

Constructing the De-Regulatory State: Trump Executive Orders Aim to Reduce Regulation and Speed Project Development

Over the last week, President Trump has made good on his promise to take immediate action to reduce and streamline regulations he sees as inhibiting domestic industry and key construction projects. Through a series of executive orders and memoranda, he has charted a path forward on de-regulation, and in so doing, has created powerful new roles for the White House Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). While the effectiveness and impact of these actions will depend on how they are implemented, they are a historic break from past administrations. The actions create significant opportunities for companies and investors developing energy, telecommunications, pipeline and other infrastructure projects or otherwise expanding operations, to engage with more compliant agencies. At the same time, the actions raise significant uncertainties as to application and will likely provide further bases for legal challenges to individual projects. Finally, though these actions arise from assertions of executive authority, many dovetail with efforts underway in Congress. These actions are briefly described below.

1. Regulatory Reduction: The January 30, 2017 Executive Order on **Reducing Regulation and Controlling Regulatory Costs** combines two concepts: an offset approach and a regulatory budget. Under the former, for any regulation *proposed* or issued by an executive department or agency, at least two existing regulations need to be identified for repeal. Moreover, any new incremental costs associated with a new regulation, to the extent permitted by law, must be offset by the elimination of existing costs associated with at least two prior regulations.

As to the latter, the OMB will set budgets for each agency, establishing the total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing existing regulations. These determinations will be based on an agency's best approximation of the total costs or savings associated with each new regulation and repeal of an existing regulation. For fiscal year 2017, the total incremental costs of all new regulations, including repealed regulations, cannot exceed zero. OMB is authorized to approve each regulation for inclusion in the Unified Regulatory Agenda, a prerequisite

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to issuance, and to allow agencies to exceed their yearly budget allowance under certain circumstances. OMB thus becomes an even more significant player in the regulatory process and is further drawn into the operations of federal agencies.

There are major caveats to the order. It does not apply to regulations issued with respect to military, national security, foreign affairs or related to agency organization, management or personnel. OMB can also determine other exempt categories. More significantly, the executive order does not purport to change statutory law, including the Administrative Procedure Act (APA). Agencies would still need to issue – or keep – regulations as required by statute and could not repeal prior regulation except in accordance with that law or the APA. This may have the effect of limiting the order to only “discretionary” regulations issued by agencies, as opposed to those mandated by law or, perhaps, by courts resolving judicial challenges brought by parties to enforce those laws.

The implementation of the executive order will depend on detailed guidance to be issued by OMB on complex matters including measuring and accounting for costs across agencies and fiscal years, methods for calculating offsets, and circumstances that may merit waivers. There is no set timeline for such guidance. OMB will thus have to grapple with complicated issues such as how to equate costs, including loss of health and safety protections, across a broad array of subjects. It is also unclear whether the order is intended to cover independent or quasi-governmental agencies.

While the executive order itself is likely to survive any judicial scrutiny, the future actions by agencies in repealing regulations and determining costs and offsets will inevitably give rise to significant litigation.

2. Streamlining Permits and Environmental Review: One week earlier, on January 24, 2017, the President took two executive actions intended to decrease regulatory burdens on infrastructure and manufacturing arising from permitting and environmental review. In the **Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects**, the President required the CEQ to determine whether projects submitted by states, agencies or the President qualify as “high priority” infrastructure projects within 30 days of their submission. CEQ is to make this determination based on impacts to general welfare, value to the U.S., environmental benefits, and others factors the CEQ deems relevant.

For selected projects, CEQ is then to work with relevant agencies to establish expedited procedures and deadlines for environmental reviews under the National Environmental Policy Act (NEPA) and other project approvals. Agencies are then to give highest priority to completing these reviews and approvals by the deadlines “using all necessary and appropriate means,” though also “in a manner consistent with law.” An agency must explain in writing the causes for any delay and provide concrete actions to complete the reviews and permits.

In a separate Presidential memorandum, **Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing**, the President directed federal

agencies to support the expansion of manufacturing through expedited reviews and approvals and to reduce regulatory burdens. The Department of Commerce is tasked with outreach to stakeholders and drafting a report setting forth a plan to streamline federal permitting processes and reduce identified regulatory burdens. The report is to include recommendations for any “necessary changes” to existing regulation, laws, policies, practices and procedures.

While these actions are broader than the January 30th Order on de-regulation discussed above, they follow the same general theme of identifying regulatory burdens and mandating action to reduce those burdens. The January 24th order focuses specifically on expediting environmental reviews, and provides significant authority to CEQ, the agency most invested in the NEPA process. CEQ is thus likely to take on a new role in fostering project development, a change from its more traditional role as the mediator of interagency debate over environmental protection and economic development.

As with other executive orders, these agency actions must be consistent with law, which means environmental reviews and permit approval can only be expedited and finalized in accordance with NEPA and other existing statutory programs, e.g. the Endangered Species Act (ESA). The executive actions seek to require agencies to devise ways to expedite any such compliance. Companies, developers and investors will therefore likely find the relevant agencies to be allies in moving projects forward. However, any such efforts will certainly be scrutinized in court by parties challenging the underlying projects. Significantly, the Commerce Department report may make recommendations for legislative changes that could significantly impact the application of such laws in the future.

3. Keystone and Dakota Access Pipelines – The President’s efforts to expedite and streamline reviews found specific applications with regard to two controversial pipeline projects which were either rejected or delayed by the Obama Administration. In a Presidential Memorandum entitled **Construction of the Keystone XL Pipeline**, the President specifically invited TransCanada Keystone Pipeline to resubmit its application for a Presidential permit. It then directed the Department of State, which was historically delegated authority to grant or deny such permits through a determination of “national interest,” to reach a final decision within 60 days of the permit application. State was further authorized, “to the maximum extent permitted by law,” to consider the existing NEPA review in the matter to satisfy the agency’s obligations under NEPA and other laws. Significantly, the President also directed the Army Corps of Engineers (Corps) to expedite any permits regarding wetlands or other federal waters, and for the Department of Interior to expedite permits and reviews, including Bureau of Land Management permits and ESA assessments.

The Dakota Access Pipeline project was given a similar boost. Through the Presidential Memoranda, **Construction of the Dakota Access Pipeline**, the President made his own determination of “national interest,” and directed the Corps to expedite review and approval to construct and operate the pipeline, including the controversial easement for crossing under Lake Oahe. To do so, the President authorized the Corps to rescind or

modify a memorandum issued only weeks earlier under the Obama Administration, requiring additional environmental review of the easement. The Corps was also authorized to consider existing NEPA assessment to meet statutory obligations and to agree to any waivers of notice periods.

Notably, neither of these memoranda mandate that the permits be issued, but they create clear paths for the relevant agencies to expedite those decisions and issue any required permits. They share with the other Presidential orders and memoranda discussed above the general intent to expedite and streamline agency decision-making, particularly with respect to NEPA and other environmental and land use laws. Indeed, both memoranda authorize decisions based on existing assessments so that additional review is not deemed necessary. And like the other measures discussed above, all actions must be consistent with relevant law. Therefore, any permits for domestic construction granted in these two projects will be subject to judicial challenge (the Presidential permit process is not likely justiciable as an exercise in Presidential discretion). Nevertheless, these actions show the President is willing to go beyond more general orders and step in to expedite specific actions he deems to be of sufficient importance.