



Information Alert

State-Federal Relations Division

President Trump Issues Executive Order Impacting State Water Quality Rights

April 11, 2019

On April 10, President Donald Trump signed [two executive orders](#) (EO) focused on “expanding fossil energy infrastructure.”

The primary component of the first EO directs the Environmental Protection Agency (EPA) to simultaneously review both existing guidance and regulations that pertain to state implementation of section 401 of the Clean Water Act (CWA), while engaging in a formal consultation process with state and tribal governments regarding any potential changes. Section 401 provides states and tribes authority to review and approve, condition, or deny any federal permits or licenses that may result in a discharge of pollutants to waters of United States within their borders. EPA is then directed, within 60 days of the EO signing, to update or issue new guidance pertaining to section 401 implementation. At the same time, the agency is directed to begin the notice and comment process within 120 days for any changes to section 401 implementing regulations. Further, EPA is also tasked with leading a review with other federal agencies that have guidance or regulations on section 401 implementation to ensure consistency.

While it remains unclear exactly how EPA plans to review, replace or update existing implementation guidance and regulations, it is likely the agency will aim to reduce the amount of time that states have to review infrastructure projects. Once a state’s review time expires without a state decision, the Clean Water Act states that the permit will have been deemed granted. However, many questions exist about when an infrastructure project’s application to a state is considered submitted: Is it when a project developer simply tells a state that it wishes to construct a project? Or does it depend on specific details of the project being submitted to the state for review? NCSL, along with many other national associations, has been [vocal](#) surrounding the issue and has met with officials from both EPA and the United States Army Corps of Engineers to express our concern that the agencies have proceeded to begin development of new guidance and regulations without any consultation with states who serve as co-regulators in protecting and managing the nation’s waters. The current lack of consultation may be in violation of [EO 13132](#) which requires federal agencies to consult with state and local governments when developing new regulations if there is a federalism impact.

Additionally, the EO directs Department of Transportation (DOT) Secretary Elaine Chao to propose a rule within 180 days that would allow train cars to transport liquefied natural gas. It also tasks the DOT secretary and Department of Energy (DOE) Secretary Rick Perry with submitting reports within 180 days “regarding the economic and other effects caused by the inability to transport sufficient quantities of natural gas and other domestic energy resources to the States in New England and, as the Secretary of Transportation deems appropriate, to States in other regions of the Nation.” DOT and DOE will also be required to issue a second report, within 180 days, “regarding the economic and other effects caused by limitations on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States. This report shall assess whether, and to what extent, State, local, tribal, or territorial actions have contributed to such effects.”

An additional item included in the first EO concerns rights-of-way (ROW) for energy infrastructure. The EO tasks the secretaries of the Departments of Interior, Agriculture, and Commerce to develop a master agreement for energy infrastructure ROW renewals or reauthorizations and, within one year, initiate renewal or reauthorization processes for all expired energy ROW grants, leases, permits, and agreements, as determined to be appropriate by the applicable secretary and to the extent permitted by law.

The second EO concerns the issuance of federal permits for facilities and land transportation crossing at U.S. international borders and is likely in response to the difficulties the administration has encountered in approving the Keystone XL pipeline, which would cross the Canadian border. The EO would "clarify how this process works for future cross border" permits and give the president sole discretion to approve those permits rather than the Secretary of State. It is unclear if this new process will allow international pipelines to avoid undergoing a review as part of the National Environmental Policy Act.

For more information on the executive orders, or the administration’s ongoing actions related to Section 401, please contact NCSL staff, [Ben Husch](#) and [Kristen Hildreth](#).