

Publications

Oil and Gas Alert: Presidential Energy Related Executive Orders Issued

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President Trump issued two Executive Orders (EO) on April 10, 2019 to expedite permitting and construction of primarily energy-related infrastructure projects. The two EOs were published in the Federal Register on April 15, 2019 (copies posted below). Some states have attempted to slow down or stop energy-related infrastructure such as pipelines by manipulating (some would say misusing) outdated or inefficient regulatory permitting processes. The EOs appear to be an attempt to overcome those efforts. The purpose and scope of the EOs are:

1. Executive Order 13867 (Fed. Reg. Docket: 2019-07645) - Issuance of Permits with respect to Facilities and Land Transportation Crossings at International Borders. The purpose of this EO is to expedite permitting of facilities crossing the international border, such as oil and gas pipelines to and from Canada. The EO uses the President's foreign affairs powers under the U.S. Constitution to create a Presidential Permit Application process that will be developed and adopted by the U.S. Secretary of State. Goal is to process cross-border permits within 60 days for projects such as pipelines, conveyor belts, water and sewer lines, transportation, and certain bridges. The Secretary of State will process the permit application, and issue an opinion of whether or not the issuance of the Presidential Permit would serve the foreign policy of the United States. Any decision to issue, deny or amend such permit shall be made solely by the President. All permits issued before the EO remain in effect, and the EO does not impair or otherwise affect the authority of an executive department or agency, and does not create any rights or benefits to any party against the U.S. (its departments/agencies/officers/employees) or any other person.
2. Executive Order 13868 (Fed. Reg. Docket: 2019-07656) - Promoting Energy Infrastructure and Economic Growth. The purpose of this EO is to promote efficient permitting processes, reduce regulatory uncertainties, and develop new energy infrastructure. Establishes a policy to promote private investment in the Nation's energy infrastructure through:
 - (a) efficient permitting processes and procedures that employ a single point of accountability, avoids duplication, reduces studies and reviews, and establishes clear and reasonable time tables;
 - (b) regulations that reflect best practices and best-available technologies;
 - (c) timely action on infrastructure projects that advance America's interests and ability to participate in global energy markets;
 - (d) increased regulatory certainty regarding the development of new energy infrastructure;
 - (e) effective stewardship of America's natural resources; and

(f) support for American ingenuity, the free market, and capitalism.

The EO specifically calls for revisions to the Clean Water Act (CWA) Section 401 state Water Quality Certification (WQC) process for federal agency-issued permits/licenses for projects which may result in a discharge to Waters of the United States (WOTUS). The WQC provides a state with the ability to review the impact of the project and determine if state water quality standards will be violated. A state may grant the WQC, grant with water quality-related conditions, deny, or waive its right to certify. The EO states that the U.S. EPA CWA Section 401 WQC interim guidance (i.e., "Water Quality Protection Tool for States and Tribes") and certain WQC regulations are outdated, causing confusion and uncertainty. The EO directs the U.S. EPA Administrator to consult with states in reviewing the WQC guidance and regulations to determine if any should be clarified to be consistent with the EO policies. This review is required to take into account federalism considerations underlying CWA section 401, and focus on (i) the need to promote timely federal-state cooperation/collaboration; (ii) appropriate scope of water quality reviews; (iii) types of conditions appropriate to include in a WQC; (iv) expectations of reasonable review times; and (v) the nature and scope of information that states may need to substantively act on a WQC request within a prescribed time. U.S. EPA is directed to issue new WQC guidance within 60 days of the EO as appropriate, and within 120 days review regulations for consistency with the EO policies. Any new regulations are to be finalized no later than 13 months of the EO. In addition, upon completion of the review/clarification of the WQC guidance, U.S. EPA is to lead an inter-agency review with other agencies involved with the WQC process, and those agencies are required to update their WQC guidance and adopt new regulations if necessary.

U.S. DOT is directed within 13 months of the EO to finalize regulations covering modernized LNG export terminals and liquefaction facilities, and to allow transportation of LNG in approved rail tanker cars the same as other cryogenic liquids.

U.S. DOL is directed within 180 days of the EO to study ERISA pension plan data and issue a report on discernable trends in energy investments by such plans, and review DOL guidance on fiduciary responsibilities for proxy voting to ensure consistency with current law and policies that promote long-term growth and maximize return on the plans' assets.

U.S. DOI is to develop a master agreement for energy infrastructure rights of way (ROWs) renewals/reauthorizations and within one year of the EO, initiate the renewal/reauthorization process for all expired ROW grants, leases, permits and agreements as determined to be appropriate and to the extent permitted by law.

Various reports are required to be prepared: (i) Barriers to a National Energy Market (due within 180 days of the EO); (ii) Intergovernmental Assistance (i.e., how the federal government can better provide assistance to states and local governments related to the transportation and development of domestically produced energy; due within 30 days of the EO); (iii) Economic Growth of the Appalachian Region (due within 180 days of the EO).

The EO does not impair authority granted to executive agencies/departments, or the functions of the OMB relating to budgetary, administrative or legislative proposals. It shall be implemented consistent with applicable law and subject to availability of appropriations. It does not create any rights or benefits to any party against the U.S. (its departments/agencies/officers/employees) or any other person.

If you have any questions on the Executive Orders, please contact Ted Boggs at 614-464-8319 (taboggs@vorys.com).