Recent changes to the process for permitting pipelines, particularly for natural gas, could see needed improvements to the speed and efficiency of the permitting process. However, several challenges remain.
The iconic line from the film Field of Dreams, “If you build it, [they] will come,” might work for ghosts in cornfields, but in case of infrastructure—particularly energy infrastructure—“they” are already here. It’s no secret that America is in urgent need of new and upgraded roads, bridges, and pipelines—including those for oil, natural gas, and related products. The U.S. energy renaissance, powered by twin breakthroughs in oil and gas drilling and extraction utilizing hydraulic fracturing, has driven domestic production to record highs and energy infrastructure sprinting to keep up. “Infrastructure” has become a buzzword for policymakers, though efforts to improve the process for permitting pipelines, particularly for natural gas, have been on the regulatory radar for years. President Trump’s infrastructure plan, along with recent efforts in Congress, have made several meritorious changes that could improve the speed and efficiency of permitting sought by stakeholders and sponsors alike. Challenges remain, however, particularly when it comes to state-level environmental decisions like water quality determinations under the U.S. Clean Water Act.

**CWA 401 and NEPA Concerns**

One of the primary state-level challenges for energy infrastructure projects is the denial of certifications under Section 401 of the Clean Water Act (CWA 401). Section 401 requires that applicants for federal licenses certify that discharges will comply with the Clean Water Act, including state-created water quality standards. This authority is extremely broad, not consistently applied across all states and its limitations have not been well-defined in law or in guidance from the U.S. Environmental Protection Agency (EPA). For example, some states interpret CWA 401 to apply to nonpoint source discharges like stormwater run-off while others do not. There is also a tremendous amount of variability in its application as staffing and resources available to state water agencies and managers also varies.

In the past two years, several federally permitted natural gas pipeline projects have been significantly delayed or effectively blocked by states refusing to issue CWA 401 certificates. In several instances, objections included non-water impacts such as a missing accounting of greenhouse gas emissions. While legitimate concerns as to water impacts should be thoroughly examined and vetted by the states, EPA, and the U.S. Army Corps of Engineers (USACE), the nature of the delegated authority, without further clarification, can become a tool for the further politicization of what should be a scientific and fact-based review.

If a project is subject to a National Environmental Policy Act (NEPA) analysis, then there will be overlap between the requirements of the NEPA process and the requirements of certain permits. For example, in the case of a NEPA review led by the Federal Energy Regulatory Commission (FERC), FERC requires placement of copies of air, wetlands, and other permits (with applications) on the publicly accessible FERC docket as part of the NEPA proceeding. FERC reviews the documents and in some cases requests the applicant take the analysis further, beyond the already-issued permits/approvals. For instance, a federal agency might provide its approval for the project of note, but FERC has the ability to review the letter, and request the permittee to provide more information, because FERC isn’t satisfied the previous federal authority that provided approval was sufficiently thorough. In another example, a proposed source may have been issued air permits from a state with an EPA-approved permitting program. FERC has required that permittees continue analysis and modeling of the proposed facility air emissions in combination with mobile air emissions (which can take several months of additional work), but offered no guidance on how to calculate mobile emissions.

While legitimate concerns as to water impacts should be thoroughly examined and vetted by the states, EPA, and the U.S. Army Corps of Engineers, the nature of the delegated authority, without further clarification, can become a tool for the further politicization of what should be a scientific and fact-based review.
If a project is subject to CWA Section 404 permitting, the USACE has authority for Section 404 permitting. To obtain the permit, however, review and consultation are required with multiple other federal agencies. In one recent Section 404 permitting effort, questions/concerns of seven federal/state agencies had to be addressed—EPA, USACE, FERC, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Texas Parks and Wildlife Department, and Texas General Land—all raising issues about maintaining sufficient bird and fish habitat.

Steps Toward Improvement

Section 41 of the 2015 Fixing America’s Surface Transportation Act (FAST Act) created a new governance structure billed as a “coordinated framework for improving the Federal environmental review and authorization process.” The legislation created the Federal Permitting Improvement Steering Council (Permitting Council) comprised of senior-level officials from 14 government agencies, the Council on Environmental Quality (CEQ), and the Office of Management and Budget. The Permitting Council’s primary function is to develop a coordinated permitting plan for completing the required environmental reviews and public and tribal outreach while providing a single point of contact for the entire federal review process. The Permitting Council is also empowered to enforce the coordinated schedule and referee disputes between agencies.

Among other things, Section 41 (FAST 41):
• reduces the statute of limitations for NEPA challenges from 6 to 2 years for covered projects and limits agency review of NEPA challenges to those from parties that submitted a related comment during the project’s environmental review;
• limits the ability of opponents to challenge a project after-the-fact through temporary restraining orders or preliminary injunctions; and
• gives the Permitting Council the responsibility of developing and maintaining an online permitting dashboard to improve project tracking and to increase transparency and accountability.

While available to projects in nearly every infrastructure sector, only those that meet certain cost or complexity thresholds are eligible for consideration under the FAST 41 program. The relatively new and relatively unknown program presents a promising though unproven opportunity to enhance interagency coordination and accountability, but state agencies—where many of the biggest coordination challenges lie—are included only if they opt in.

President Trump’s Infrastructure Plan

Improving America’s infrastructure was a key message during President Trump’s campaign and his ambitious infrastructure plan includes components to increase the efficiency and speed of permitting reviews. The cornerstone of the plan is a “one agency, one decision” structure for environmental reviews. While some agencies (FERC, for example) are already designated in statute or regulations as the “lead agency” for NEPA review, this is not universal for all types of projects. Further, the role and authority of the lead agency versus cooperating agencies, is not always clearly delineated. The plan envisions limiting the end-product of environmental review to one environmental document and Record of Decision (ROD)—“one federal decision.” This could eliminate some of the duplicative work of the multiple agencies that may be participating in the review.

Among funding proposals and pilot programs, the plan contains a number of items focused on permit processing improvement that could be beneficial for energy infrastructure projects. These include:
• constraining the scope of review to areas within an agency’s authority and limiting alternatives to those that are “feasible”;
• further narrowing of the scope of agency review for Section 309 of the U.S. Clean Air Act;
• encouraging the creation and use of government-wide categorical exclusion; and
• reducing the time frame and addressing delays for Section 401 of the Clean Water Act decisions.

The plan would also direct CEQ to issue regulations and guidance for improving NEPA reviews, limit the ability of other federal agencies to intervene in FERC proceedings, and allow non-federal entities to provide funding to agencies to support environmental reviews. While many of these proposals will require Congressional action, the Trump Administration has taken the substantive step of entering into a Memorandum of Understanding (MOU) that accomplishes some of the plan’s goals. Instead of a hard 21-month deadline for reviews suggested in the President’s plan, it sets a two-year average goal. The MOU calls for the development of policies to implement a “one federal decision” framework, including concurrent agency reviews, adherence to a permitting timetable, and the determination of lead agencies.

The MOU provides a helpful clarification of the lead agency’s authorities and responsibilities. These include developing a permitting timetable based on CEQ guidance, seeking state, tribal and local participation, preparing a single environmental impact statement in coordination with cooperating agencies, identifying alternatives to be analyzed and issuing a final ROD.

While the actual fruits of this MOU are yet to be borne, this is an encouraging development that in many ways represents
a proactive step forward. Combined with the efforts of the Permitting Council, these changes appear to shift the Administration's position from being just an arbiter of project permitting to that of a partner and promoter of infrastructure. However beneficial these changes may turn out to be, for most energy infrastructure projects, significant hurdles remain at the state and local level, out of the reach of this process improvements.

Conclusion

The business community, including the oil and natural gas industry, relies on a cost-effective regulatory system that promotes the certainty and predictability necessary to make the massive capital investments required to bring energy and other projects to the U.S. economy. Further, the pace of production in the oil and gas industry is not expected to slow dramatically anytime soon, and growth in new areas, such as the Permian Shale play in Texas and New Mexico, will require new infrastructure to move production to market. Within the industry, there is cautious optimism that the Permitting Council and the interagency “one federal decision” MOU will help streamline permitting processes. However, there is still more that can be done. Introduction of a legislative package that includes other aspects of the President’s plan and addresses concerns like CWA 401 would significantly help increase efficiency, transparency and accountability in permitting. The need is clear and API, its members, and industry partners are willing and able to help make that field of dreams a reality.

References

3. For example, two denials issued by the State of New York were made public by the state on Earth Day.