Issues and Challenges for High Quality, Efficient Environmental Review of State and Tribal Oil & Gas Pipeline Permits

A Pipeline Permitting Project Factsheet from the Association of State Wetland Managers

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Background

The permitting of linear oil and gas pipeline projects is a complex effort, involving multiple parties working with an array of regulatory processes and goals. ASWM worked with state regulatory agencies to identify some of the key challenges that they face when working on pipeline project review. This document documents breadth of issues identified by state and tribal regulators. This list serves as a foundation for the development of ASWM's challenges and recommendations matrix and summary on *"Improving Environmental Coordination of Oil and Gas Pipeline Permitting for States and Tribes: What can be Done?"*

Methodology

This resource was developed through three stages of data collection. The first step involved a review of the literature, including both gray and peer-reviewed sources. The second step included review by a national workgroup of 35 pipeline permitting staff from states, tribes and federal agencies. The third step included incorporation of data from a Switzer Foundation-funded survey that was conducted in collaboration with this project. Categories were created to create groupings of concerns that were similar and specific issues were sorted into these categories. Once compiled, the list was reviewed by the workgroup again and used to develop a matrix that added solutions, contacts and resources to assist states and tribes in addressing (at least in part) the issues and challenges listed in this document.

Listing of Issues and Challenges Identified by ASWM's Pipeline Permitting Project

State and tribal regulatory staff have identified the following list of issues and challenges as some of the leading restraints and complications that limit and sometimes delay permitting processes. The list is not exhaustive but provides critical insights to inform capacity building efforts and provide guidance for innovations in state and tribal permitting processes. Neither categories nor bullets are listed in order of frequency or importance.

1) Expansion of Natural Gas Production

- The Shale Revolution has dramatically impacted natural gas and liquids industries
- Demand for more natural gas leading to need for additional pipelines
- Pipelines are being planned in areas where they have not historically hosted energy pipelines (i.e. there is increasing need to move liquids to new supply basins)
- There is documented expansion into green routes/green lines where there is currently no infrastructure and/or history of permitting
- Applications for pipeline development are coming in large numbers, not incrementally, for state and tribal review in a growing number of states
- Currently, it appears that there are state and tribal capacity issues if review will rely solely on existing regulatory systems and staffing to accommodate new market realities

2) Access to Information about Pending Projects

- States need to be aware of all pending projects, as they can't review/condition/assist if they don't know an application is coming/has been submitted.
- State should be provided information about proposed projects during the scoping process

3) Numbers of Regulatory Staff to Complete Review and Enforcement Activities

- The number of staff available to provide oversight and review of permit applications is limited in many states
- The amount of information to be reviewed is extensive and time consuming, requiring a large commitment of staff time
- Staffing in states that have not traditionally had to review pipeline permit applications may not have the staffing capacity to undertake these additional tasks
- After applications have been reviewed, staff may not have the time to do additional after-review

4) Regulatory Staff Training and Experience

- Permitting requires unique and specialized expertise
- Regulators need access to a range of expertise: engineers, scientists, planners, environmental professionals, legal experts, public policy experts, air and water quality professionals.
- Have been seeing lots of turnover in regulatory staff across the nation; new hires need to receive training on permit review processes
- In some cases, permitting staff inexperience leads to inaction, as they are not sure how to address issues or may not recognize an issue exists
- Lack of training and experience can result in:
    - Poorly designed projects
    - Incomplete applications
    - Missed regulatory deadlines
    - Regulatory process delays

    - Adverse agency decisions
    - Staff having to play "catch-up"
- Permitting staff also need training on how to challenge an applicant's experts

5) Need for Resources and Expertise to Defend State Decisions

- State and tribal permitting programs need to be able to go "toe-to-toe" with energy companies when there is a disagreement; this requires resources and expertise that many states do not have
- States need to be able to secure internal support to disagree with experts hired by the applicant if permit requirements are not met

6) Complications from Multi-state Projects

- Different states have different certificate requirements/procedures
- There are also a range of different rules and regulations at the state level regarding eminent domain and access to lands proposed for pipeline development

7) Agency Coordination, Consistency and Prioritization

- Many states and tribes, as well as permit applicants, lack of understanding about FERC-regulated permitting processes
- Current efforts to lessen state authority to conduct state water quality certifications through Clean Water Act Section 401 leads to concerns about states' authority and the commitment to cooperative federalism.
- Different regions have different approaches to endangered species and migratory bird issues.
- When state conditions are not agreed upon or require additional data be submitted by applicants, this can cause delays to secure missing review elements
- Applicants may be unaware of differing information requirements among various agencies or even state/tribes for interstate projects, which also have varying permitting timelines and schedules.
- One agency's permit process may be dependent on another issuing a permit or approval, which may lead to delays by one agency regardless of whether they are able to complete their internal review in a timely manner.
- Some information can only be collected at certain times of the year. Consequently, delays may throw off schedules and result in permitting delays.
- Delays can also occur due to the need to coordinate comments with public requirements (Specific types of coordination: NEPA, Coastal Zone Program, State Dredge and Fill Programs, 401 Certification Programs).

8) Specific Challenges for Smaller Project Review

- While larger (single and complete) projects usually do result in compensatory mitigation, smaller projects do not get the same level of review (consideration for mitigation or cumulative impacts) – some things slip through the cracks
- Especially for smaller projects, applicants often receive mixed messages from different state agencies about which BMPs to use.

9) Understanding of Systems between Entities Involved

- There are many different players in oil and gas pipeline permitting. Lack of Understanding of understanding about the regulatory process can cause confusion and delays. This may occur at the consultant level, at the state agency level or at the federal level.
- In some cases, there may be a lack of understanding by state agencies about how the energy industry conducts planning and develops applications
- Many states and tribes identify confusion about what are FERC/Non-FERC program aspects
- Some states need to encourage the involvement of state-recognized-only tribes (not federally-recognized), which will be required at state level but not the federal level. If they are not involved from the outset, their input can cause delays later in the process.

10) Complete Permit Applications

- Many states that currently work on permitting of oil and gas pipeline development and maintenance report a high number of incomplete applications from permit applicants
- In some cases, despite training of applicants, applications are still submitted incomplete
- Some states/tribes report that several current state/tribal permitting processes may not discourage incomplete applications
- Section 401 water quality certification applications are often very generic (not detailed like other permit applications). States and tribes may need to require more detailed, specific information to be provided in order to adequately assess planned projects.

11) Information about Pipeline Route

- Lack of information about where the pipeline is going to be constructed (the specific route, which specific resources are going to be impacts – the overall picture and watershed level impacts)
- Once the route is set, the applicant is usually not flexible to change. Concerns are not usually introduced at the stage where route changes are viable, during the planning/pre-application phase of the process.

12) Access to the Land being Impacted

- The inability for companies and the state to get access to land planned for use along the pipeline route leads to an inability to identify the resources that will be impacted and to what extent (e.g. vegetation, soils, hydrology, endangered species, threatened habitats)
- Remote sensing is often inadequate to assess the impacts from development. Instead, there is need for on-the-ground access to make informed permit review decisions.
- Not receiving permission to survey the land is a huge limitation in the permit review process, as permission if often not granted to some of the private properties that will be taken through eminent domain until they have their approvals (e.g. FERC certification).

13) Approach to Applying for Permit Approvals

- There is a common practice by pipeline companies where applicants apply for multiple permits over time for what is a single pipeline. Single and complete projects are permitted. The definition and interpretation of this definition can cause challenges for states and tribes in their review process and result in impacts that would not otherwise be permitted.
- In a related problem, applicants may separate out permits for pipeline installation, cathodic protection systems, etc.

14) Applicability of Laws

- Disagreements have been known to occur between agencies within a state about the specific applicability and interpretation of laws associated with pipeline permitting.
- Some of these disagreements focus on interpretation of laws around identifying, assessing and mitigating impacts.
- This is complicated by a lack of legal clarity, as recent lawsuits have not set clear directives.
- Interpretations of laws may differ by the type of project being considered. For example, natural gas and liquids are linked, but regulatory challenges differ, especially related to infrastructure development.
- Increasingly, states and tribes are encountering differing views on specific emerging practices such as horizontal drilling and boring with adequate setbacks.
- When emerging practices or technologies are being reviewed, there are many cases where regulations and laws have not caught up to these developments and do not provide guidance or the ability to regulate, despite the potential for significant negative adverse effects.
- In some states/tribes, it is unclear whether permit applications must include prevention and emergency response plans, as well as other mitigation, for spill if fracturing of substrate or possible leaks of fluids from spills or drilling fluids.

15) Agency Consultation

- In many states, there is a lack of access to staff or outside consultants with specific expertise (e.g. endangered species) for applicants to consult with when developing applications
- A lack of access to expertise have, in some cases, lead to:

- Protracted negotiations between the permit applicant and regulators
- Environmental advocates suing or blocking projects after approval

16) Agency Decisions

- Within and between state agencies, there may be differing implementation of regulations/requirements for permit applicants
- Some applicants indicate that they have difficulty identifying the chain of command within a regulatory agency.
- Varying interpretations of permitting requirements may result in:
  - Inconsistent/unpredictable implementation of regulations
  - Confusion for the applicant
  - Inability to identify the individuals responsible for explaining and addressing issues brought up with the draft application/plans.

17) Environmental Lawsuits and Environmental Justice

- Perceptions that the law is inadequately applied may lead to the state being sued by environmental organizations.
- Citizen suit provisions exist in many of the major environmental laws, including the Clean Water Act, providing a clear and accessible way for lawsuits to be filed against states.
- There is a tremendous financial/staff time burden related to defending lawsuits around regulatory decisions. Often states and tribes do not have the resources to counter lawsuits adequately, which leads to a strong aversion to conditioning, delaying or denying permits.
- This creates the potential for the "defeat by delay" political tactic and can lead to additional expense for regulators (and applicants).
- There is a need to balance avoiding wetlands in protected areas versus impacting vulnerable populations.

18) Regulator Understanding about Appropriate Applications for Specific Planned Activities

- States need to have better understanding about when the application of specific practices (e.g. horizontal directional drilling, trench blasting, etc.) is appropriate and when it is not (context specific considerations).
- State reviewers need to know how to reclaim impacted areas, what they can put back, restoration potential, etc.)

19) Political Uncertainty

- Political views and initiatives may result in shifts in the direction of long-time environmental policies
- There may be Influence of partisan politics (e.g. declining political will to fight for the environment or pushes towards stronger environmental protections).

- In the last year, there are several new initiatives to streamline infrastructure permitting to reduce "regulatory paralysis."
- Ongoing efforts to reform/repeal NEPA[1] may result in:
    - Narrowing review to only "major" environmental issues;
    - Mandating time limits;
    - Requiring NEPA to incorporate previous analysis into similar projects
    - Establishing functional equivalence of a NEPA analysis through federal and state statues that already require an environmental impact analysis; and
    - Eliminating greenhouse gas emissions analysis from the review process
- Current initiatives focused on energy reform result in:
    - Efforts to remove "duplicative" federal laws in favor of state regulations and an increasing burden on state resources and a lack of protections for resources where state law does not cover impacts
- State regulatory programs may have to face decreasing or increasing political will/staff resources to support denying or conditioning permits

Conclusions

ASWM's Pipeline Permitting Project has identified a wide range of issues, barriers and challenges that states and tribes may face when permitting pipeline development and maintenance projects. This list serves as a resource to those seeking to better understand the breadth of these issues and invest resources in identifying possible solutions and capacity building efforts at the state and tribal level.

Future Research

Additional research should be conducted to identify the number of states and tribes reporting each of the issues, barriers and challenges to understand the frequency and diversity of each issue. Thorough engagement of various stakeholder groups, including states, tribes, federal agencies, energy companies and consultants that serve as intermediaries between regulators and applicants to better understand ways to break down these barriers to effective and efficient permitting of pipeline projects.

For More Information about this List or ASWM's Pipeline Permitting Project

All project materials and products for ASWM's Pipeline Permitting Project can be found on ASWM's website at http://www.aswm.org. For more information on this information gathering process or other project elements, please contact Brenda Zollitsch, Senior Policy Analyst, Association of State Wetland Managers at 207-892-3399 or brenda@aswm.org.

[1] Examining Environmental Barriers to Infrastructure Development (2017). Subcommittee on the Interior, Energy and the Environment and Subcommittee on Intergovernmental Affairs, Committee on Oversight and Government Reform, US House of Representatives. (Heritage Foundation). Downloaded from: https://oversight.house.gov/wp-content/uploads/2017/03/Loris_Testimony_infrastructure_FINAL.pdf