Environmental Protection in the Trump Era

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Environmental Protection in the Trump Era.

CHAPTER 4:

"Fast-Tracking" Pipelines, the Border Wall, and Other Infrastructure Projects

The Trump Administration is seeking to fast-track infrastructure or other projects that ordinarily would undergo extensive environmental and permitting review. Federal agencies may approve or reject pipelines and other construction projects:

- that cross international boundaries,
- that occupy federal lands and waters, or
- that require federal permits.

Approvals can be fast-tracked either by the executive branch or by Congress, but executive actions must follow procedures set out in current laws. Streamlining permit processes are also under consideration.

Process.

Infrastructure Projects. On January 24, 2017, the president issued Executive Order 13766, entitled "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects." The Order **directs the Chair** of the Council on Environmental Quality (CEQ) (position currently operating with an acting career official) **to determine**, within 30 days after a request from any state governor or the head of a federal agency, **whether a proposed infrastructure project is a "high priority" project**, taking into account its:

- importance to the general welfare,
- value to the nation,
- environmental benefits, and
- any other factor the Chair deems relevant.

For any "High Priority" project, **the Chair must coordinate** with the "relevant" federal agency **to establish expedited procedures and deadlines** for completion of environmental reviews and approvals. Federal agencies then must give highest priority to meeting the deadlines, and must explain in writing failures to meet deadlines and steps to complete required reviews. The Order must be implemented "consistent with applicable law and subject to the availability of appropriations."

On July 19, the president issued Executive Order 13805, **establishing a Presidential Advisory Council on Infrastructure**. This Council, drawn from the private sector, was **to find, recommend, and prioritize the nation's**

Areas to Watch

Pipelines, electric transmission corridors, border wall construction, and other infrastructure projects requiring federal approval will likely be subject to substantial pressure for early approval and shortening of environmental review processes. Congressional action may also provide for waivers of environmental laws in some instances, modeled on prior enactments.

It will be critically important to track the huge wish list of regulatory changes affecting NEPA, the Clean Water Act, and other laws, that will emerge from the internal White House infrastructure process. The White House's lengthy list of proposed legislative changes includes a two-year permit-issuance deadline, removal of EPA review of NEPA documents, limiting state water quality reviews of proposed federal actions, removing

infrastructure needs, making recommendations on accelerating pre-construction approval processes, developing funding and financing options, and identifying methods to increase public-private partnerships (including statutory or regulatory changes). On August 17, 2017, the White House announced that the Infrastructure Advisory Council would not be formed. However, the listed recommendations are being developed by the White House in a **non-public process.**

Areas to Watch

certain EPA powers under §404 of the Clean Water Act in favor of the Corps of Engineers, and limitations on injunctions affecting infrastructure projects.

On August 15, 2017, the president issued Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." This Order endorsed procedures already created by the Government Performance and Results Act (GPRA) Modernization Act of 2010, the Fixing America's Surface Transportation (FAST) Act of 2015, and the Water Resources Development Act of 2014, and directed federal agencies to **coordinate and expedite review of infrastructure projects**. The Order directed the Office of Management and Budget (OMB) to set a Cross-Agency Priority (CAP) goal for infrastructure permitting modernization within 180 days, in consultation with the current Federal Permitting Improvement Steering Council, and to adopt guidance for federal agencies within 180 days after establishing the CAP goal. It directed CEQ within 30 days to identify a list of actions that it will take to "enhance and modernize" the federal environmental review and authorization process. CEQ did so in a brief notice identifying targets for changes in guidance documents and announcing an interagency working group to "identify impediments to efficient and effective processing of environmental reviews and authorizations."

The Order also:

- directed agencies to complete all federal environmental reviews and decisions on "major infrastructure projects" within two years of the beginning of such reviews;
- required agencies to use a system leading to "one Federal decision" where there are multiple federal agencies involved; and
- directed federal agencies not only to rely on a single environmental impact review document for a project, but also to issue a single federal "Record of Decision" unless the project sponsor or lead federal agency determines that this would not best promote completion of the review and authorization process.

The Order also revoked President Obama's Executive Order 13690, which had required federal agencies to use a federal flood risk management standard that includes climate change-induced sea-level rise when designing and evaluating federally-funded construction projects.

On February 12, 2018, the White House released a new infrastructure strategy setting out principles and a proposed legislative framework.

Presidentially-Preferred Projects. The president can direct executive branch agencies to **carry out review and approval procedures expeditiously,** but cannot waive or supersede federal laws and regulations unless authorized by Congress. On January 24, 2017, the same day as the first infrastructure Executive Order, the president issued two memoranda advancing approvals of the Keystone XL Pipeline (KXL) and Dakota Access Pipeline (DAPL).

The KXL memo directed the Secretary of State to accept a re-submitted application from the pipeline developer and to reach a final determination within 60 days, including any permit conditions. It directed the Secretary, to the "maximum extent permitted by law," to consider the environmental impact statement (EIS) and supporting documentation for the prior rejected application as satisfying all requirements under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other laws, and to allow any previously issued permits or authorizations to remain in effect.

The memo directed the Secretary of the Army to take all actions necessary to "review and approve as warranted, in an expedited manner" KXL's requests to use Clean Water Act Nationwide Permit 12 to authorize stream crossings, and the **Secretary of the Interior to take all steps necessary to "review and approve** as warranted, in an expedited manner," right-of-way applications, Migratory Bird Treaty Act requirements, and other approvals, again "to the maximum extent permitted by law."

KXL re-filed its application, which was promptly approved by the president on March 24, 2017. The pipeline faces continuing litigation and opposition from landowners and others over part of its route; and in July 2017 the pipeline owners solicited commitments from potential customers for its capacity, suggesting that demand for transmission may have softened since the project was conceived.

The president's DAPL memo likewise **directed the Secretary of the Army to "review and approve in an expedited manner" easements and other authorizations for the pipeline:**

- "to the extent permitted by law and as warranted";
- to consider whether to rescind or modify the prior Secretary's December 4, 2016, order initiating a new EIS process; and
- to consider prior NEPA documents and environmental reviews as satisfying all applicable requirements of NEPA, the ESA, and consultation requirements.

On February 8**,** 2017, **the Army granted the easement, incorporating only standard permit conditions.**

In ongoing litigation against the DAPL pipeline, U.S. District Judge James Boasberg denied a motion for preliminary injunction against its completion; and the pipeline was completed and began to carry petroleum under the Missouri River. However, on June 14, 2017, the judge ruled that the **Army Corps of Engineers had not adequately considered the impacts of an oil spill** on tribal hunting and fishing rights, nor evaluated potential disproportionate impacts on minority and low-income populations, in violation of NEPA and environmental justice considerations. (See discussion in Chapter 13). **The Corps must conduct this evaluation, even as the pipeline continues to operate**.

Congressional Actions. Congress can, by law, add or remove environmental review and permitting requirements for individual projects or for entire categories of projects. Congress can also suspend the application of environmental laws, or deem them satisfied, as it did in the many appropriations "riders" affecting forest activities in the Pacific Northwest in the 1990s.

Congress can also empower federal agencies to waive federal laws under some circumstances, as it did in 1996 in authorizing construction of border fencing along portions of the U.S.-Mexico border. For example, the 2005 REAL ID Act authorized the Secretary of Homeland Security to waive numerous environmental and regulatory laws to support border activities (including all EPA-

administered pollution control laws, and all of the public land laws administered by the Department of the Interior and the Forest Service). **DHS used this latter authority in 2008 to waive more than 30 laws.** This authority has been used to support border security construction activities by the Trump Administration. DHS adopted waivers of all environmental laws for border security barriers in the Calexico area of California on September 12, 2017, and for a 20-mile stretch of the U.S.-Mexico border in New Mexico on January 22, 2018, to support further development of the proposed border wall.

Congress has the power to enact legislation requiring rapid environmental reviews, including the setting of specific timetables, as it did in the Fixing America's Surface Transportation (FAST) Act signed into law by President Obama in December 2015. **Congress can also direct that certain actions be made "categorical exclusions" under NEPA, exempting them from undergoing an environmental impact statement or environmental assessment**; it has used this approach in the past for certain classes of transportation projects, logging operations, and other activities. These congressional actions would be subject to regular congressional procedures dealing with legislation, appropriations, and oversight.

Discussion.

President Trump's Executive Orders on infrastructure direct the use of authority that already exists in CEQ regulations and recent federal laws speeding up reviews of transportation and water resources projects. CEQ regulations already allow federal agencies to set time limits for environmental review (40 C.F.R 1501.8). The August 2017 Order is somewhat less specific than President Obama's infrastructure permitting order, Executive Order 13604 (March 22, 2012), which created the federal permitting "dashboard" to track projects; and it duplicates to some degree agencies' frequently updated infrastructure approval implementation memos, as well as the procedures created by the FAST Act. It is not yet clear whether the new Order adds anything other than prominence to certain projects, except for the greater involvement of OMB in setting and monitoring agency performance goals.

The two pipeline memoranda did not change the substantive and procedural legal requirements applicable to those projects. They remain subject to litigation on the same grounds as before. For DAPL, the Army is required to explain its decision, which may create new issues that can be raised in litigation. On February 17, 2017, the Army published a *Federal Register* notice of its decision to terminate the EIS process. And in June 2017, a federal court found that its NEPA evaluation was inadequate under the law, while not enjoining the continued operation of the pipeline.

For the transboundary KXL, there is a legal issue concerning whether presidential approval is litigable under NEPA. However, in November 2017, the U.S. District Court for the District of Montana denied the State Department's motion to dismiss NEPA claims brought by the Indigenous Environmental Network. And **state court litigation continues over authority to condemn private land along the pipeline's route.**

Congress can amend laws to exempt activities from procedures and substantive requirements. However, when it grants authority to an agency to waive application of a federal law, it must provide sufficient guidance for the exercise of that authority to enable a court to determine that the agency has not been improperly delegated congressional powers.

Opportunities for Public Engagement.

The public will have opportunities to engage agencies, the Council on Environmental Quality, and Congress about possible administrative actions, including:

- direct communication on specific projects,
- participating in administrative notice-and-comment procedures on regulations and guidance documents, and
- litigation over changes to regulations or the issuance of permits.

As to the infrastructure Executive Orders, some questions remain, including whether these could be used to advance renewable energy or other environmentally-friendly infrastructure projects. However, most emphasis appears to be on fossil fuel development and transportation. In January 2018, the Department of the Interior revoked land withdrawals intended to support the prior administration's Desert Renewable Energy Conservation Plan.