

FERC Overhauls Existing Pipeline Project Analysis, Creates Separate Interim GHG Policy for Gas Infrastructure Projects

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On February 17, the Federal Energy Regulatory Commission (FERC or Commission) announced two new, significant policies that may have a profound impact on both natural gas pipeline projects before the Commission and the industry in general. Headlining these policies is FERC's new interim greenhouse gas (GHG) policy statement (Interim GHG Policy Statement), pursuant to which FERC will presume any gas project with 100,000 metric tons per year of carbon dioxide equivalents (CO₂e) emissions to have a significant impact on climate change and will trigger the preparation of an Environmental Impact Statement (EIS). Notwithstanding the interim nature of FERC's new Interim GHG Policy Statement — where FERC is accepting comments by April 4, 2022 — FERC clarified that it will apply both policies to all pending and new project applications, effective immediately.

As expected, the Commission's new policies address, add, or update several other items related to its review of natural gas pipeline projects that the Commission previously announced it was revisiting over the last several years. Those changes include:

- **Project Need:** The Commission's Updated Pipeline Certificate Policy Statement (Updated Policy Statement) reaffirms its commitment to consider all relevant factors bearing on the need for a project. Of note, FERC announced that precedent agreements between non-affiliates will remain important evidence of project needs but will not be the only factor the Commission considers. Further, the Commission will consider information about the intended end use of gas associated with the proposed project to help explain why it is needed.
- **Landowner Issues/Eminent Domain:** With respect to landowners, the Updated Policy Statement provides that the Commission will consider a wider range of impacts to landowners beyond just the economic impacts associated with siting the right-of-way, though it did not provide examples of the additional types of impacts it would consider. Rather, the Commission stated that its evaluation will be based upon "robust early engagement" with landowners that will continue throughout the proceeding. The Commission also explained that it will consider the steps a pipeline applicant has taken to acquire lands through good-faith negotiations and its efforts to minimize the use of eminent domain after receipt of a certificate.
- **GHGs/Climate Change:** In the Interim GHG Policy Statement, FERC establishes a rebuttable presumption that proposed projects with 100,000 metric tons of CO₂e emissions will be deemed to have a significant impact on climate change, thereby triggering the preparation of an EIS. In quantifying GHG emissions, the Commission

said it will consider “reasonably foreseeable” GHG emissions (which can be based on project utilization rates and other factors) that also have a “reasonably close causal relationship” to the proposed project. FERC confirmed that these include direct GHG emissions resulting from the construction and operation of the project, and that the Commission will consider whether upstream or downstream emissions are reasonably foreseeable on a case-by-case basis for Natural Gas Act (NGA) Section 7 projects; the Commission will not consider upstream or downstream emissions associated with NGA Section 3 export facility projects. FERC also announced that while it will consider proposals to mitigate all or part of a project’s climate change impacts, the Commission may condition its approval of the project based on the project sponsor further mitigating those impacts.

- **Environmental Justice:** The Updated Policy Statement provides that the Commission will now formally include a significant consideration of potential project-related impacts to environmental justice communities. As part of that consideration, the Commission stated that a project proponent will be required, as part of the early outreach discussed above, to identify any potential environmental justice communities that may be affected by a proposed project and would require close ongoing consultation between the project proponent, the environmental justice communities, and Commission staff. Additionally, the Commission stated that it will not use a “one-size-fits-all” approach with respect to environmental justice communities but will tailor its evaluation — including any potential mitigation measures — to meet the specific needs of different communities. However, the Commission did not provide specific guidance on how environmental justice communities will be identified, what the ongoing consultation with the project proponent and Commission staff must entail, or what mitigation measures might be required.
- **Applicability of the Policy Statements:** The Commission reiterated that the Updated Policy Statement does not establish binding rules but is intended to explain how the Commission will consider applications to build new interstate natural gas facilities. The Updated Policy Statement will not only apply to pending and new projects, but also to stakeholders who will have the opportunity to comment on any additional or supplemental information filed in such proceedings.

While FERC’s corresponding policy statements have yet to issue as of this publication, both Commissioner James Danly and Commissioner Mark Christie noted their respective dissents from FERC’s policies during the Commission’s monthly meeting. Among other issues, Commissioner Danly criticized the policies as contradicting the goals of the NGA. Meanwhile Commissioner Christie argued that the policies effectively rewrite the NGA and National Environmental Policy Act — which is a task for Congress, not the Commission — and that the new policies would increase costs for project sponsors, rather than provide “legal durability.”

Background

Under the NGA, natural gas facilities that provide transportation or storage service in interstate commerce must first receive a “certificate of public convenience and necessity” from FERC. Prior to today, FERC’s 1999 Certificate Policy Statement outlined the Commission’s evaluation process and criteria for such certificate applications. In addition to satisfying the Commission’s multipronged test to demonstrate that the project is or will

be required by the public convenience and necessity, the Commission also performs an environmental review under the National Environmental Policy Act to evaluate a proposed project's environmental impacts, which are then weighed against the project's benefits.

Although FERC previously issued a Notice of Inquiry in April 2018 seeking information regarding whether — and if so, how — to revise its 1999 Certificate Policy Statement, the Commission never took any further action at the time. Once then-Commissioner Richard Glick stepped into the chairman's role at FERC in January 2021, however, the Commission announced soon thereafter that it was seeking “new information and additional stakeholder perspectives” on potential revisions to its 1999 Certificate Policy Statement (2021 Notice of Inquiry).

The 2021 Notice of Inquiry sought information in four areas related to FERC's policy for reviewing pipeline certificate applications: (1) determining need for a pipeline project; (2) eminent domain issues; (3) evaluating environmental impacts, including GHGs and climate change; and (4) changes that would improve the efficiency and effectiveness of FERC's review. At the time, FERC explained that its intention in issuing the 2021 Notice of Inquiry was “to appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.” Similar to the 2018 Notice of Inquiry, numerous parties filed thousands of pages of comments in response.

Separate, but related to the 2021 Notice of Inquiry, the Commission also held an all-day technical conference in November 2021 to discuss potential methods natural gas companies may use to mitigate GHGs associated with natural gas infrastructure projects before FERC, including both pipeline projects and LNG export terminals. While the technical conference agenda was primarily focused on the technical aspects involved — including the level, type, and compliance/cost recovery issues associated with mitigation — a significant portion of the conference was also spent discussing FERC's jurisdictional reach and corresponding authority to order any such mitigation, particularly for upstream and downstream emissions.

Next Steps

Although FERC's new policy statements address several significant issues that have otherwise been pending before the Commission for quite some time, several significant questions remain.

First, although FERC's issuances during its monthly meeting is limited to general policy, several different aspects of both policy statements could be set for clarification, rehearing, and potential appeal. Given the number of conflicting comments filed with the Commission leading up to its meeting, it is likely that FERC's newest policies will continue to be litigated for the foreseeable future.

Second, now that these policy statements have been announced, the Commission must turn its attention to the backlog of pipeline projects and certificate applications that have been pending before the Commission for quite some time, and in some cases, several years. It remains to be seen how and when FERC will process these projects, all of which (again) could be set for clarification, rehearing, and potential appeal. Given Chairman Glick's repeated statements stressing his desire for legal certainty, the Commission may start with those pending projects that already minimize any potential environmental impacts and eminent domain issues, yet have a strong showing of continued need for reliability reasons.

Finally, to the extent FERC proceeds to process pipeline certificate applications in the near future, there are still questions surrounding how it will evaluate such projects. The majority of the applications pending before FERC — and the corresponding pipeline projects — were developed, financed, and proposed pursuant to FERC's 1999 Certificate Policy Statement. Given today's announcements, it is unclear whether FERC will require pipeline developers to change or supplement their pending certificate applications and how any of the unique facts, circumstances, and evidence in each proceeding will be weighed by FERC under these new policies.

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