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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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New Executive Orders Aim to Reduce Federal and State Permitting Obstacles for Pipeline and Energy Projects

By Cynthia L. Taub, Joshua Runyan, Monique Watson, Jody A. Cummings, and David H. Coburn*

Two executive orders were issued recently to expedite permitting processes for pipelines. The executive orders are the latest in a series of actions by the Trump Administration meant to reduce permitting obstacles for energy and infrastructure projects. The authors of this article discuss the orders and the implications.

President Trump issued two executive orders ("EO") to expedite permitting processes for pipelines. The first, entitled "Promoting Energy Infrastructure and Economic Growth," seeks to prevent states from blocking pipelines and other energy infrastructure by using authority granted under Section 401 of the Clean Water Act ("CWA").[1] The second, "Issuance Of Permits With Respect To Facilities And Land Transportation Crossings at the International Boundaries of the United States," provides that the authority to issue presidential permits for trans-border pipeline projects lies with the president and is no longer delegated to the Department of State. The executive orders are the latest in a series of actions by the Trump Administration meant to reduce permitting obstacles for energy and infrastructure projects.

POTENTIAL CHANGES TO 401 CERTIFICATIONS UNDER THE PROMOTING ENERGY INFRASTRUCTURE ORDER

The Promoting Energy Infrastructure EO includes a grab bag of initiatives related to energy infrastructure, but the primary focus is seeking to prevent states from blocking energy infrastructure under Section 401. Under that statute, companies must obtain certifications from the state before they can build federally-approved infrastructure, like pipelines, within the state's borders. A state can deny certification if it determines the project will have a negative impact on water quality within the state's borders, even if the project has been approved by a federal regulator like the Federal Energy Regulatory Commission ("FERC") or the U.S. Army Corps of Engineers ("USACE").

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* Cynthia L. Taub (ctaub@steptoe.com), Jody A. Cummings (jcummings@steptoe.com), and David H. Coburn (dcoburn@steptoe.com) are partners at Steptoe & Johnson LLP. Joshua Runyan (jrunyan@steptoe.com) and Monique Watson (mwatson@steptoe.com) are of counsel at the firm.

[1] 33 U.S.C. 1341.

Water quality certifications under Section 401 have become a focus for energy and transportation project opposition across the country. Most notably, New York has denied the 401 certification for three natural gas pipelines in recent years. However, this issue is not just impacting natural gas pipelines—401 challenges have impacted hydroelectric projects, mines, and other types of energy development. For example, the State of Washington denied the 401 certification required to permit construction of the Millennium coal export terminal, and that denial is now in litigation.

The new executive order attempts to reduce state obstacles to energy projects by directing the U.S. Environmental Protection Agency ("EPA") to review its existing guidance and regulations on Section 401. EPA regulations implementing CWA Section 401 were promulgated in 1971 and have not been updated since 1979.[2] EPA also issued a guidance document in 2010—the Water Quality Protection Tool for States and Tribes ("Section 401 Interim Guidance").

Specifically, Section 3 of the EO directs the following:

- EPA is to consult with states, tribes, and relevant federal agencies regarding existing 401 guidance and consider the following factors:
  - Timely federal-state cooperation and collaboration
  - Appropriate scope of water quality reviews
  - Types of conditions that may be appropriate to include in a certification
  - Reasonable review times for various types of certification requests
  - The scope of information states and tribes need to act on a certification request
- EPA had 60 days from the date of the EO, or until June 10, to issue new guidance to supersede the Section 401 Interim Guidance to clarify the items set forth above.
- EPA has 120 days after the date of the EO, or until early August, to publish proposed rules revising its 401 regulations.
- EPA is directed to finalize such rules no later than 13 months after the date of the EO, or by May 2020.
- After all of the above is done, EPA is directed to lead an interagency review with the head of each agency that issues permits or licenses subject to the certification requirements of Section 401 of the Clean Water Act ("401 Implementing Agencies") of existing guidance and

[2] 40 C.F.R. Part 121.

regulations for consistency with EPA guidance and rulemaking. The primary federal implementing agencies are FERC and the USACE. The implementing agencies are directed to update their respective guidance and regulations to be consistent with EPA's new guidance and regulations, as well as the policies set forth in the EO.

The EO imposes very short timelines on EPA—60 days to issue new guidance, and 120 days to issue proposed regulations. These timeframes are likely only feasible because EPA apparently has already been considering changes to its guidance and regulations on Section 401, in response to industry and Congressional pressure.[3] David Ross, assistant administrator for EPA's Office of Water, stated last year that EPA was considering revising the 401 process, including clarifying the timeliness and scope of state reviews, and raised the possibility of new guidance or rulemaking. The timeline for revised regulations is also more feasible because EPA's 401 regulations are very concise and focus only on procedural issues.

EPA issued guidance on June 7 to clarify the implementation of Section 401. The guidance "is intended to assist federal permitting agencies and states and tribes until the EPA promulgates a final rule updating its CWA Section 401 regulations." As directed by the EO, EPA's new guidance addresses the following topics:

- *Timing.* EPA does not set new timelines in the guidance. However, the guidance provides that an outstanding request for information does not toll the time for acting on a certification request. Although EPA's prior Section 401 guidance indicated that the timeline for state action began upon receipt of a "complete application," EPA has now reversed that position and provided that the timeline begins on receipt of a written request for certification. "Accordingly, any effort by a state or tribe to delay action past the reasonable timeline due to insufficient information may be inconsistent with the Act and specifically with Section 401."
- *Scope.* EPA provides that the scope of a Section 401 certification review, and the decision whether to issue a certification, is limited to an evaluation of potential water quality impacts. This is a critical point, as many states have been criticized for bringing in factors arguably unrelated to water quality, such as climate change. EPA goes on to suggest that if a state issues a certification with conditions "not related

[3] For example, several senators sent a letter to then-Acting EPA Administrator Wheeler in 2018 asking EPA to "determine whether new clarifying guidance or regulations are needed in light of recent abuses of the Section 401 process by certain states."

to water quality requirements," or denies a certification based on factors "beyond the scope of Section 401," federal agencies may issue a permit without the conditions, or determine that waiver has occurred.

- *Information.* EPA recommends that project proponents provide appropriate *water quality-related information* to the state to ensure timely action on a request. EPA recommends that states do not delay action on a certification request based on on-going NEPA reviews, since the environmental review required by NEPA has a broader scope than that required by Section 401.

It remains to be seen how effective these EPA actions will be in connection with the Section 401 certification process. The state certification power is statutory, and neither a presidential order nor an EPA regulation can override the terms of the statute. Congress continues to mull potential legislative fixes, but none of the bills related to CWA 401 has gotten traction so far.[4] Moreover, given the strict enforcement of Section 401 that we have seen from courts to date, it may be particularly difficult for EPA to alter the certification process administratively.

The one factor the statute explicitly allows the federal government to control is the timing of the 401 certification process. CWA Section 401 provides that the federal permitting or licensing agency may set the certification response time limit to any "reasonable period of time (which shall not exceed one year)."[5] The USACE has already taken steps under this statutory provision to try to "tighten up" the 401 certification process. The Army's Assistant Secretary for Civil Works issued a policy directive late last year requiring the USACE to adhere to a "default" of 60 days for states to act under Section 401 with regard to USACE's issuance of dredge and fill permits under CWA Section 404. The memorandum also requires USACE to establish criteria for circumstances that may warrant additional time for states to issue a certification decision. The new 60 day policy is aimed at streamlining the process and increasing consistency across USACE districts, as currently states are often given up to a year to issue certification decisions.

FERC has long interpreted Section 401 as meaning that a certifying agency waives the certification requirements of Section 401 if the certifying agency does not act within one year after receiving a certification request. More

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[4] For example, Senators Barrasso, Inhofe, Capito, Enzi, and Daines introduced the Water Quality Certification Improvement Act of 2018 (S. 3303). The legislation would make several changes to Section 401 about the appropriate scope of review for a water quality certification, and would add procedural requirements for state processing of certification applications.

[5] 33 U.S.C. 1341(a)(1).

recently, it has emphasized that the purpose of 401's reasonable time period language is to prevent delay. Consequently, it has found in a number of cases that a state has waived its 401 authority by failing to act within a year. It has also rejected the withdrawal and resubmission processes used by some states as not complying with 401's timeline. However, FERC has emphasized that certifying agencies are not without remedy—they can deny certification applications with or without prejudice.

While administrative actions cannot restrict a state's substantive authority under 401, they can provide more certainty on timing, as well as establish guidelines to inform the certification process. In the meantime, project opponents continue to actively lobby states to deny 401 certificates for energy and infrastructure projects, and frequently challenge state certification decisions that are favorable to new projects being built. Section 401 is therefore likely to remain an important and potentially contentious process for many energy and infrastructure projects.

OTHER DIRECTIVES UNDER THE PROMOTING ENERGY INFRASTRUCTURE ORDER

Beyond the Section 401 issues, the Promoting Energy Infrastructure EO also includes an assortment of other actions related to energy projects, including:

- Directs a review of safety standards for liquefied natural gas ("LNG") export terminals and rules that prevent LNG from being transported by rail car. In August 2018, FERC signed a memorandum of understanding with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration to coordinate the siting and safety review of FERC-jurisdictional facilities. This led to the Commission's authorization of a new LNG export terminal in Cameron Parish, Louisiana, earlier this year.
- Orders the Department of Labor to review existing guidance on fiduciary responsibility related to energy infrastructure investments.
- Tasks the Energy and Transportation Departments with preparing reports on limitations to transporting natural gas to the Northeast and other regions.

One of the miscellaneous provisions in the EO of particular interest to pipelines is Section 6, which relates to federal right-of-way renewals. The EO provides that infrastructure right-of-way agreements routinely include sunset provisions that create "legal and operational uncertainties for owners and operators of energy infrastructure." To remedy this, the EO directs the Secretaries of Interior, Agriculture (for USFS lands), and Commerce to develop a master agreement for energy infrastructure right-of-way renewals or reautho-

rizations; and to initiate renewal or reauthorization processes for all expired energy right-of-way grants, leases, and agreements within one year of the date of the order.

CHANGES TO THE PRESIDENTIAL PERMIT PROCESS

A separate executive order issued April 10 clarifies that the final decision to approve certain cross-border infrastructure rests with the president rather than the secretary of state. The EO is intended to streamline the process for issuing presidential permits for certain cross-border infrastructure projects, including pipelines.[6]

The following points are worth noting with respect to the new presidential permit EO:

- The president is now the decision-maker relative to any application for a presidential permit. As opposed to an executive branch agency, the president is not typically subject to NEPA or to judicial review.
- The State Department will still receive permit applications and provide advice to the president on whether a project would serve United States foreign policy interests. The EO requires the State Department to adopt procedures by May 29, 2020 to ensure that the State Department completes its recommendation process within 60 days after the receipt of a presidential permit application.
- The EO specifies that a presidential permit will be granted if the project would serve U.S. "foreign policy interests." The State Department will need to clarify how an applicant satisfies this requirement.
- An intra-agency review period is no longer required; rather, the secretary of state is to advise the president as to whether the president should request the opinion of any heads of agencies concerning the application, and if so, require such agencies to provide any views within 30 days from the date of a request. The EO also allows the secretary of state to solicit advice from state, tribal, and local government officials, and foreign governments on any application, with any advice needing to be provided to the secretary of state within 30 days from the date of a request.
- The EO provides that all existing presidential permits remain in full

[6] The presidential permit EO supersedes several EOs governing the presidential permitting process, including EOs used heretofore to permit cross-border oil pipelines. However, it does not impact Executive Order 12038, under which the Department of Energy issues presidential permits for cross-border electric transmission facilities.

> effect in accordance with their terms unless and until modified, amended, suspended, or revoked by the appropriate authority.

There are many unknowns at this point with respect to the new process that the State Department will establish regarding presidential permit applications and advising the president on whether the applicant's proposed project will serve U.S. foreign policy interests. It is clear, however, that the new process is designed to avoid lengthy environmental reviews and resulting litigation on the sufficiency of such reviews, and also allow pipeline companies to obtain presidential permits in a shorter timeframe, at least while President Trump remains in office.