



Federal Permitting Reform Initiative Continues to Ignore Submarine Cable Infrastructure

On May 17, 2013, the White House released a Presidential Memorandum, “Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures” (“Memorandum”), that directs the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement (“Steering Committee”) to: (a) identify and prioritize within the next 60 days opportunities to modernize key regulations, policies, and procedures to reduce the aggregate project review and permitting time while improving environmental and community outcomes, and (b) develop within the next 120 days a comprehensive plan to modernize federal review and permitting of infrastructure projects. *See* www.whitehouse.gov/the-press-office/2013/05/17/presidential-memorandum-modernizing-federal-infrastructure-review-and-pe.

Concurrently with the issuance of the Memorandum, the Administration also issued its first annual report to the President regarding the reform initiative’s achievements thus far. *See* www.whitehouse.gov/sites/default/files/omb/reports/report-to-the-president-rebuilding-america-s-infrastructure.pdf. The annual report calls for appointment of coordinating agencies, establishment of timelines through integrated project planning, concurrent rather than consecutive reviews, application toolkits, and greater coordination in federal interagency processes and among federal, state, municipal, and tribal governments.

President Obama established the Steering Committee in 2012 to address permitting for “surface transportation, such as roadways, bridges, railroads, and transit; aviation; ports and related infrastructure, including navigational channels; water resources projects; renewable energy generation; conventional energy production in high-demand areas; electricity transmission; broadband; pipelines; storm water infrastructure; and other sectors as determined by the Steering Committee.” *See* Executive Order 13604, 77 Fed. Reg. 18887 (Mar. 28, 2012), www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr. The Steering Committee’s membership consists of representatives of the Departments of Defense, Interior, Agriculture, Commerce, Transportation, Energy, and Homeland Security; the Environmental Protection Agency; the Advisory Council on Historic Preservation; the Department of the Army; and such other agencies or offices as the Steering Committee’s Chief Performance Officer may invite to participate. The Memorandum directs the Steering Committee to work with the White House Office of Management and Budget’s Office of Information and Regulatory Affairs (which reviews and approves paperwork requirements imposed by federal agencies) and the White House Council on Environmental Quality (which oversees implementation of the National Environmental Policy Act (“NEPA”).

Neither the Executive Order nor the Memorandum uses the term “telecommunications,” much less “submarine cable,” and the Federal Communications Commission (“FCC”) is not included among the member agencies. It is not clear whether the President excluded the FCC due to its status as an independent regulatory agency answerable to Congress (rather than an Executive department) or for some other reason. Regardless, it would be surprising for federal

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agencies to interpret the term “broadband” to include submarine cable infrastructure. Nevertheless, submarine cable operators will remain subject to many of the permitting processes targeted for reform. For example, the initiative will likely address reform of Army Corps permits issued pursuant to the Rivers and Harbors Act of 1899; consistency certifications issued by all federal agencies under the Coastal Zone Management Act; and environmental assessments and impact statements developed under NEPA. The Executive Order established a Federal Infrastructure Projects Permitting Dashboard for tracking permitting progress with nationally- or regionally-significant projects. See www.permits.performance.gov/projects/Nationally%20or%20Regionally%20Significant%20Projects. To date, there are no broadband projects—much less telecommunications or submarine cable projects—listed in the Dashboard.

Changes to many of these permitting processes would affect submarine cable operators, but to date submarine cable operators have not had a voice in shaping any of those changes. Some of the changes would likely benefit submarine cable operators. Other changes, however, could make it more difficult for submarine cable operators to protect their interests vis-à-vis other marine activities, whether to protect or preserve maintenance access for existing cable systems or preserve access to geographically diverse routes and landings for construction of new cable systems. While this problem is not new, as many federal agencies already fail to acknowledge the presence or importance of submarine cables, any new fast-track procedures for infrastructure such as offshore alternative energy projects could make the problem worse. Nevertheless, the Steering Committee’s process remains a relatively open one, and the submarine cable industry still has the opportunity to influence the priorities identified by the Steering Committee and the resulting modernization plan.

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For more information regarding federal infrastructure permitting reform or Wiltshire & Grannis LLP’s industry-leading undersea cables practice, please contact **Kent Bressie** at +1 202 730 1337 or kbressie@wiltshiregrannis.com, or the W&G lawyer with whom you regularly work.

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