TESTIMONY OF
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BEFORE THE
SUBCOMMITTEE ON ENERGY
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

REGARDING
LEGISLATION ADDRESSING PIPELINE AND HYDROPOWER INFRASTRUCTURE MODERNIZATION

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Good morning Chairman Upton, Ranking Member Rush and the members of the subcommittee. My name is Donald Santa, and I am president and CEO of the Interstate Natural Gas Association of America, or INGAA. INGAA's members transport the vast majority of the natural gas consumed in the United States through a network of approximately 200,000 miles of interstate transmission pipelines. These transmission pipelines are analogous to the interstate highway system; in other words, they are large-capacity transportation systems spanning multiple states or regions.

Thank you for the opportunity to share INGAA's perspective on the discussion draft of legislation to improve agency coordination during the review of federally regulated natural gas pipeline projects. This testimony is limited to the pipeline permitting discussion draft because, as I understand it, the discussion draft on cross-border energy project approvals retains the current process for natural gas pipelines, with only a very minor amendment to existing law.

While the Federal Energy Regulatory Commission (FERC) has exclusive authority to grant the certificate of public convenience and necessity required to construct a new or expanded interstate natural gas pipelines, various federal and state agencies are responsible for granting other environmental and land use permits and approvals that must be obtained before a pipeline company may commence construction. Consequently, for purposes of this testimony, the term "permitting process" refers to the full range of approvals that are necessary to construct an interstate natural gas pipeline.

This is not the first time that INGAA has testified before this subcommittee on the need to improve the permitting process for interstate natural gas pipelines. In fact, I appeared before this subcommittee during the last Congress. The need for action is even greater today, because the pipeline review and permitting process has only become more protracted and more challenging over the intervening two years. Federal permitting agencies are taking longer, and, in some cases, are electing not to initiate reviews until FERC has completed its review of a proposed pipeline project. These disjointed, sequential reviews cause delay and, in some cases, create the need for supplemental environment analysis.

This is unnecessary and avoidable. The regulations implementing the National Environmental Policy Act (NEPA)[1] provide for designating a lead agency to coordinate the review of a proposed "major Federal action." The lead agency, in turn, identifies and works with "cooperating" agencies to develop a single environmental document for the

[1] 40 C.F.R. section 1501.

project. This document, either an environment impact statement or an environmental assessment, should include information and data that the cooperating agencies need for their separate permitting reviews. Congress, as part of the Energy Policy Act of 2005 (EPAct 2005), designated FERC as the "lead agency" under NEPA for natural gas projects subject to the commission's Natural Gas Act jurisdiction. EPAct 2005 also provided a framework for FERC to coordinate the various permitting reviews that occur in connection with a natural gas pipeline project and to set a deadline for other agencies to complete their work once the NEPA document was complete. Notwithstanding the intent expressed by Congress in EPAct 2005, it has been a challenge to get federal and state agencies to work cooperatively and constructively within this framework.

The recent experience of an INGAA member company illustrates this point. This company proposed a gas transmission pipeline that would intersect the Blue Ridge Parkway and Appalachian National Scenic Trail in Virginia. Instead of traditional boring methods, the pipeline company proposed a horizontal directional drill. If this proposed alternative is approved, the company would bore under a mountain for nearly one mile so that the pipeline would cross beneath the parkway and trail. This construction method, while very costly, was selected to ensure that there would be no surface disturbances, tree clearing or interference with public access to the parkway or trail.

The Park Service has responded with indifference to the pipeline operator's effort to minimize the impact of its project. The Park Service took 14 months to review the 22-page application to survey the area. Once permission was granted, the survey work was

completed within a single afternoon. The survey, however, is only an initial step. The Park Service has yet to complete its extensive review of the pipeline operator's application for a permit to cross the parkway and trail using horizontal directional drilling.

We clearly need better agency engagement and decision-making than that demonstrated by the Park Service in this example. These kinds of permitting delays are becoming much more frequent and are not confined to the Park Service. Because there is no direct accountability for this lack of engagement, agencies with limited resources are free to ignore or delay their response to requests to participate in the review of a proposed pipeline.

To address these conflicts, and to reinforce the intent of Congress in EPAct 2005, INGAA in its prior testimony proposed that the subcommittee clarify and strengthen the lead agency role for FERC and further define the process for participating federal and state agencies. Legislation to achieve this result is not unprecedented or outside the mainstream. The process created by the Congress in highway authorization legislation offers a model.[2] Just like interstate highway infrastructure, interstate pipelines need a clear, coordinated permitting process that addresses conflicts, allows agencies to negotiate with one another, and reaches a conclusion in reasonable time.

[2] 23 U.S.C. section 139.

Let me be clear that INGAA is not seeking a diminution of the substantive requirements connected with the permits that must be obtained to construct an interstate natural gas pipeline. INGAA simply seeks greater certainty regarding the schedule for reviewing and acting upon applications for such permits and better coordination among the agencies that are responsible for issuing such permits. We understand that each agency has an assigned duty under the law, and we support a thorough analysis of permit applications to ensure environmental and resource protection. We also recognize the need for robust stakeholder engagement and public dialogue. The certainty sought by INGAA's members can be achieved without diminishing the rigor of environmental review and mitigation.

Review of Discussion Draft

The direction signaled by the committee's discussion draft is consistent with INGAA's goal to strengthen FERC's role as the lead agency and to encourage a more coordinated NEPA and permit review process. We appreciate the committee's leadership in drafting legislation to address this need. INGAA encourages the committee to provide even greater structure and detailed guidance so that there is no misunderstanding about Congress' intent for the pipeline permitting process. Given current permitting delays, and the intent of earlier legislation, there is a clear need for greater Congressional guidance in this area. Past highway authorizations provide a blueprint. INGAA encourages you to be bold.

We suggest the following additions:

1) **"Agency actions" instead of "Federal authorizations."** The draft refers to coordination and approval of "Federal authorizations," as defined in past statutes such as EPAct 2005. We suggest a new defined term – "agency actions" – that would capture more broadly the universe of reviews and consultations connected with the pipeline permitting process, and not just those that require an affirmative approval.

2) **Clear designation of "participating agencies."** The highway authorization statutes created the concept of "participating agencies," which are agencies invited by the lead agency to participate in the review of a project, and that accept such invitation. Permitting agencies that elect to be a participating agency agree to work with the lead agency, but are not bound to a certain outcome. We propose that those agencies electing not to become participating agencies not be authorized to submit comments for the record of the lead agency's NEPA review, and be restricted in developing a supplemental NEPA review for the proposed project. This provides critical accountability. An agency either participates in the lead agency review process, or it forfeits the ability to comment or adjust the record later (with certain exceptions). FERC, as lead agency, should have a corresponding obligation to consult with the participating agencies to ensure that

the NEPA review produces information that those agencies may need for their permitting reviews.

Making permitting agencies accountable for this choice should increase the likelihood that permitting agencies will participate in the FERC NEPA review. This, in turn, should result in a more fulsome and complete environmental analysis in a single document. The participating agency concept is entirely consistent with the intent of NEPA.

3) **Clear demarcation between the NEPA review process and concurrent permitting reviews**. The NEPA review and the review of permit applications are complementary processes. While they can, and should, occur concurrently, they are nonetheless separate. We suggest that the draft provide greater clarity by defining the NEPA review process in one subsection and the concurrent review of applications for agency permits in another subsection.

4) **Transparency regarding permit applications that are "ready for processing."** The draft includes a section on the concurrent review of permit applications – a concept that we strongly support. To ensure that such permits are reviewed concurrently, however, agencies must be clear about when an application is "ready for processing." On numerous occasions, agencies have explained their choice not to act on a permit application on the basis that the application is "incomplete" or "unready." INGAA suggests that the draft require each

permitting agency notify an applicant whether its application is ready for processing within 30 days of receipt of the application. If the application is unready for processing, the agency should be required to provide a description of the information needed for the application to proceed.

5) **Accountability for missed deadlines.** As mentioned, EPAct 2005 empowered FERC to establish a deadline for final permitting determinations once the FERC NEPA document is complete. While FERC's current regulations provide for establishing this deadline, there is no accountability on the part of permitting agencies because the law provides no means to enforce the deadline. The discussion draft includes a provision on "failure to meet deadlines," pursuant to which an agency that misses the FERC-established deadline must report to Congress and FERC on the failure and its plan to ensure completion. INGAA supports this and suggests that the Office of Management of Budget also receive notice of the missed deadline. We also suggest that both the authorization and appropriations committees of the Congress overseeing an agency receive notice of a missed deadline. The point is to create some accountability for adhering to deadlines.

INGAA supports the provision in the discussion draft on remote surveys. Many permitting agencies require submission of extensive ground survey data before an application can be reviewed. However, access to all potential rights of way often cannot be obtained to conduct such surveys. For example, landowners may refuse to grant such

access. Project developers can find themselves in dilemma because they cannot collect the data needed to submit an application for a permit. With the change envisioned by the discussion draft, pipeline project developers could proceed in the least intrusive manner if they can use data obtained from remote surveys to file a permit application, with the proviso that ground surveys might be required for final permit approvals. The provision in the draft is permissive. It requires agencies to "consider" such remote survey data for purposes of a permit application. But it also states that agencies might condition permit approval on subsequent ground survey data collection.

This concludes my comments on the discussion draft.

I also wish to highlight for the subcommittee a pipeline permitting issue that lies outside its jurisdiction, but which INGAA strongly urges you to consider as part of any broader energy or infrastructure legislation. The Clean Water Act vests in states a limited authority to issue a "certification" that a project meets federally approved water quality requirements. Some states are abusing this authority by delaying the issuance of a certification, by issuing a certification that is laden with requirements that do not have a nexus to federal water quality requirements, or by denying a certification without a well-founded basis. These actions are inconsistent with what Congress intended when it established the certification authority. INGAA believes that amendments to the Clean Water Act are needed to clarify the scope of the certification authority to ensure that it is focused on the specific environmental matters at issue. INGAA has seen similar problems in how states exercise authority delegated to them under the Clean Air Act. It

will be increasingly difficult to construct major interstate infrastructure projects of any kind without amendments clarifying the scope of authority that federal law vests in the states.

The subcommittee's discussion draft is being considered against the backdrop of possible comprehensive infrastructure legislation in this Congress. We anticipate that the principal focus of that legislation will be the kinds of infrastructure that rely on public funding, such as roads, bridges, airports and sea ports. Projects funded with private capital, such as interstate natural gas pipelines, also are an important part of our nation's infrastructure. What our industry needs is a process for the timely review and permitting of proposed projects. We are not looking for a rubber stamp, but this robust review should not be an unending and protracted process either.

Finally, allow me to emphasize that a critical element to the timely approval of pipeline infrastructure will be restoring the quorum at the FERC. This is a place where your input with the president and your colleagues in the Senate can do great good. I appreciate the leadership of members of the Committee on Energy and Commerce in urging swift nomination of candidates as members of the FERC and encourage you to continue doing so.

Thank you for the opportunity to testify today.