

The Trump Energy Agenda

The Early Days of President Trump and Secretary of Energy-Designee Rick Perry

By Sheila McCafferty Harvey, Jeffrey S. Merrifield and Elizabeth Vella Moeller

What has happened since President Trump was inaugurated?

- In one of his first executive actions, President Trump has placed a freeze on new government hires (excepting the military). Based on information from Trump transition staff this is just the first step in efforts to reduce the size of the U.S. government.
- President Trump also signed executive orders to advance the Keystone XL and Dakota Access pipeline projects. He called for American steel to be used for the pipelines.
- As part of his infrastructure agenda, Trump signed an executive order to speed the environmental review and approval of high-priority infrastructure projects. In order to fund tax and infrastructure activities, the Trump Administration is expected to seek a 10+% reduction in the federal workforce and a 10+ percent federal spending.
- During a top to bottom review of federal programs, the following type of questions will be asked:
 - Is this something the federal government needs to be doing?
 - Does this program benefit job creation and increase exports?
- In another one of his first executive actions, President Trump has signed a memorandum withdrawing the U.S. from the Trans-Pacific Partnership. Actions on the Clean Power Plan and the Paris Climate Accord are also expected to be a priority, although these will be more difficult to accomplish through purely executive action. Right now, the administration is evaluating its legal options, particularly for the CPP as legal action may provide a quicker alternative than the traditional rulemaking process.
- The White House web site includes an “America First Energy Plan” which lays out goals to reverse Obama Administration policies on global warming, while bolstering domestic sources of energy including oil, gas and coal. Nuclear power is not mentioned in the plan.

What is going on at DOE?

- Governor Rick Perry’s nomination hearing went as well as could be expected, and it is anticipated that his confirmation could occur soon.

- Secretary-designee Perry admitted it was a mistake to propose abolishing DOE, that he is now familiar with its science, nuclear weapons and environmental cleanup missions among others, and that he will be ready to support them going forward as Secretary.
- While pressed on his Yucca Mountain position, Perry said that he was assessing alternative options, but that he wasn't ruling anything out, including Yucca.
- Perry discussed his expertise in wind generation, with Texas being the largest U.S. supplier (19,000 Mw), radioactive waste disposal (Waste Control Specialists) and nuclear weapons (Pantex site).
- Beginning last Friday, a "Beach Team" of approximately 28 individuals has "landed" at DOE to assist in the turnover of power and serve as interim staff until more permanent individuals are nominated and confirmed to take those positions.
- One area of focus for the Trump Administration will be the review of subsidies for renewables as this was a topic of Perry's nomination hearings. Look for this to be an area of focus for the Beach Team and early DOE action.
- The first order of business for Perry after his expected confirmation is to firm up with the White House who will serve as his Chief of Staff and Deputy Secretary of the Department.
- It is expected that the Chief of Staff will be an individual familiar to Secretary-Designee Perry with roots in Texas. It is rumored that Dan Wilmont, who served Perry while he was Governor in the Texas State Office in Washington, could be tapped to take the Deputy Chief of Staff slot.
- The Deputy Secretary slot is down to three individuals, but the leading candidate is said to be a familiar face to Perry and also knowledgeable with Washington, DOE and Texas.
- On January 26, the president named Kristine Svinicki, a member of the Nuclear Regulatory Commission, to chair the NRC.
- On the cybersecurity front, Secretary Perry will be tasked with playing a major role in cybersecurity, at least under current policies. There is some concern that the incoming Administration would like to give DOD more authority on cyber. There is an interest in continuing to keep existing channels open (at least in electricity) between industry, DOE and DHS.

What is going on at FERC?

- There have been major changes at the Federal Energy Regulatory Commission (FERC) since President Trump took office. The President has named Democrat Cheryl LaFleur to be the acting chairman of FERC. This move was followed by former Chairman Norman Bay's resignation. He plans to depart FERC on February 3rd, leaving FERC with only two Democratic commissioners—acting Chairman LaFleur and Commissioner Colette Honorable whose term expires in June 2017.
- This development poses major challenges to utilities and energy companies as FERC requires a quorum of at least three members in order to issue orders and regulations. The lack of a quorum will impact pending approvals of gas pipeline projects or settlements of investigations.

- Naming and confirming new Republican commissioners to FERC will be a high priority for the Trump Administration. In the meantime, FERC staff and commissioners are working to get as many orders out as possible while there is still a quorum until February 3rd.
- Once Republicans control the committee, a new chairman—who sets the agenda—and a Republican majority will be set to either reexamine or revive policies from the last eight years. We expect a newly-composed FERC to address wholesale market issues, perhaps with an attempt to provide more compensation to baseload resources (mostly coal and nuclear, but increasingly gas) to reflect the value that these resources bring to the market but are currently not paid to provide.
- Order 1000, the nearly seven-year-old rule meant to provide more competition in transmission development (and that few would claim has helped the process) is likely to be at least examined and perhaps revisited.
- Also of significance is that the natural gas industry is not subject to the same standards that apply to the electricity sector through FERC and NERC. We expect some attention to be given to this lack of equivalent regulation, especially as the electricity industry and the natural gas industry become more untwined.

Attachments: White House Executive Memos regarding the Keystone XL and Dakota Access pipelines.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Sheila McCafferty Harvey [\(bio\)](#)
Washington, DC
+1.202.663.8224
sheila.harvey@pillsburylaw.com

Jeffrey S. Merrifield [\(bio\)](#)
Washington, DC
+1.202.663.8718
jeff.merrifield@pillsburylaw.com

Elizabeth Vella Moeller [\(bio\)](#)
Washington, DC
+1.202.663.9159
elizabeth.moeller@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2017 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

January 24, 2017

January 24, 2017

MEMORANDUM FOR THE SECRETARY OF STATE
THE SECRETARY OF THE ARMY
THE SECRETARY OF THE INTERIOR

SUBJECT: Construction of the Keystone XL Pipeline

Section 1. Policy. In accordance with Executive Order 11423 of August 16, 1968, as amended, and Executive Order 13337 of April 30, 2004, the Secretary of State has delegated authority to receive applications for Presidential permits for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country, and to issue or deny such Presidential permits. As set forth in those Executive Orders, the Secretary of State should issue a Presidential permit for any cross-border pipeline project that "would serve the national interest."

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Invitation to Submit an Application. I hereby invite TransCanada Keystone Pipeline, L.P. (TransCanada), to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States.

Sec. 3. Directives. (a) Department of State. The Secretary of State shall, if the application referred to in section 2 is submitted, receive the application and take all actions necessary and appropriate to facilitate its expeditious review. With respect to that review, I hereby direct as follows:

(i) The Secretary of State shall reach a final permitting determination, including a final decision as to any conditions on issuance of the permit that are necessary or appropriate to serve the national interest, within 60 days of TransCanada's submission of the permit application.

(ii) To the maximum extent permitted by law, the Final Supplemental Environmental Impact Statement issued by the Department of State in January 2014

regarding the Keystone XL Pipeline (Final Supplemental EIS) and the environmental analysis, consultation, and review described in that document (including appendices) shall be considered by the Secretary of State to satisfy the following with respect to the Keystone XL Pipeline as described in TransCanada's permit application to the Department of State of May 4, 2012:

(A) all applicable requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*; and

(B) any other provision of law that requires executive department consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)).

(iii) To the maximum extent permitted by law, any Federal permit or authorization issued before the date of this memorandum for the Keystone XL Pipeline shall remain in effect until the completion of the project.

(iv) The agency notification and fifteen-day delay requirements of sections 1(g), 1(h), and 1(i) of Executive Order 13337 are hereby waived on the basis that, under the circumstances, observance of these requirements would be unnecessary, unwarranted, and a waste of resources.

(b) Department of the Army. The Secretary of the Army shall, if the application referred to in section 2 is submitted and a Presidential permit issued, instruct the Assistant Secretary of the Army for Civil Works and the U.S. Army Corps of Engineers, including the Commanding General and Chief of Engineers, to take all actions necessary and appropriate to review and approve as warranted, in an expedited manner, requests for authorization to utilize Nationwide Permit 12 under section 404(e) of the Clean Water Act, 33 U.S.C. 1344(e), with respect to crossings of the "waters of the United States" by the Keystone XL Pipeline, to the maximum extent permitted by law.

(c) Department of the Interior. The Secretary of the Interior, as well as the Directors of the Bureau of Land Management and the United States Fish and Wildlife Service, shall, if the application referred to in section 2 is submitted and a Presidential permit issued, take all steps necessary and appropriate to review and approve as warranted, in an expedited manner, requests for approvals related to the Keystone XL Pipeline, to the maximum extent permitted by law, including: (i) requests for grants of right-of-way and temporary use permits from the Bureau of Land Management; (ii) requests under the United States Fish and Wildlife Service's regulations implementing the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; and (iii) requests for approvals or other relief related to other applicable laws and regulations.

(d) Publication. The Secretary of State shall promptly provide a copy of this memorandum to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Majority Leader of the Senate, and the Governors of each State located along the Keystone XL Pipeline route as described in

TransCanada's application of May 4, 2012. The Secretary of State is authorized and directed to publish this memorandum in the *Federal Register*.

(e) Private Property. Nothing in this memorandum alters any Federal, State, or local process or condition in effect on the date of this memorandum that is necessary to secure access from an owner of private property to construct the pipeline and cross-border facilities described herein. Land or an interest in land for the pipeline and cross-border facilities described herein may only be acquired consistently with the Constitution and applicable State laws.

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

#

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

January 24, 2017

January 24, 2017

MEMORANDUM FOR THE SECRETARY OF THE ARMY

SUBJECT: Construction of the Dakota Access Pipeline

Section 1. Policy. The Dakota Access Pipeline (DAPL) under development by Dakota Access, LLC, represents a substantial, multi-billion-dollar private investment in our Nation's energy infrastructure. This approximately 1,100-mile pipeline is designed to carry approximately 500,000 barrels per day of crude oil from the Bakken and Three Forks oil production areas in North Dakota to oil markets in the United States. At this time, the DAPL is more than 90 percent complete across its entire route. Only a limited portion remains to be constructed.

I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest.

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Directives. (a) Pipeline Approval Review. The Secretary of the Army shall instruct the Assistant Secretary of the Army for Civil Works and the U.S. Army Corps of Engineers (USACE), including the Commanding General and Chief of Engineers, to take all actions necessary and appropriate to:

(i) review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. 185; permits or approvals under section 404 of the Clean Water Act, 33 U.S.C. 1344; permits or approvals under section 14 of the Rivers and Harbors Act, 33 U.S.C. 408; and such other Federal approvals as may be necessary;

(ii) consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 (Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota), and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, dated January 18, 2017, and published at 82 *Fed. Reg.* 5543;

(iii) consider, to the extent permitted by law and as warranted, prior reviews and determinations, including the Environmental Assessment issued in July of 2016

for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act, as amended, 42 U.S.C. 4321 et seq., and any other provision of law that requires executive agency consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a));

(iv) review and grant, to the extent permitted by law and as warranted, requests for waivers of notice periods arising from or related to USACE real estate policies and regulations; and

(v) issue, to the extent permitted by law and as warranted, any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act, as amended, 30 U.S.C. 185(w).

(b) Publication. The Secretary of the Army shall promptly provide a copy of this memorandum to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Majority Leader of the Senate, and the Governors of each State located along the Dakota Access Pipeline route. The Secretary of the Army is authorized and directed to publish this memorandum in the *Federal Register*.

(c) Private Property. Nothing in this memorandum alters any Federal, State, or local process or condition in effect on the date of this memorandum that is necessary to secure access from an owner of private property to construct the pipeline and facilities described herein. Land or an interest in land for the pipeline and facilities described herein may only be acquired consistently with the Constitution and applicable State laws.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

#