

April 11, 2019

PRESIDENT TRUMP ISSUES TWO EXECUTIVE ORDERS ON ENERGY INFRASTRUCTURE

To Our Clients and Friends:

On April 10, 2019, President Trump issued two long awaited executive orders (“EOs”) intended to promote the development of energy infrastructure through several regulatory reforms. In many respects, the EOs are driven by concerns that some states are thwarting the development of much needed energy infrastructure. Indeed, a central feature of the **first EO** addresses reforms seeking to expedite and remove barriers to domestic energy projects. The **second EO** reforms the process for permitting international cross-border projects, including oil pipelines.

EO ON DOMESTIC INFRASTRUCTURE ISSUES

President Trump’s first EO takes aim at a range of regulatory issues hindering the development of energy infrastructure projects domestically, including the Clean Water Act Section 401 water quality certifications and outdated safety regulations for LNG facilities. The EO also requires reports on a number of energy issues, including, among others, constraints for entering the energy markets of New England and economic growth in the Appalachian region.

Clean Water Act Section 401 Review

There has been a great deal of concern that some states are impermissibly using delegated federal authority under Section 401 of the Clean Water Act to impede construction of natural gas pipelines. As a result, President Trump declared that outdated federal guidance and regulations on Water Quality Certifications are causing confusion and uncertainty and hindering the development of energy infrastructure. EO I at Sec. 3. Accordingly, President Trump ordered the Administrator of the EPA to consult with states, tribes and the relevant executive departments and agencies to review these materials to determine whether any provisions should be clarified to reduce confusion and regulatory uncertainty. *Id.* at Sec. 3(a). This review will include existing guidance issued under President Obama, which, among other things declares that the one-year time limit for states to act on a Section 401 certification begins when the certifying agency deems an application complete—contrary to recent case law. *See, e.g., N.Y. State Dep’t of Envtl. Conserv. v. FERC*, 884 F.3d 450 (2d Cir. 2018) (finding that the one-year time limit begins when the applicant submits the application).

The review that EPA must conduct appears aimed at addressing recent efforts in some states to exploit the Section 401 process to hinder energy projects by focusing on the following:

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- The need to promote timely Federal-State cooperation and collaboration, EO I at Sec. 3(a)(i);
- The appropriate scope of water quality reviews, *id.* at Sec. 3(a)(ii);
- Types of conditions that may be appropriate to include in a certification, *id.* at Sec. 3(a)(iii);
- Expectations for reasonable review times for various types of certification requests, *id.* at Sec. 3(a)(iv); and
- The nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time, *id.* at Sec. 3(a)(v).

New EPA Section 401 Guidance: President Trump ordered that upon completion of the review of existing guidance and regulations, but no later than 60 days from the date of the order (June 9, 2019), the Administrator of the EPA shall issue new guidance to States and authorized tribes to supersede the Section 401 interim guidance. *Id.* at Sec. 3(b). The new guidance will, at minimum, clarify the issues listed above. *Id.*

Revised EPA Section 401 Regulations: President Trump ordered that upon completion of the review, but no later than 120 days from the date of this order (August 8, 2019), the Administrator of the EPA shall review the Section 401 implementing regulations for consistency with the policies set forth above and publish revised rules for notice and comment. *Id.* at Sec. 3(c). Such revised rules shall be finalized no later than 13 months after the date of the order (May 10, 2020). *Id.*

Updated Guidance for 401 Implementing Agencies: Following the issuance of the new Section 401 guidance, the Administrator of the EPA will lead an interagency review, in coordination with the head of each agency, such as the Federal Energy Regulatory Commission and the Army Corps of Engineers, that issues permits or licenses subject to Section 401 certification requirements, of existing regulations and guidance for consistency with the EPA guidance and rulemaking. *Id.* at Sec. 3(d). The heads of these agencies will then update their respective agency's guidance within 90 days (*i.e.*, no later than September 7, 2019). *Id.* Within 90 days of the EPA finalizing revised rules regarding Section 401, the heads of these agencies shall initiate a rulemaking to ensure their respective regulations are consistent with the EPA's revised rules (*i.e.*, no later than August 8, 2020). *Id.*

LNG Safety Regulations

Currently, the Department of Transportation's safety regulations for LNG facilities in 40 C.F.R. Part 193 apply uniformly to all LNG facilities regardless of size (*e.g.*, small-scale peak shaving and large-scale import and export terminals). *Id.* at Sec. 4(a). Because the current rules were developed to regulate small facilities and new LNG export terminals are in various stages of development, President Trump ordered the Secretary of Transportation to initiate a rulemaking to update Part 193 using risk-based standards (*i.e.*, those that impose regulatory requirements commensurate with the associated risk) to the maximum extent practicable. *Id.* The EO requires the Secretary to finalize that rulemaking no later than 13 months after the date of the order. *Id.*

In addition, President Trump directed that the Secretary of Transportation propose for notice and comment rulemaking, no later than 100 days from the date of the order, a rule that would allow LNG to be transported via rail in approved tank cars. *Id.* at Sec. 4(b). The rule shall be finalized no later than 13 months from the date of the order.

Capital Markets

Because a majority of project financing is done through the United States capital markets, President Trump directed the Secretary of Labor to complete a review of the data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) to identify whether there are discernable trends with respect to such plans' investments in the energy sector. President Trump directed that within 180 days of the issuance of the order the Secretary of Labor shall complete the review and provide an update to the Assistant to the President for Economic Policy on any discernable trends in energy investments of such plans. *Id.* at Sec. 5.

The President also directed that the Secretary of Labor complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets. *Id.*

Rights-of-Way Renewals and Reauthorizations

To address the issue of automatic sunset provisions in rights-of-way granted for energy infrastructure projects, President Trump directed the Secretaries of Commerce, Agriculture, and Interior to develop a master agreement for energy infrastructure rights-of-way renewals or reauthorizations, and within a year of the date of the order, initiate renewal or reauthorization for all expired energy rights-of-way. *Id.* at Sec. 6.

Reports on Barriers to National Energy Market

Report on New England Constraints: President Trump directed the Secretary of Transportation, in consultation with the Secretary of Energy, to submit a report regarding the economic and other effects caused by the inability to transport sufficient quantities of natural gas and other domestic energy resources into the States in New England and, as appropriate, other regions of the United States. The report must be submitted within 180 of the order and assess to what extent state, local, tribal, and territorial actions have contributed to these issues. *Id.* at Sec. 7(a).

Report on West Coast Export Constraints: President Trump also directed the Secretary of Energy, in consultation with the Secretary of Transportation, to submit a report regarding the economic and other effects cause by limitation on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States. This report shall also be submitted within 180 days of the order and assess to what extent state, local, tribal, and territorial actions have contributed to such effects. *Id.* at Sec. 7(b).

Report on Intergovernmental Assistance

Due to the vital role state and local governments play in supporting energy infrastructure projects, President Trump directed the heads of agencies to review existing authorities related to the transportation and development of domestically produced energy resources and report within 30 days on how those authorities can be most efficiently and effectively used to promote energy infrastructure development. *Id.* at Sec. 8.

Report on Economic Growth in Appalachian Region

President Trump directed the Secretary of Energy to submit a report describing opportunities, through the federal government or otherwise, to promote economic growth of the Appalachian region, including growth of petrochemical and other industries. The report shall also assess diversifying the Appalachian economy and promoting workforce development. The report is due within 180 days of the order. *Id.* at Sec. 9.

EO ON INTERNATIONAL CROSS-BORDER PERMITTING

Citing concerns that the policies of certain executive agencies have hindered the permitting process and relations with neighboring countries, President Trump's second EO transfers authority from the Secretary of State to the President to issue, deny or amend Presidential permits for certain international border crossing facilities, including oil pipelines. EO II at Sec. 1. Under the EO, such decisions shall now reside solely with the President. *Id.* at Sec. 2(i). The EO requires the State Department to complete its review of any application and to provide any opinion supporting the issuance of a permit to the President within 60 days of receipt of the application. *Id.* at Sec. 2. The EO will effectively eliminate what has, at times, been a lengthy State Department review process. These reforms would allow the President to permit a project like the Keystone XL, which was famously denied after the type of State Department review that is being eliminated here.

Subject to a few significant exceptions, the EO applies to all Presidential permits for "pipelines . . . and similar facilities for exportation or importation of all products," "facilities for the transportation of persons or things," "bridges," and "motor and rail vehicle" border crossings. EO II at Sec. 2(b). The EO specifically excepts, however, natural gas import and export facilities, electric transmission lines, and licenses to land or operate submarine cables. *Id.*; *see also* Executive Order 10486 at Sec. 1(1)-(2); Executive Order 10530 at Sec. 5(a).

The EO requires the Secretary of State to "adopt procedures to ensure" that if taken, certain actions are "completed within 60 days of the receipt of an application for a Presidential permit." EO II at Sec. 2. While not required, during that 60-period the Secretary "may"

- "[R]equest additional information from the applicant," or "refer the application and pertinent information" to other agency heads, *id.* at Sec. 2(c)(i)-(ii);
- "[A]dvice the President" on whether to "request the opinion, in writing, of any heads of agencies concerning the application," *id.* at Sec. 2(d). Should the President request such opinions, the

agency heads are to provide them in writing “30 days from the date of the request, unless the President otherwise specifies,” *id.*; and

- “[S]olicit such advice from State, tribal, and local government officials, and foreign governments, as the President may deem necessary,” but must “seek responses no more than 30 days from the date of a request,” *id.* at Sec. 2(e).
- If after reviewing the additional information received from the applicant, the “opinions” of other agency heads, or “advice from State, tribal, and local government officials, and foreign governments,” the Secretary considers other information necessary for the President’s evaluation, the Secretary “shall advise the President accordingly.” *Id.* at Sec. 2(f). If directed by the President, the Secretary shall request such additional information. *Id.*

Within 60 days of receipt of the application, and after receiving or requesting the information discussed above, if the Secretary “is of the opinion” that issuance or amendment of a permit “would” or “would not serve the foreign policy interests of the United States, the Secretary” shall provide the reasons supporting that opinion to the President in writing. *Id.* at Sec. 2(g)-(h).

The EO also revokes Executive Orders 13337 and 11423, which had previously granted the Secretary of State authority to grant, deny or amend Presidential permits for the covered international border-crossing facilities. *Id.* at Sec. 2(k).

Notably, the EO makes no provision for the Secretary of State to make public notice of or seek public comment on a proposed permit. Nor does it make allowance for any review that may be required under the National Environmental Policy Act (“NEPA”) or any other statute. The current State Department’s NEPA regulations provide that an environmental assessment is normally required for “actions for which the Department has lead-agency responsibility and which may significantly affect the human environment of the United States,” including the “[i]ssuance of permits for construction of international bridges and pipeline[.]” 22 C.F.R. § 161.7(c).



Gibson Dunn's Energy, Regulation and Litigation lawyers are available to assist in addressing any questions you may have regarding the developments discussed above. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or the authors:

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