

Oil and gas pipeline industry in an evolving legal landscape

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There are nearly three million miles of oil and gas pipelines in the United States. Most are small-diameter gathering or distribution lines, but there are more than a quarter-million miles of both large oil and natural gas transmission lines. Oil and gas combined currently provides over two-thirds of the country's energy needs. Development of new resources in shale fields across the country in the past decade has increased supply and reduced the cost of domestic oil and gas, making the United States nearly energy independent.

To bring these sources to consumers, industry proposed numerous flow reversals and new construction projects. At the same time, several high-profile incidents increased public scrutiny of the industry. Congress and regulators responded to the changing energy landscape by expanding (or proposing to increase) regulation in certain areas. In some states, agencies have reacted with delays and denials of required permits, while courts have limited application of eminent domain laws.

Against this backdrop, the Trump administration's policies and executive actions—while signaling support for the industry and favoring energy infrastructure—have increased uncertainty through vague executive orders (such as mandating use of U.S. steel for new pipelines when that supply is not available). Pipelines are safer than other modes of transportation, such as truck, barge, or rail, and policies promoting the utilization of pipelines can be protective of safety and the environment while fueling the U.S. economy and consumers' needs.

Federal regulation of oil and gas pipelines

Pipelines became subject to environmental and pipeline safety laws after much of the infrastructure was already in place. Construction began during World War II, as the United States sought to avoid attacks by German U-boats on marine transport and grew further after the Cuban missile crisis. It was not until 1968 and 1979 that the Natural Gas Pipeline Safety and Hazardous Liquid Pipeline Safety Acts were passed, respectively. The federal Office of Pipeline Safety (OPS) was created in 1968. Environmental laws followed a similar timeline, developing rapidly after the enactment of the National Environmental Policy Act in 1969, Clean Air Act in 1970, and Clean Water Act in 1972.

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Legal issues historically affecting pipelines

The primary legal issues affecting pipelines for decades were local or regional, related to right-of-way, construction, and operational incidents. Land use and demographics changed over time, however, and pipelines originally constructed in rural or agricultural areas became surrounded by growing populations. As a result, pipeline inspections, maintenance, and operational activities became subject to public and regulatory scrutiny.

As this infrastructure aged, it also became subject to increasing demand to meet U.S. energy needs. Regulations thus evolved to address system integrity inspection and modification, focusing on highly populated or environmentally sensitive areas. Although pipelines have a significantly better safety record than other forms of transportation, when incidents occur and affect public safety and/or the environment, enforcement and litigation typically arise along with calls for more stringent regulation.

Changing legal concerns with new construction

Much of the evolving legal landscape affecting pipelines relates to new construction because new shale finds require new pipelines or reversals of flow to bring new product to market. And the shift from reliance on import to abundant domestic resources has increased use and throughput of previously existing and new pipelines.

Controversy over the Keystone XL pipeline construction project altered both the perception and nature of legal challenges. The Keystone XL challenge was acknowledged as a stalking horse for climate change at the outset, but orchestrated public reaction created a generic outcry against pipelines (and fossil fuels). Meanwhile, a tragic gas pipeline explosion in San Bruno, California, in 2010 led to more legislation and regulation. Recently, controversy about the Dakota Access pipeline and its route—a pipeline that moves oil from the Bakken Shale Play to Illinois—has added to growing public concern about pipelines. Those incidents created concern for virtually all new construction, even where similar issues were not presented.

Citizen groups now oppose virtually all new pipeline projects, and social media connects the opposition nationally. Responding to the public focus, many states now scrutinize pipeline projects more closely. Several states in the Northeast have delayed or withheld issuance of Clean Water Act water quality certifications. The Environmental Protection Agency and the Army Corps have been more circumspect in issuing wetland permits. Additionally, the Federal Energy Regulatory Commission has delayed issuing Certificates of Necessity for certain gas projects, perhaps as much due to public and state concerns as to its lack of a quorum. And some state courts have found rights of eminent domain inapplicable to oil pipelines, while other courts have allowed projects to continue, but after significant delays and additional costs.

Although the Trump administration supports expanded oil and gas resources and infrastructure, it also strongly promotes coal. Those two goals often conflict. Moreover, many of the nearly two dozen executive orders and memoranda issued early in 2017 were intended to facilitate oil and gas interests with permit streamlining or deregulation. Those orders and memos have largely backfired, however, by creating conflict and uncertainty about their implementation by both regulators and the regulated community.

Path forward

Oil and gas will continue to provide the majority of America's energy supply for the immediate future, even as availability of and demand for renewable energy continues to rise. The energy markets are moving from coal to gas to renewable sources more quickly than anticipated. As that evolution progresses—largely driven by market forces—the challenge is to use newfound domestic oil and gas resources safely and responsibly. The market will continue to move, perhaps more quickly than regulation, as demand dictates. During that process, proactive resolution of legal issues will be most protective of safety and the environment.