

**Before the United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Energy and Power**

**Regarding Discussion Draft Addressing FERC Process
Coordination Under the Natural Gas Act**

**Testimony of the Pipeline Safety Coalition | Email: contact@pscoalition.org
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Chairman Whitfield, Ranking Member Rush and Members of the Subcommittee:

Thank you for the opportunity to provide testimony to the subcommittee this morning. My name is Carolyn Elefant and I am a Board Member of the Pipeline Safety Coalition. The Coalition is a non-profit organization which serves as a clearinghouse for factual, objective information to increase public awareness and participation in the pipeline permitting process through education and improves public and environmental safety in pipeline issues. In addition to my service on the Board of the Pipeline Safety Coalition, as an attorney in private practice, I represent landowners, conservation trusts, farms and small businesses and local governments in FERC pipeline certificate process and eminent domain proceedings, and in that capacity, I have gained familiarity with the concerns of stakeholders directly impacted by the pipeline process.

My testimony today will highlight the Coalition's concerns regarding the draft legislation, which would require federal and state agencies with permitting authority over pipelines to adhere to deadlines established by FERC. First, the Coalition believes that the proposed legislation is unnecessary. There is little evidence to suggest that state and federal permitting agencies are responsible for delays in the development of pipeline infrastructure; the extent that they are, companies already have the right under the Natural Gas Act, as amended by EPact 2005 to bring suit at the D.C. Circuit Court of Appeals to compel a dilatory federal or state agency to act on a permit.

Second, the Coalition is concerned that proposed legislation's approach to expediting the permit process - such as requiring federal and state permitting agencies to confine the scope of their environmental review to those issues identified by FERC - would subordinate the regulatory mandates of FERC's sister federal agencies as well as and state agencies implementing delegated authority under the CWA, CAA and CZMA to the goals of the Natural Gas Act.

I. The Proposed Legislation Is Unnecessary

Although the Natural Gas Act preempts most state and local permit requirements, pipelines must still obtain certain federal authorizations, as well as state permits issued through delegated federal authority under the Clean Air Act, Clean Water Act and Coastal Zone Management Act. As amended by EPact 2005, federal and state permitting agencies must issue any required

authorizations within 90 days of FERC's issuance of a final environmental document.

The sole source of evidence that federal and state authorizations delay the certificate process comes from a 2012 study commissioned by INGAA (Interstate Natural Gas Association of America).¹ The INGAA report defines a federal or state authorization as delayed when it issues after the 90 day deadline enacted by EAct 2005. Applying this definition, the INGAA report found that delays for federal authorizations post-EAct 2005 in approximately 19 percent of certificate proceedings.

However, merely because a federal or state authorization issues after the 90 day deadline does not necessarily mean that the project itself is delayed. For certain authorizations, such as those issued under the Clean Water Act, an agency has up to one year to act. If an applicant does not initiate a federal permit process until several months after filing a certificate application (which is a fairly common occurrence) the agency may still have time to act on the application under its enabling statute even though the 90-day deadline may have passed. In this scenario, it is inaccurate to claim that the agency has delayed.

Other times, delays result because pipeline applicants fail to provide permitting agencies with sufficient information to enable the agency to make an

¹ See *Expedited Authorization of Natural Gas: Are Agencies Complying With EAct 2005*, INGAA (December 2012) at 12, online at <http://www.ingaa.org/Foundation/Foundation-Reports/EAct2005.aspx>.

informed decision on the application. In these circumstances, the agency must wait until the applicants provide the information in order to act.

In this regard, many federal and state permit process differs significantly from the FERC certificate process. Whereas many federal and state agencies collect all relevant information in support of an application before initiating review, FERC accepts applications in piecemeal fashion. A review of any FERC pipeline docket shows that even after the year-long pre-filing process, and even after submitting a full application, a pipeline applicant typically supplements its application on a monthly or even weekly basis over a period of three to six months. These constant filings interfere with stakeholders' ability to meaningfully participate because they are forced to comment on an constantly changing proposal. To the extent that the proposed legislation seeks to impose deadlines for agency action, it should also impose deadlines on applicants for submission of all information necessary to enable FERC, state and federal agencies and the public to review and evaluate the proposed project as well.

On other occasions, a project may be delayed because an applicant hedges its bets and ignores initial feedback from state or federal permitting agencies (for example, to re-reroute the project or conduct additional environmental studies), figuring that it can defeat these requirements during the permit process. If ultimately, the agency prevails, the applicant may need to make changes that could delay the project - even though those delays could have been avoided had the applicant not resisted the agency's feedback to begin with.

The proposed legislation attempts to address this situation by requiring an agency to identify these conditions early on, and provides for a process, mediated by FERC to resolve these disputes. Yet this added procedure is unnecessary as well since there is no reason why the applicant cannot work with federal and state agencies, under the existing licensing framework, to resolve these issues earlier rather than later.

Still, perhaps the most compelling evidence that the problem of federal and state permitting delays have been exaggerated is the fact that one of the enforcement tools to compel agency action has been used only twice in the past decade. As part of the EPact 2005 amendments to the Natural Gas Act, Congress added a provision allowing an applicant to bring a civil action for review of a federal or state agency's failure to take action on a permit required by federal law (other than the Coastal Zone Management Act). See 15 U.S.C §717r(d)(2).

Although the D.C. Circuit reviews these "failure to act" cases on an expedited basis and the process for bringing suit is relatively simple, this provision of the Natural Gas Act has been invoked just twice in the ten years since its adoption.²

That pipeline companies have declined to take advantage of this statutory enforcement mechanism suggests that the companies themselves do not view the

² *Dominion Transmission v. Summers*, No. 13-1019 (D.C. Cir. Jul. 19, 2013)(finding Maryland Department of Environment improperly withheld action under Clean Air Act); *Weaver Cove v. Rhode Island*, 524 F.3d 1330 (D.C. Cir. 2008)(finding state's delay under Clean Water Act moot since certificate is deemed waived).

delays as serious enough to rise to the level of relief afforded by the Natural Gas Act.

II. The Legislation Will Subordinate The Regulatory Mandates of Other Federal Agencies to the Natural Gas Act.

From the Coalition's perspective, the most troubling aspect of the proposed legislation is that it seeks to eliminate delay by eliminating differing perspectives. For example, one provision states that "When making a decision with respect to a Federal authorization, each Federal and State agency shall give deference to the maximum extent allowed by law, to the scope of environmental review that the Commission determines to be appropriate." Requiring federal and state agencies to abide by this requirement would substantially encroach on their regulatory discretion.

For example, to date, FERC has taken the position that it need not address the cumulative impacts of Marcellus Shale tracking in pipeline cases because the impacts are remote and not causally connected.³ However, another federal or state agency might find consideration of these impacts relevant to its statutory mandate. There is no justification to compel a federal, or federally-backed state agency to subordinate its regulatory mandate to the goals of the Natural Gas Act - and indeed, we can think of no other federally-related industry that has been granted a similar "trump card."

³ See *Coalition for Responsible Growth and Resource Conservation v. FERC*, No. 12-566 (2nd Cir. 2012) (affirming FERC's decision declining to consider cumulative impacts of Marcellus Shael in pipeline certificate process).

III. Conclusion

The current regulatory process for gas pipeline certificates is far from perfect. Landowners, whose property may be directly impacted by pipelines and is subject to taking by eminent domain, are often unable to afford legal representation to participate in the FERC certificate proceeding or to defend their property in an eminent domain proceeding. Much of the information filed at the Commission is classified as critical energy infrastructure information (CEII) or privileged and is not readily or immediately accessible by intervenors and their representatives, even if they are willing to sign a non-disclosure agreement. In contrast to the electric utility industry, there is no regional planning in the gas industry - and it is difficult to assess whether all of the infrastructure currently proposed is necessary. If the Natural Gas Act is to be amended, all of these issues must also be addressed.

Thank you for the opportunity to present this testimony. I welcome any questions that the sub-committee may have.