

What a difference an administration makes, or does it?

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To understand the impact the Trump administration is having on the national conservation movement, it is only necessary to look at controversial pipeline projects like the Keystone XL, Dakota Access and the Southeast Market project, including the Sabal Trail pipeline. All of these projects have long generated substantial debate regarding the balance between economic benefit and the risk of environmental damage.

While these pipeline projects moved slowly during the Obama administration, President Donald Trump has sought to move them forward through use of executive orders directed to the federal agencies responsible for their approval.

Executive orders are directives issued by the president to federal agencies. While the presidential use of executive orders is not a new practice, Trump is issuing executive orders at the second-fastest rate of any modern Republican president. In issuing an executive order, the president can revoke or modify executive orders from prior presidents. Such executive orders were issued regarding these pipelines.

KEYSTONE XL PIPELINE

TransCanada Corp. has proposed the Keystone XL pipeline, a 1,200-mile pipeline to transport up to 830,000 barrels of oil a day from the oil sands of Alberta, Canada, through Montana and South Dakota to Nebraska. There, the pipeline will join an existing pipeline and carry the oil to the Gulf Coast.

Environmentalists have opposed the Keystone XL pipeline, claiming that the oil to be carried will hasten climate change, threaten spills, pollute air and water, and endanger wildlife.

or the pipeline to cross the border from Canada to the United States, the U.S. State Department must issue a permit. In 2015, the State Department did not issue such a permit. President Barack Obama rejected the proposed pipeline, on saying it would undercut American leadership in curbing reliance on carbon energy that contributes to climate change.

Within days of taking office, Trump signed an executive order to revive the Keystone XL pipeline, which had been debated extensively in the 2016 presidential election. He suggested that TransCanada submit a presidential permit application to the State Department.

In March 2017, in response to that application, the State Department issued a permit allowing the pipeline to be built. The State Department, in making its determination to issue the permit, took into account a range of factors, including foreign policy considerations and energy security.

Shortly after the permit was issued, several environmental groups, including the North Coast River Alliance, filed lawsuits against the Trump administration to challenge its decision to approve the construction of the Keystone XL pipeline.¹

The plaintiffs alleged that the Trump administration relied on an “outdated and incomplete environmental impact statement” when making its decision to issue the permit and that the administration thus violated the National Environmental Policy Act, 42 U.S.C.A. § 4321.

NEPA requires federal agencies to evaluate the environmental and related social and economic effects of their proposed actions and provide opportunities for public review and comment on those evaluations. Under NEPA, an agency must prepare an environmental impact statement for any proposed federal action significantly affecting the quality of the human environment.

In its response, attorneys for the Trump administration said federal judges have no authority to revoke or enjoin a presidential permit because the Constitution gives the president authority over matters of foreign affairs and national security. In November 2017 a U.S. district judge allowed the lawsuit to continue.

That same week, the Nebraska Public Service Commission decided by a 3-2 margin that the Keystone XL pipeline could proceed but rejected TransCanada’s preferred route, approving the project only on an alternative route.² The new route was slightly longer and would require TransCanada to negotiate new easements with landowners.

The approved route moved the pipeline further east to follow a path of an existing pipeline, which regulators said could make emergency responses more efficient. TransCanada indicated it would need to analyze the economics of building the \$8 billion pipeline.

TransCanada on Jan. 18 announced its plans to build the pipeline according to the alternative route approved by Nebraska regulators. The litigation against the pipeline continues.

DAKOTA ACCESS PIPELINE

The Dakota Access pipeline is a nearly 1,200-mile pipeline designed to transport more than a half million gallons of crude oil a day from North Dakota to Illinois, where it can be shipped to refineries. Much of the pipeline has been built.

The DAPL became the focus of protests when the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe objected to its construction less than a mile from the Standing Rock Sioux Reservation. The tribes argued that the pipeline threatened sacred sites and that the presence of oil in the pipeline under Lake Oahe also threatened their water supply.

The tribes and others filed a lawsuit in the U.S. District Court for the District of Columbia and requested a preliminary injunction because the pipeline was already under construction and would be finished before the case could be formally decided.³

One of the focuses of the litigation was the Lake Oahe easement, which would allow the pipeline to be constructed under the Missouri River one-half mile upstream from the Standing Rock Sioux Reservation. The easement was required because the pipeline would cross federally owned land on both sides of the Missouri River.

In September 2016 a federal judge denied the tribes' motion for a preliminary injunction. In December 2016 the Obama administration, through the U.S. Army Corps of Engineers, announced that it would not grant an easement under Lake Oahe for the DAPL to cross the Missouri River.

The Corps further stated that it planned to prepare an environmental impact statement for alternative routes. The next day, Dakota Access filed a motion for summary judgment.

On Jan. 24, 2017, within days of taking office, Trump issued an executive order directing the Corps to review and approve, in an expedited manner, the pipeline to the extent permitted by law and as warranted.⁴

On Feb. 8, 2017, the Trump administration granted the Lake Oahe easement, allowing the pipeline to be constructed under the Missouri River. On Feb. 14, 2017, the environmental group Earthjustice, on behalf of the tribes, filed a motion for summary judgment arguing that the NEPA requirements had not been met and that the Corps violated the tribes' treaty rights.⁵

On June 14, 2017, the district judge ruled that the environmental review for the DAPL was, in part, inadequate and had to be reconsidered.

While the judge indicated that the federal government "substantially complied" with NEPA, he said the Corps did not adequately consider the impacts of an oil spill on fishing and hunting rights or on environmental justice — or the degree to which DAPL's effects are likely to be highly controversial in light of the critiques of its scientific methods and data.⁶

The court stated that to remedy those violations the Corps would have to reconsider those sections of its environmental analysis upon remand by the court. The judge did not, however, order Dakota Access to cease operations (which had been underway since June 1, 2017). He indicated that that was a separate question he would consider at a later time.

On Oct. 11, 2017, the court ruled that the DAPL could continue pumping oil during an ongoing environmental review by the Corps.⁷ The judge indicated he would not rescind the previous permit issued by the Corps while it reassessed its prior environmental review.

The court stated that the errors in the Corps' prior environmental assessment were not fundamental or incurable and said there was a serious possibility that the Corps would be able to substantiate its prior conclusions.

The judge did warn the Corps, however, to conduct a thorough review and not treat the process simply as an exercise in filling out the proper paperwork. The Corps anticipates completing its ongoing environmental review by spring 2018.

The judge went on to state he will reconsider "whether [the Corps] have in fact fulfilled their statutory obligations" should legal challenges arise after the review is complete.

On Dec. 4, 2017, the court issued a decision stating that while the judge declined to vacate the Corps' easement approval, he left open the question of whether to impose any conditions.

The tribes had requested a series of measures to monitor the ongoing operation of the DAPL. The court decided to issue certain measures as a means to ensure that the court receives up-to-date and necessary information about the operation of the pipeline.

The court also stated that the measures do not affect the Corps' ongoing environmental analysis, but rather are a means of providing the court with relevant information while the Corps is completing its environmental analysis. It said recent events made it clear that there is a pressing need for ongoing monitoring by the court.

In November 2017 the Keystone pipeline leaked 210,000 gallons of oil in South Dakota. The spill blackened roughly a 100-yard radius in a grassy field outside Amherst, South Dakota, near the boundaries of the Lake Traverse Reservation. The court hearing the Dakota Access case indicated the Keystone spill highlighted the potential impact of pipelines on tribal land.

The Dakota Access court ordered the finalization and implementation of an oil spill response plan at Lake Oahe. The Corps, Dakota Access and the tribes were to coordinate and finalize the plan and obtain a third-party compliance audit by April 1, 2018.

Finally, the court required Dakota Access to file bimonthly reports beginning the end of December 2017 regarding the

status of the pipeline during the remand. The bimonthly reports are to detail any repairs or incidents occurring at the segment of the pipeline crossing Lake Oahe.

As pipeline spills continue, they may impact the decisions courts make regarding other pipelines as in the Dakota Access case. The twists and turns in this litigation will not be concluded any time soon.

SOUTHEAST MARKET PIPELINE PROJECT

The Southeast Market pipeline project comprises three natural gas pipelines under construction in Alabama, Georgia and Florida.

The cornerstone of the project is the Sabal Trail pipeline, which is a 500-mile pipeline that runs from eastern Alabama, across southwestern Georgia and then to Osceola County, Florida, which is near Orlando. Large sections of the project have been completed and are in operation.

The purpose of the project is to serve Florida's growing demand for natural gas and the electric power that natural gas generates. In June 2017, the Sabal Trail pipeline started pumping natural gas to Florida from Alabama. It is designed to transport 1 billion cubic feet of natural gas every day.

Proponents of the project say Florida is not located near a major source of natural gas production and as a result, the natural gas needed to meet increasing demand is best transported by pipeline to power plants.

Supporters also claim the project is the cleanest, cheapest and safest way to guarantee around-the-clock electricity for more than 1 million homes in Florida.

Environmentalists say the project could jeopardize clean water sources and threaten Florida's natural environment. They are also concerned about explosions the pipeline could cause and the increased potential for sinkholes.

One of the most deadly accidents occurred in San Bruno, California, just outside of San Francisco in 2010, when a steel 30-inch natural gas pipeline ruptured and ignited a giant fireball, killing eight people and destroying 38 homes. An investigation found that the pipeline owner, Pacific Gas & Electric Co., had not properly maintained the pipeline or monitored it for safety.

The Sierra Club sued the Federal Energy Regulatory Commission in 2016 because it approved the project. The suit alleged FERC's environmental impact statement failed to adequately consider the project's contribution to greenhouse gas emissions and its impact on low-income and minority communities.

On Aug. 22, 2017, the District of Columbia U.S. Circuit Court of Appeals, in a 2-1 ruling, found that FERC did not properly analyze the climate impact from burning the natural gas that the project would deliver to power plants.

The court stated that the environmental impact statement for the project "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas the pipelines will transport or explain more specifically why it could not have done so."⁸

The court went on to state that an agency conducting a NEPA review must consider not only the direct effects but also the indirect environmental effects of the project under consideration. Indirect effects are those that are caused by the project and are later in time or farther removed in distance but still reasonably foreseeable.

It is reasonably foreseeable that the gas will be burned in the power plants and that burning natural gas will release carbon compounds that contribute to climate change.

The Court of Appeals vacated the FERC order and remanded to the agency for the preparation of an environmental impact statement that is consistent with its decision.

FERC prepared a draft supplemental environmental impact statement for the project Sept. 27, 2017. That statement estimates the greenhouse gas emissions generated by the project's customers' downstream facilities, describes the methodology used to determine the estimates, discusses the context for understanding the magnitude of the emissions, and addresses the value of using the social cost of carbon tool.

Federal agencies use estimates of the social cost of carbon to value the climate impact of rulemaking by measuring in dollars the long-term damage caused by a ton of carbon dioxide emissions in a given year.

Based on the environmental analysis, FERC concluded that constructing and operating the project would result in temporary and permanent impacts on the environment.

It further determined, however, that with the applicants' implementation of their respective impact avoidance measures as well as their adherence to the measures FERC has required to further avoid these impacts, operating the project would not significantly impact the environment.

On Oct. 6, 2017, FERC asked the D.C. Circuit to end its ruling blocking construction of the natural gas pipeline in Florida, saying it had complied with the court's decision to redo its original environmental review for the project, taking into consideration the effect of greenhouse gas emissions from the power plants that the pipelines would supply.⁹

FERC has asked for a rehearing of the court's decision to vacate its order.

FERC stated: "The court's decision faults the commission for inadequately considering one aspect of its environmental review, yet fails to afford the commission sufficient time to complete its review in the manner the National Environmental Policy Act contemplates before the negative consequences

of vacature occur. That judgment has significant implications for this case and, possibly, future natural gas pipeline cases.”

On Jan. 31 the D.C. Circuit declined to review its earlier ruling finding that FERC did not properly analyze the impact of greenhouse gas emissions from the project.

This decision could have significant impacts. Requiring FERC to do a better job of quantifying greenhouse gas emissions could result in procedural delays for other pending pipeline cases. In complying with NEPA, federal agencies will need to consider not only direct effects of a project but indirect effects as well, including downstream emissions.

This could also have an impact on Trump’s executive order to streamline infrastructure projects if regulators must examine the effects of climate change when they review proposed natural gas pipeline projects. This decision may also lead the way to evaluating upstream impacts as well as downstream impacts such as reviewing the emissions from the fracking of the natural gas that goes into the pipeline.

While it appears clear that downstream greenhouse gas emissions associated with the natural gas pipeline project will have to be considered, it is not clear whether the court’s “foreseeability” interpretation will be applied by other courts and to other types of projects.

The most important part of the ruling was not the court’s finding that the environmental impact statement was deficient. More important was the court’s decision to vacate the underlying FERC order rather than just remand it to the agency for correction.

This could increase the risk regarding challenges to the sufficiency of environmental impact statements. When courts vacate FERC orders, projects can be forced to shut down, causing substantial revenue losses and disrupting the electric generation and natural gas markets.

CONCLUSION

In all three of these pipeline cases, litigation is ongoing. What is clear is that, while the president has the power to issue executive orders, the courts will act to ensure that his power is used consistent with the law.

Even if Trump wants to do away with considering climate change and related social and economic effects in evaluating the environmental impacts of federal agencies’ actions, the

courts are going to hold federal agencies to their obligations under federal environmental laws.

NOTES

¹ *Indigenous Env’tl. Network v. U.S. Dep’t of State*, No. 17-cv-29, 2017 WL 5632435 (D. Mont. Nov. 22, 2017).

² *In the Matter of the Application of TransCanada Keystone Pipeline LP for Route Approval of the Keystone XL Pipeline Project Pursuant to the Major Oil Pipeline Siting Act*, No. OP-0003, 2017 WL 2555971 (Neb. Pub. Serv. Comm’n May 2017).

³ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101 (D.D.C. 2017).

⁴ Exec. Order No. 13, 766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

⁵ Plaintiff Standing Rock Sioux Tribe’s Memorandum in Support of its Motion for Partial Summary Judgment, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-cv-1534, 2017 WL 1454134 (D.D.C. Feb. 14, 2017).

⁶ *Standing Rock*, 255 F. Supp. 3d at 112.

⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-cv-1534, 2017 WL 4564714, at *1 (D.D.C. Oct. 11, 2017).

⁸ *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357 (D.C. Cir. 2017).

⁹ Petition for Panel Rehearing, *Sierra Club v. Fed. Energy Regulatory Comm’n*, Nos. 16-1329 and 16-1387, 2017 WL 5496284 (D.C. Cir. Oct. 6, 2017).

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