

## ALERTS

### Pipeline Law Alert - Rapid Pace Of Presidential Memoranda, Executive Orders Spells Opportunities And Challenges For Pipeline Industry

February 3, 2017 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Dallas](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [New York](#) | [South Bend](#)

On Jan. 24, President Trump issued four presidential memoranda and one executive order that affect the pipeline industry. These recent directives add to the significant regulatory changes that may occur once the rules and amendments promulgated pursuant to the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 and Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016 emerge from the Jan. 20 60-day regulatory freeze, on which we [previously reported](#). These include the Jan. 13 Safety of On-Shore Hazardous Liquid Pipelines final rule; a final rule to amend operator qualification, cost recovery, and accident and incident reporting regulations; an advance notice of proposed rulemaking on crude oil volatility standards; and possibly the rules establishing emergency order authority for the PHMSA and standards for underground gas storage facilities that PHMSA opened for public comment after their effective dates.

Two of the memoranda directly address high profile pipeline projects that were stalled under the Obama administration:

- The [Presidential Memorandum Regarding Construction of the Dakota Access Pipeline](#) (DAPL) directs the assistant secretary of the Army for Civil Works and the U.S. Army Corps of Engineers to “review and approve in an expedited manner, to the extent permitted by law and as warranted . . . requests for approvals to construct and operate the DAPL,” and to consider whether to withdraw its Notice of Intent to Prepare an Environmental Impact Statement in connection with the Lake Oahe water crossing. Consistent with the administration’s pledge to speed environmental permitting, the memorandum also directs the Corps to consider whether the environmental review to date (such as the 2016 Environmental Assessment) satisfies the requirements of the National Environmental Policy Act and other interagency consultation requirements. The Corps has not publicly responded to the memorandum as of this date.
- The [Presidential Memorandum Regarding Construction of the Keystone XL Pipeline](#) to the Secretary of State, Secretary of the Army, and the Secretary of the Interior invites TransCanada Keystone Pipeline, L.P., to reapply for a presidential permit to construct and operate the Keystone XL Pipeline; waives the agency notification and 15-day delay requirements of Executive Order 13337 (the order granting the Department of State authority to receive applications for permits for petroleum import and export

## RELATED PEOPLE



**Paul M. Drucker**

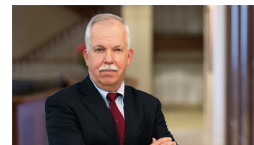
Partner

Indianapolis, Chicago

P 317-231-7710

F 317-231-7433

[paul.drucker@btlaw.com](mailto:paul.drucker@btlaw.com)



**Michael H. Elam**

Partner

Chicago, Indianapolis

P 312-214-5630

F 312-759-5646

[michael.elam@btlaw.com](mailto:michael.elam@btlaw.com)

## RELATED PRACTICE AREAS

Environmental

Pipelines

facilities at the border); and directs the Department of State to complete the permit review process within 60 days. Similar to the DAPL memorandum, the Keystone XL memorandum directs the agencies to expedite the review process by using an existing Environmental Impact Statement. [TransCanada announced](#) that it submitted its permit application to the Department of State on Jan. 26.

The other Jan. 24 directives have the potential to simultaneously speed administrative review and approval of pipeline projects, while increasing some costs:

- The [Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing](#) requires all executive departments and agencies to “reduce regulatory burdens affecting domestic manufacturing[,]” but does not provide further detail on how to do so. More specifically, the memorandum directs the Secretary of Commerce to solicit public comment for 60 days on streamlining permitting and reducing regulatory burden for manufacturers, and to submit an action plan to the president within 60 days after the close of the comment period. The Department of Commerce has yet to open the comment period as of this date.
- The [Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects](#) specifically references the importance of repairing and upgrading pipelines and sets out the procedure by which high priority infrastructure projects are identified for fast-track review. The order also directs the chairman of the White House Council on Environmental Quality to establish, in coordination with the heads of the relevant agencies, the expedited timeline for project review.
- The [Presidential Memorandum Regarding Construction of American Pipelines](#) has the most significant potential impact on the pipeline industry as a whole. It directs the secretary of commerce to develop a plan, due 180 days from Jan. 24, under which all new, retrofitted, repaired and expanded pipelines inside the borders of the United States “use materials and equipment produced in the United States.” According to the memorandum, an iron or steel product is only produced in the United States if “all manufacturing processes for such iron or steel products, from the initial melting stage through the application of coatings, occurred in the United States.” Products manufactured abroad from semi-finished U.S. steel and iron or manufactured domestically from semi-finished steel or iron of foreign origin do not qualify under the memorandum’s definition. It is unclear from the memorandum whether the requirements apply to cross-border or offshore pipelines, and how the administration plans to harmonize the domestic product requirements with existing international trade agreements to which the U.S. is a party.

The Department of Commerce may look to existing laws for guidance in developing the American Pipelines plan. For example, the 1982 Surface Transportation Assistance Act contains a “Buy America” provision under which the Secretary of Transportation “may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States[,]” but also

authorizes the secretary to issue a waiver. 49 U.S.C. § 5323(j).

Another, the American Recovery and Reinvestment Act of 2009, required funds appropriated under the act to be used only for projects utilizing only U.S. iron, steel, and manufactured goods. Pub. L. No. 111-5 § 1605. More recently, the 2014 Consolidated Appropriations Act (Pub. L. No. 113-76 § 436) introduced an “American Iron and Steel” requirement for grants to state water pollution control agencies and public water systems and treatment works under the Clean Water Act. EPA implements this requirement via [guidance](#) and has also established [waiver procedures](#).

Once the department’s plan is developed, it will need to go through notice and comment before implementation. Additionally, the cost of any new regulations will need to be offset by eliminating existing costs associated with at least two prior regulations pursuant to the Jan. 30 [Executive Order on Reducing Regulation and Controlling Regulatory Costs](#).

For more information, please contact Pipeline Practice team members Lydia Barbash-Riley at [Lydia.Barbash-Riley@btlaw.com](mailto:Lydia.Barbash-Riley@btlaw.com) or 616-742-3945; Ashley Parr at [Ashley.Parr@btlaw.com](mailto:Ashley.Parr@btlaw.com) or 312-214-4842; Paul Drucker at [Paul.Drucker@btlaw.com](mailto:Paul.Drucker@btlaw.com) or 317-231-7710; or Michael Elam at [Michael.Elam@btlaw.com](mailto:Michael.Elam@btlaw.com) or 312-214-5630.

© 2017 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*

Visit us online at [www.btlaw.com](http://www.btlaw.com) and follow us on Twitter [@BTLawNews](https://twitter.com/BTLawNews).