Congressional legislation. So decision makers outside the White House, including career civil servants, retain some control over how these executive actions are implemented. In fact, the memos themselves only direct agencies to expedite or reconsider previous judgments, rather than commanding agencies to ignore previously passed law.

Many in the energy industry have applauded the Trump Administration's quick and aggressive actions expected to benefit upstream and midstream companies, their shareholders and the energy-consuming American public. At the same time, environmental activists and many on the political left are crying foul and preparing legal challenges to implementation of these memoranda. Expect some excitement and drama in this space in the weeks and months to come.

Natalie Regoli is a partner in Baker & McKenzie in Houston. Brian Polley is an associate with the firm in Houston.

Copyright 2017. ALM Media Properties, LLC. All rights reserved.

Reprinted with permission from the January 30, 2017 edition of the Texas Lawyer © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. ALMReprints.com - 877-257-3382 - reprints@alm.com.