

**PRIVILEGED AND CONFIDENTIAL
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MEMORANDUM

VIA E-MAIL

To: Rep. Ralph Samuels
Ms. Cheryl Sutton

From: William A. Mogel
Kate Brewer

Date: February 6, 2008

Subject: Application of Executive Order 13202 to an Alaska Gas Pipeline Project that Uses a Project Labor Agreement

I. QUESTION PRESENTED

Whether Executive Order 13202 would prevent a pipeline sponsor that complies with AGIA's requirement that the work be performed under a project labor agreement (PLA) from receiving federal assistance in the form of loan guarantees as set forth in ANGPA.¹

II. SUMMARY

It is unlikely that Executive Order 13202 would prevent a pipeline sponsor from being eligible for ANGPA loan guarantees. Executive Order 13202 provides that a federal agency shall prohibit the use of a PLA on a federally assisted construction project "to the extent permitted by law." Although there is no specific statute stating that the applicability of

¹ 15 U.S.C. §§ 720 *et seq.* (2004).

Executive Order 13202 to an Alaskan pipeline, ANGPA provides that it is the “sense of Congress” that the sponsor of the Alaska pipeline “negotiate a [PLA] ... to expedite construction.” Thus, it appears that is Congress’ intent that use of a PLA would not affect eligibility for ANGPA’s loan guarantees.

III. DISCUSSION

Section 17 of AGIA, 43.90.130(17), requires all applicants for a license to construct a pipeline to commit “to negotiate, before construction, a project labor agreement to the maximum extent permitted by law.” Under Section 720n of ANGPA, 15 U.S.C. § 720n, the Secretary of Energy is authorized to guarantee up to \$18 billion in loans and other debt obligations incurred to finance the design and construction of the pipeline and related transportation and production systems. Section 720n(b) of ANGPA contains three specific requirements for the loan guarantee: (1) a certificate of public convenience and necessity has issued for the project; (2) the loan or debt obligation must be issued by a qualified lender; and (3) the loan guarantee may be used only by the project chosen by the FERC as the qualified project. In addition, Section 720i of ANGPA, 15 U.S.C. § 720i, states the “sense of Congress” that, to maximize the economic benefits of the gas pipeline to the United States and Canada, “the sponsors of the Alaska natural gas transportation project should make every effort to ... negotiate a project labor agreement to expedite construction of the pipeline.”

Executive Order 13202 is intended to prohibit the use of PLA’s on federally funded or assisted construction projects. It states in pertinent part:

Sec. 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts ... shall contain any of the requirements or prohibitions set forth in section 1(a) ... of this order.

Section 1(a) of Executive Order 13202 prohibits any condition that would “Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations”²

In *Building and Construction Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), the Court of Appeals concluded that Executive Order 13202, on its face, neither exceeded the President’s constitutional power nor was preempted by the National Labor Relations Act. The Court acknowledged, however, that Executive Order 13202 would not be lawful if it were applied to a particular project contrary to the applicable funding statute. *See generally, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. 170 (1804) (executive order exceeds the executive power of the President under Article II, Section 1 of the Constitution if it is inconsistent with the intent of Congress).³

IV. CONCLUSION

The intent of ANGPA is that for a pipeline sponsor to be eligible for loan guarantees it must meet the three conditions listed in the statute and that eligibility is not to be affected by use of a PLA, since ANGPA encourages the use of a PLA. Assuming that the three conditions in ANGPA are met, Executive Order 13202 would not preclude the use of a PLA or disqualify sponsors from receiving loan guarantees because of AGIA’s PLA requirement.

² On April 6, 2001, Executive Order 13202 of February 17, 2001, was amended to add a subsection allowing the head of an executive agency, upon application, to exempt a particular project from the no-PLA requirement if at least one contract for the project had been awarded under an agreement or specification requiring a PLA as of the date of Executive Order 13202.

³ If the federal government concludes that Executive Order 13202 does not apply, it is unlikely that an opponent of the PLA requirement would be able to reverse that decision in court. Section 11 of Executive Order 13202 states, “This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right to administrative or judicial review, or any right, whether substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.” Courts typically refuse to allow private parties to sue in order to force a federal agency to comply with an executive order. *See, e.g., Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978, 86 S. Ct. 548, 15 L. Ed. 2d 469 (1966); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976).