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Lead NEPA Story: Trump plots action on energy

(Greenwire, 1/24/2019) **Niina Heikkinen, Hannah Northey, and Ariel Wittenberg, E&E News Reporters**

The Trump administration is considering executive actions to boost the proliferation of pipelines across the United States and limit state interference on water permitting, according to multiple industry sources familiar with the discussions.

The expected actions have been delayed by the partial government shutdown now surpassing a month, sources said, and would potentially touch on everything from boosting pipeline approvals out of areas like the Permian Basin to potential action on liquefied natural gas exports.

Another focus: reforming states' ability to block permits under Section 401 of the Clean Water Act.

Details for now remain sparse, and sources cautioned that the actions are far from settled. Leading the effort is Francis Brooke, a senior energy adviser to President Trump who left Vice President Mike Pence's office to replace former White House energy aide Mike Catanzaro. The White House said it would not be providing comment on the expected orders.

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Clean Water Act: Critics slam WOTUS economics: 'in theory, pigs could fly'

(Greenwire, 1/21/2019) **Ariel Wittenberg, E&E News Reporter**

The Trump administration's bid to restrict the Clean Water Act's reach over streams and wetlands is backed by an analysis showing the proposal wouldn't reduce environmental benefits when it comes to dredging and filling waterways.

Key to lessening the rule's impact on water quality is the assumption that 29 states "may" or are "likely" to bolster dredge and fill regulations as federal oversight retreats.

Among eight states the administration says "may" strengthen regulations is North Carolina. That assumption springs from wetlands legislation that a Democratic-led General Assembly passed 18 years ago — ancient history in light of the Republican takeover of the Legislature in 2010.

"In theory, the Legislature could wake up and pass a new law, but, in theory, pigs could fly," said John Dorney, an environmental consultant who worked on wetland permitting for North Carolina's Division of Water Resources for 38 years. "I'm not holding my breath."

Dorney is among the former state regulators and environmental experts who say closing the gap between current federal waterway protections and President Trump's proposed Waters of the U.S. rule, or WOTUS, will be all but impossible given state laws limiting environmental regulations or imposing budgetary restrictions.

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Trump's WOTUS proposal would erase federal protections for the more than 51 percent of wetlands and 18 percent of streams nationwide that lack relatively permanent surface water connections to larger downstream waters, according to data from the U.S. Geological Survey.

The Clean Water Act requires federal permits for dredging and filling of wetlands because of their benefits as buffers against flooding, cleansers for pollution and habitat for wildlife.

The administration's economic analysis calculates the forgone costs and benefits from reducing federal protections for wetlands and waterways.

The analysis assumes there are no forgone costs or benefits from the WOTUS proposal in those 29 states that "may" or are "likely" to bolster their dredging and filling regulations.

So the administration calculates that limiting the jurisdiction of the Clean Water Act's dredge and fill program for development in wetlands and waterways would result in between $28 million and $266 million in annual forgone costs and between $7 million and $47 million in annual forgone benefits.

Betsy Southerland, a former career official in EPA's Office of Water, said that while it might be fair to argue that the benefits of protecting wetlands won't change in states that expand their own rules, doing so will likely come at a huge cost to those states. It's incorrect to exclude cost data from those 29 states, she said.

"You have to include what states have to do in order to maintain the baseline benefits," said Southerland, who worked on cost-benefit analyses at EPA. "Otherwise, you're really just calculating the savings to the regulated community, not the cost overall."

Likewise, she said, the administration's assumption about states boosting their own regulations seems far-fetched.

"They are assuming that states can change easily, but they often don't have the expertise, the funding or the political clout within their state legislature to do so," Southerland said. "It is stunning to me that they would make some of these claims."

'It seems unlikely'

The notion of states stepping up regulations allows EPA and the Army Corps of Engineers to push back against the idea that the proposed WOTUS rule represents a regulatory "rollback."

"For the first time, we are clearly defining the difference between federally protected wetlands and state protected wetlands," acting EPA Administrator Andrew Wheeler said at a news conference that rolled out the proposal last month.

To that end, the agencies used the economic analysis to "carefully examine the potential responses of the states" and make predictions.

Thus-far, only California has made moves toward beefing up its wetlands protections. The Trump administration says the Golden State is "likely" to expand protections, and the state Water Resources Control Board is set to meet in February to consider changes.

Many of the administration's other predictions, critics say, are off-base. EPA and the Army Corps based their North Carolina prediction on Tar Heel State legislators deciding to protect "isolated wetlands" after a 2001 Supreme Court case struck down federal protections for such habitat.

Following the *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers* decision, North Carolina protected any isolated wetland larger than a third of an acre.

So the Trump administration's WOTUS analysis says, "Any states that have already expanded their regulatory scope ... will be assumed to continue such practices."

"It's no longer a legitimate assumption," Dorney said. "That was then, this is now."

North Carolina's Republican-controlled Legislature has rolled back wetlands protections numerous times between 2012 and 2015.

Today, only two types of isolated wetlands — bogs and basin wetlands — are protected, and only if they are larger than an acre. Most of North Carolina's bogs and basin wetlands don't make the cut, Dorney said.

The sponsor of those bills has said it was the lack of federal protections for isolated wetlands that motivated his legislation.

"If the Army Corps doesn't think it's a wetland, it's not a wetland," state Sen. Brent Jackson (R) told *E&E News* in 2017.

The Legislature has also passed a law requiring that future wetland regulations be "no more stringent" than federal ones.

Those recent changes mean "the state is not going to expand its wetlands protections in response to WOTUS," Dorney said.

Wisconsin also beefed up its regulations for isolated wetlands in response to SWANCC, so the Trump administration's WOTUS analysis assumes it will again expand protections.

But since 2012, Badger State legislators have been chipping away at those protections. Wisconsin already has a law on the books preventing state agencies from implementing environmental protections that are "more stringent" than federal rules.

Last July, a new law took effect eliminating permit requirements for dredging and filling of isolated wetlands smaller than an acre in urban areas and 3 acres in rural ones.

"Given the recent changes in state law, and the composition of the government, it seems unlikely that the state of Wisconsin would take action to expand state protections" if the WOTUS proposal is finalized, said Erin O'Brien, policy programs director at the Wisconsin Wetlands Association.

Jeanne Christie, who recently retired from her post leading the nonprofit Association of State Wetland Managers, says the Trump administration should understand that "SWANCC was a long time ago."

"Both those states would be in a very different place now," she said, "and it would be relatively evident to anybody working on this issue."

Methodology

For its analysis, the administration emphasized states having their own dredge-and-fill permit program.

Even though the program might not cover all waters or activities regulated by the Clean Water Act under current regulations, the analysis says, the existence of such programs serves "as an indicator of a state's interest and capacity in regulating dredge and fill activities within the waters of their state."

"As a result, the economic analysis has made the simplifying assumption that states with existing programs, regardless of scope, are likely to have the capacity and interest to regulate waters that may no longer be jurisdictional following a change in the definition of 'waters of the United States,'" the administration says.

It also considered whether states legally define "waters of the state" more broadly than the current "waters of the U.S." definition or have legal limits preventing state agencies from acting without approval of their legislatures.

States were deemed "likely" to increase wetland protections if they had their own dredge and fill program and had an expansive "waters of the state" definition, but didn't have any legal limitations.

The administration predicted states "may" increase their own protections if they didn't have legal limitations but had either their own dredge and fill program or a broad definition of "waters of the state."

Two states the administration says might increase regulations in response to WOTUS don't have their own permit program for dredging and filling: Nebraska and Nevada. Those two rely on Section 401 of the Clean Water Act, which allows states to "certify" whether Army Corps permits for dredge and fill projects will adhere to their own water quality standards.

Those certifications apply only to projects that require Clean Water Act permits from the Army Corps. If fewer projects require permits under the new WOTUS proposal, the states won't be able to weigh in on as many projects.

The only thing that can fill that gap is the states deciding to create their own dredge and fill programs.

But both Nebraska and Nevada have fewer than one full-time employee devoted to those

certifications, according to a 2015 report from the Association of State Wetland Managers.

To protect wetlands and waterways no longer covered by the new WOTUS definition, the states would have to create entirely new regulatory programs covering a topic hardly any staff currently work on.

Creating a new program — and finding the funding for it — is a high bar. Christie notes the Army Corps currently charges just $100 per permit, no matter how large or complicated a project might be.

"States setting up their own programs are either going to have to increase permit costs for the applicants or find some other very substantial forms of funding from general funds or taxes," she said.

Needing to increase funding could also be an issue for the six states that only have their own programs for coastal wetlands and otherwise rely on the federal Section 401 certification process.

Expanding a state program inland could take considerable time and funding in a state like Louisiana, but that hasn't stopped the Trump administration from predicting the Pelican State might increase its protections.

'Begging, borrowing and stealing'

Even states that already have comparatively strong dredging-and-filling permitting programs could face large obstacles in expanding those programs.

The 21 states identified by the Trump administration as "likely" to increase their own protections following WOTUS implementation have some of the strongest wetlands protections in the nation.

But many still would need to undergo substantial changes to avoid a lapse in jurisdiction. New York, for example, protects all tidal wetlands regardless of size, but only freshwater wetlands larger than 12.4 acres, unless smaller wetlands are shown to be of "unusual local importance."

The federal government doesn't currently place size restrictions on wetlands that are protected under the Clean Water Act, meaning New York would have to change its regulations and potentially add staffing to ensure no currently protected wetlands fall through the cracks if the proposed WOTUS rule is implemented.

Beefing up even strong programs takes time and money that states might not want to spend, said Julia Anastasio, executive director and general counsel at the Association of Clean Water Administrators. "You might need some more employees, and it takes time to get them up to speed," she said.

The new WOTUS rule could force states wanting to expand their wetlands programs to choose between hiring new employees and transferring staff from other programs.

"I'm not sure we have any members who feel adequately staffed in any of their programs, so you're going to be begging, borrowing and stealing to increase protections to this level," Anastasio said.

Anastasio and Christie both said the Trump administration should have considered more factors in determining whether a state would expand its own regulations in response to WOTUS.

Merely looking at the laws currently on states' books isn't enough. "You have to take into account the same politics or economics states would as part of their own analyses," Anastasio said.

"I don't think these categories correspond very well to the things that actually determine whether or not states will take action," Christie said.

And while some states might see a federal rollback and decide they want to step up, Christie said the history in states like North Carolina shows some might take the opposite approach.

"What I expect would happen in an unknown number of states is that legislatures, urged by interest groups, actually say, 'If the federal government doesn't think it's important, then we shouldn't either,'" she said.

Clean Air Act: Bill Barr's tangle with the Clean Air Act

(Greenwire, 1/14/2019) **Ellen M. Gilmer, E&E News reporter**

In 1992, President George H.W. Bush's attorney general sat in a Senate hearing room and fielded questions about the Clean Air Act.

It was an unusual exchange. The Justice Department's top official doesn't tend to get involved in technical issues of environmental law.

But after DOJ waded into an EPA-White House battle over air pollution rules that year, Democrats on Capitol Hill wanted to know if the attorney general had overstepped.

The DOJ leader was Bill Barr, a name once again circulating in Washington as President Trump moves to elevate him to his old post of attorney general. His confirmation hearing begins tomorrow.

Barr's particular role in the Clean Air Act clash of 1992 remains disputed, but the controversy is notable for a nominee poised to lead DOJ as it handles more and more cases involving environmental rollbacks and reinterpretations of cornerstone anti-pollution measures.

The issue dogging Barr in 1992 was an EPA rule addressing part of the 1990 Clean Air Act amendments: Title V, a landmark federal permitting system for factories, power plants and other sites that release pollutants into the air.

Title V established central federal permits to outline the assorted emissions standards and operating requirements in place for sources. Officials at EPA and the White House disagreed, however, on certain features of the program, including when to involve the public in proposed permit changes.

Critics accused the White House and Barr's DOJ of pressuring EPA to insert a "massive loophole" in the program by allowing certain permit changes without letting the public know.

"Frankly, I am concerned about the role that the Justice Department played in the development of this loophole," then-Sen. Howard Metzenbaum (D-Ohio) said during the 1992 Senate hearing, a Judiciary Committee session on DOJ appropriations.

Barr defended himself and his agency, rejecting Metzenbaum's suggestion that DOJ did the White House's bidding by drafting a key legal opinion that supported relaxed public comment requirements.

"No one ordered me to prepare any opinion," he said during the hearing, "and no one directed me or the department, as far as I am aware, to come up with a particular result."

Infighting over air permits

The permitting fight at issue in the Barr and Metzenbaum exchange is now a dusty page of Clean Air Act history.

It centered on "minor permit modifications," air permit changes under EPA's Title V rule that qualify for fast-tracked consideration by federal and state permitting authorities due to their relatively narrow scope.

According to a 1993 law review article chronicling the debate at the time, manufacturers, power companies and other big facilities pushed EPA to create a streamlined process to ensure flexibility for sources seeking simple changes to their approved operating permits.

Companies shouldn't have to go through a long and involved permit revision process just to make small permit tweaks, industry leaders argued. Environmentalists cautioned that the public should have a chance to weigh in on any changes that could result in an increase in emissions.

An initial EPA proposal incorporating industry's request drew widespread opposition from environmentalists and Democrats on Capitol Hill, who held hearings digging into the issue. They were concerned that the term "minor" would apply too broadly and that operators could effectively rewrite permits without close oversight.

EPA walked back the plan and fought with the White House for months over the appropriate scope of permit changes the provision could cover.

According to then-EPA Administrator Bill Reilly, industry's preferred approach of cutting out public comment was championed by Vice President Dan Quayle's rule-busting Council on Competitiveness. The shadowy panel included the attorney general and other administration officials and staff focused on easing regulations for American businesses.

But Reilly was sticking with the advice of EPA's top lawyer at the time, E. Donald Elliott, who wrote a memo on his last day of work in 1991 before leaving for academia that questioned the legality of any option sidestepping public comment on environmentally significant changes.

"I was then informed by Chief of Staff Sam Skinner that the President sided with the [Competitiveness] Council," Reilly said in an email to *E&E News*. "I declined to accede to the President's decision arguing that the Clean Air Act gave the authority to the Administrator and my opinion was that the lawful course was to require a hearing.

"I said that in the face of a detailed opinion by my general counsel, the only authority I would defer to was the Justice Department," he added.

DOJ delivered just that in May 1992 when the acting chief of the agency's environmental division, Barry Hartman, wrote a legal memo concluding that minor permit changes could skip public comment without violating the law.

"To the extent that Mr. Elliott's August 16, 1991, Memorandum adopted a differing position, concluding that public notice and comment are required for all minor permit amendments, we have determined that his analysis is incorrect," the DOJ opinion said.

Barr sent the document to Reilly, noting that it "memorializes and elaborates on the oral and written advice previously provided by the Department on this question."

The EPA administrator backed down.

"I accepted that the Attorney General trumped the EPA General Counsel and had the regulation drafted to conform, i.e. no need for a hearing," Reilly told *E&E News*.

Blowback for Barr

EPA finalized the regulation with the White House-favored approach: a streamlined process without a mandatory public comment period for permit changes deemed minor.

The provision allows companies to file an application for qualifying permit changes and adopt them right away. EPA has 45 days to review the application, and state regulators have 90 days to sign off or deny it.

The Senate Judiciary Committee met for a DOJ appropriations hearing just a few days later, and Metzenbaum seized on the agency's involvement in the regulatory process, questioning whether Barr, who was a member of Quayle's council, ordered the legal opinion to please the White House.

"[I]t sure in the devil looks political, and it looks like the Competitiveness Council is just playing the political game doing whatever business wants it to do, and the attorney general of the United States is going along with it," the senator told Barr at the hearing.

Barr strongly disputed Metzenbaum's account and allegations of political meddling. He rejected the senator's claim that DOJ's legal opinion served as an after-the-fact rationalization for the White House's industry-friendly approach. DOJ worked with both EPA and Quayle's council throughout the process to advise on how different proposals would stand up in court, he said.

While it's true, he told Metzenbaum, that DOJ's legal opinion was sent to EPA after the president got involved, that was only after "EPA had been repeatedly informed of our legal conclusions."

He also defended Hartman's memo on the substance.

"Our legal analysis of this issue was and is that the 1990 Clean Air Act Amendments permit EPA wide latitude either to require the States to provide for notice and comment, or to permit the States to reach their own determinations ... as both the initial and final EPA permit rules provide," Barr said in response to written questions from then-Sen. Joe Biden (D-Del.), who chaired the committee.

Barr did not respond to a request for comment for this story.

Hartman, now in private practice in Washington, D.C., declined to comment on the matter. In response to separate *E&E News* questions about Barr's nomination last year, however, Hartman reflected on Barr's tenure as attorney general and recalled that he was "very respectful and appropriately deferential to the career lawyers" at DOJ.

Elliott, the former EPA lawyer who questioned the legality of bypassing public comment, said he never expected the issue to become so controversial when he wrote his memo, and he didn't remember Barr playing a role — though he had left the agency by then.

"Until I read the testimony from Metzenbaum, I did not know that Bill Barr was involved in it in any way," he told *E&E News* in a recent phone call.

Lasting impacts

EPA's minor permit modifications provision caused an uproar from environmentalists at the time.

Then-Rep. Henry Waxman, the California Democrat behind much of the 1990 air legislation, denounced the measure as "brazenly illegal" and criticized Quayle's Council on Competitiveness for its role in the rulemaking process.

"The council forced the E.P.A. to insert a loophole allowing permit holders to increase pollution levels and rewrite important terms without public scrutiny," he wrote in a 1992 New York Times op-ed. "This loophole is brazenly illegal."

Environmental groups sued EPA over the permitting rule, but the case stalled when the Clinton administration began considering changes — which it ultimately abandoned.

"This is a rare example of a major Clean Air Act regulation that did not get litigated," said Keri Powell, a former EPA and Earthjustice attorney now in private practice. "It just got subsumed with all these other fights with other things and fell off the radar," she added later.

The 1992 public comment exception for minor permit changes is still in effect today. And while environmental lawyers have learned to live with it, the provision is still a source of frustration.

"Often, substantial pollution-increasing changes at major sources like power plants, refineries, incinerators — all of these big sources that people are concerned about in terms of how they are affecting public health — often these things are classified as minor when they really are significant," Powell said.

"One of the most important reasons to enable the public to know what's happening and to comment on those changes is to make sure that they really are minor, and that they shouldn't be triggering more significant requirements."

The 1992 controversy surrounding Barr's role in the issue has been largely forgotten, however.

Trump tapped Barr early last month to replace the previous attorney general, Jeff Sessions. Environmental groups, more preoccupied with Trump's nomination of Andrew Wheeler to become permanent EPA chief, have given Barr's bid varying levels of attention.

The Natural Resources Defense Council, for example, has not taken a position on Barr's candidacy. But the Center for Biological Diversity, Earthjustice and the League of Conservation Voters joined more than 70 civil rights organizations and other advocacy groups in a letter to senators last month expressing "serious concerns" about the nomination.

"There's no indication that Barr would challenge the Trump administration's attempts to undermine our democracy, our voting rights, and the enforcement of crucial environmental protections," Ben Driscoll, head of the league's judiciary program, said in a statement Friday that singled out Trump's plan for a southern border wall as "environmentally destructive."

Attempts to get comment from two other major environmental groups, the Environmental Defense Fund and the Sierra Club, were unsuccessful.

Reporter Sean Reilly contributed.

NEPA: Trump administration to relax rollback of vehicle fuel efficiency

(Greenwire, 1/16/2019) **Maxine Joselow, E&E News reporter**

Sen. Tom Carper (D-Del.) today indicated that the Trump administration plans to retreat slightly from its aggressive rollback of vehicle fuel efficiency rules.

"I have heard that the Trump administration now plans to finalize a 0.5 percent annual increase in the stringency of the standards," said Carper, the ranking member on the Environment and Public Works Committee, at the confirmation hearing of Andrew Wheeler for EPA administrator.

This marks a less draconian version of the administration's original proposal to freeze fuel economy requirements at 2020 levels through 2026. Environmentalists had fretted that the original proposal would lead to a dramatic spike in greenhouse gas emissions and oil consumption.

Still, the updated proposal would fall far short of President Obama's vision for increasing the stringency of the standards each year. Along with the Clean Power Plan, the car rules formed a central plank of the Obama administration's climate agenda.

Carper noted that a 0.5 percent annual increase would be "10 times weaker than the current [Obama-era] rules," adding, "That's not a win-win outcome. It's a lose-lose."

Carper did not specify how he learned of the administration's updated plans, which have not been previously reported.

But the Democrat met last month with Deputy Secretary of Transportation Jeffrey Rosen, one of the key architects of the car rules rollback.

Carper also told reporters he met yesterday with auto industry executives — including those from General Motors Co., Ford Motor Co. and Fiat Chrysler Automobiles — to encourage them to support uniform fuel efficiency standards across all 50 states.

"If the auto industry is serious about a 50-state deal, you've got to lobby," he said, adding, "I did not talk to one auto company that wasn't on board on a 50-state deal."

Wheeler was on Capitol Hill this morning for his confirmation hearing, where Democrats on the EPW panel grilled him on a range of regulatory rollbacks at the agency.

Greens and Democrats remain deeply concerned that the car rules rollback could lead to protracted litigation between the Trump administration and California, which has the statutory authority to set tougher tailpipe emissions standards than the federal government.

Asked what Wheeler could say to alleviate this concern, Carper told reporters the acting EPA chief could make the following declaration: "I've said publicly I'm for a 50-state deal. Now I'm determined to make it happen. I'm going to move heaven and earth to make it happen if confirmed."

Wheeler made no such assurance at the hearing.

He said the Obama administration only wanted corporate average fuel economy standards to lower emissions, while the Trump administration is using the rule to target car affordability and road safety.

"We have multiple goals for the program, multiple policy goals, including saving lives," Wheeler said, claiming the rule would save 1,000 lives a year by making it cheaper for drivers to buy newer, safer cars.

EPA and the Department of Transportation have joint jurisdiction over the car rules. Asked for comment, EPA spokeswoman Molly Block said

in an email, "The Agency — in conjunction with DOT — is working on completing the rule. No final decisions have been made."

DOT spokesman Andy Post didn't immediately respond to a request for comment.

Reporters Nick Sobczyk and Adam Aton contributed.

Clean Water Act: D.C. Circuit: States 'far exceeded' authority on dam plan

(Greenwire, 1/25/2019) **Ellen M. Gilmer, E&E News reporter**

Federal judges today rejected part of a carefully negotiated decommissioning plan for hydroelectric dams along the Klamath River, slamming California and Oregon for trying to "usurp" federal authority over licensing decisions.

The ruling from the U.S. Court of Appeals for the District of Columbia Circuit involves the Klamath Hydroelectric Project, a series of dams and reservoirs along the Klamath River. It is expected to fuel broader criticism of states' use of water permitting authority to block energy projects, including gas pipelines and coal export terminals.

The case involves a challenge from the California-based Hoopa Valley Tribe, whose reservation is downstream from the Klamath project in a rugged and remote part of Northern California.

The Klamath dams have had a devastating impact on salmon runs in the river, and tribes have fought for years to remove them. In 2010, project owner PacifiCorp agreed to remove the dams, which produce very little electricity anyway.

As part of the agreement, the utility agreed to annually withdraw and resubmit its water permit applications for dam relicensing to Oregon and California — thereby blocking the Federal Energy Regulatory Commission from intervening to approve relicensing.

Section 401 of the Clean Water Act gives states no more than a year to approve or deny project applications; if a state decision isn't made at that point, the federal government can step in. If PacifiCorp withdrew its application each year, the one-year clock would keep resetting, and the states would retain jurisdiction rather than ceding it to FERC.

The Hoopa Valley Tribe challenged the plan, arguing that California and Oregon clearly exceeded the one-year clock for PacifiCorp's original permit application, which was filed in 2006. The tribe urged FERC to get involved, but the agency refused in 2014.

The D.C. Circuit rejected the "withdraw-and-resubmit" scheme today, noting that the states had "far exceeded" the one-year maximum, and lamented, citing FERC, that "it is now commonplace for states to use Section 401 to hold federal licensing hostage."

The opinion sidesteps a decision on the legitimacy of such withdraw-and-resubmit arrangements generally and instead focuses on the specifics of how PacifiCorp handled its application.

"PacifiCorp's withdrawals-and-resubmissions were not just similar requests, they were not new requests at all," Senior Judge David Sentelle, a Reagan appointee, wrote for the court.

"By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue," he added later. "Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."

The court ordered FERC to move forward with a review of PacifiCorp's application for relicensing the project.

Judges Thomas Griffith, a George W. Bush appointee, and Nina Pillard, an Obama appointee, joined in the decision.

Steptoe & Johnson LLP attorney Cynthia Taub said the decision could be useful for energy companies seeking to push back on state efforts to block infrastructure.

"However, the impact of the decision may be limited by its facts — the court emphasizes that in this case, there was a written agreement to delay the certification," she said. "Thus, states may still be able to informally suggest that an applicant withdraw and resubmit to avoid denial."

"But this decision at least suggests that mere resubmittal of the exact same application should not restart the clock," she said.

State oversight of Section 401 permits has been a contentious issue for pipeline development and other energy projects. In New York, for example, state officials have used their water permitting authority to block multiple natural gas pipelines. In two cases, FERC intervened and found the state had exceeded its one-year clock to review the projects.

The Trump administration is working on executive actions that would reel in states' authority for Section 401 permitting.

Reporter Jeremy P. Jacobs contributed.

Lead NEPA Story* (*continued from page 1)

Politico, which first reported on the executive actions, cited a senior administration official who said the push was aimed at showcasing the United States' energy strength before Russia.

An attorney and lobbyist who has represented energy companies in Washington for over two decades said there had been reports about the administration using executive action to address energy infrastructure issues.

The attorney said action from the administration would be welcome and noted the challenge of meeting the administration's goal of "energy dominance" without taking more direct action on improving energy infrastructure. Lack of adequate and predictable infrastructure is also hampering U.S. companies' expansion into foreign markets, said the attorney.

"Hopefully, an executive order can set that appropriate tone on pipelines, transmission, LNG and related topics. Of course, agencies must implement any changes in priorities. And in some cases, Congress must act as well. But executive action can concentrate attention," the attorney said.

Another industry source with direct knowledge of the executive action said such an order could touch broadly on energy issues, even though it is billed as being focused on energy infrastructure.

"The Trump administration has taken great strides to grow America's energy renaissance into an asset in ways it never has been, but there's lots of work left to be done. Industry is looking for President Trump to build on his past actions to make permitting more predictable, transparent and, frankly, sane," the source said. "This is a golden opportunity to maximize the potential of all the energy resources and technology America has developed to help us at home and abroad."

An executive action could help the Trump administration appease both energy producers pushing back on Trump's steel tariffs and Republicans who for months have been looking at potential legislation and administrative changes to stop states from using their authority under the Clean Water Act to halt or slow natural gas pipelines.

But it would also run into stiff opposition from environmental groups and Democratic governors like New York's Andrew Cuomo, who have used state authority under the Clean Water Act to block controversial gas projects.

Where are the details?

Sources expect any executive action to broadly apply to infrastructure permitting, with a focus on easing transport of fossil fuels from the wellhead to market, either domestically or internationally. Doing so could include facilitating construction of pipelines across international borders, as well as LNG exports.

The industry source with direct knowledge of the executive action noted that its broader focus was to leverage "energy dominance" both geopolitically and to enhance the U.S. economy. The administration is looking at a variety of ways to eliminate or ease obstacles to those objectives.

"It's important for people to appreciate how ever-present infrastructure is throughout the entire energy economy, which is to say actions focused on infrastructure is much more than pipelines and export facilities," the source said.

The executive action is meant as a tool to focus attention and prioritize energy-related issues within the Trump administration.

"It can facilitate a process, but it cannot add authority inconsistent with underlying statutes," the attorney said.

The order would build on previous efforts early on in the Trump administration to promote infrastructure improvements. Among those is Executive Order 13807, which was aimed at increasing accountability in environmental review and the permitting process for infrastructure projects.

That executive order established the "One Federal Decision" process, in which one agency is responsible for making sure a project moves through interagency review and sets a unified timeline across those agencies.

Ross Eisenberg, vice president of energy and resources policy at the National Association of Manufacturers, noted that the Trump administration had previously put out a comprehensive list of improvements to environmental review under the National Environmental Policy Act and on permitting changes.

"There's a lot of good ideas in that. To the extent they operationalize that, that would be fantastic," Eisenberg said.

Among the items NAM would like to see change is to enable federal agencies to run concurrent environmental reviews of a project, instead of requiring each agency to conduct reviews one after the other, with no specific deadline of when the reviews had to be completed.

"A simple fix is to require them to work all at the same time. We would like to see that become mandatory," he said.

An administration official had signaled last year the president would focus on energy infrastructure in 2019.

Larry Kudlow, director of the National Economic Council, told attendees of an October event at the Economic Club of Washington, D.C., that the administration would be continuing to make progress on its infrastructure agenda. He noted the need for more pipelines for natural gas.

"We need infrastructure, including pipelines. We need east to west, we need west to east," he said, according to reporting by *The Hill*.

Clean Water Act

Energy companies have pushed the administration for help reforming states' authorities under the Clean Water Act since New York and Washington refused to permit two high-profile projects in 2016 and 2017, respectively.

The law's Section 401 clearly grants states the right to "certify" that projects requiring Clean Water Act permits comply with both the act and their own water quality standards. That means projects being permitted federally by EPA, the Army Corps of Engineers or the Federal Energy Regulatory Commission also must be approved, denied or approved with conditions by states.

EPA water chief David Ross told the Environmental Council of States' annual meeting this fall that the agency is considering changing policies for how much time states have to make their certification decisions — a move that many state groups including the Western Governors' Association, Association of State Wetland Managers and Association of Clean Water Administrators have already expressed concerns about.

Sources at the meeting said Ross didn't comment on whether the policy change would come via an executive order, agency guidance or formal rulemaking, but Senate Environment and Public Works Chairman John Barrasso (R-Wyo.) has requested the agency update Obama-era guidance on 401 certifications.

Under the Clean Water Act, if states don't make their certification decisions "within a reasonable time" set by federal agencies, they waive their authority and a project can proceed without state action. The law itself is vague about when that clock starts, and EPA has previously interpreted it to mean the countdown begins once a state decides a permit application is complete.

Critics have argued that schedule allows states to run out the clock to get more time for review, telling project developers at the last minute their applications are incomplete and states will have to deny the application if they don't get more information, which would restart the clock. Both New York and Washington state engaged in similar requests before denying permits for the Constitution pipeline and a terminal from Millennium Bulk Terminals, respectively.

The administration could place a limit on what is considered a "reasonable time" for state decisions, and determine that the clock starts ticking when applications are filed.

State groups have already pushed back in a letter to Ross against "any changes to agency rules, guidance and/or policy that may diminish, impair or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries."

Experts have also warned that, faced with tight timelines, overtaxed state regulators might be forced to deny permits they would otherwise approve if they had more time or information to consider them.

"It could be a classic case of be careful what you wish for," said Cynthia Taub, a partner at Steptoe & Johnson LLP who leads the firm's National Environmental Policy Act practice.

Talks of potential executive action arrive after a legislative fix from Senate Republicans failed to make it to the floor last Congress.

The bill, sponsored by Barrasso, would have required states' certification decisions to be based only on water quality concerns from the project in question, not other sources, and require states to publish clear requirements for water quality certification requests.

The bill is unlikely to be taken up again with a Democratic-controlled House.

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This edition of the National Desk was compiled by Harold Draper. For more information on NAEP, please contact the NAEP office at office@naep.org.