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Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review

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Summary

Growth in U.S. shale gas production involves the expansion of natural gas pipeline infrastructure to transport natural gas from producing regions to consuming markets, typically in other states. Over 300,000 miles of interstate transmission pipeline already transport natural gas across the United States. However, if the growth in U.S. shale gas continues, the requirement for new pipelines could be substantial. This ongoing expansion has increased congressional interest in the role of the federal government in the certification (permitting) of interstate natural gas pipelines.

Under Section 7(c) of the Natural Gas Act of 1938, the Federal Energy Regulatory Commission (FERC) is authorized to issue certificates of “public convenience and necessity” for “the construction or extension of any facilities ... for the transportation in interstate commerce of natural gas.” Thus, companies seeking to build interstate natural gas pipelines must first obtain certificates of public convenience and necessity from FERC. The Energy Policy Act of 2005 (EPAc) designates FERC as the lead agency for coordinating “all applicable Federal authorizations” and for National Environmental Policy Act (NEPA) compliance in reviewing pipeline certificate applications.

There are no statutory time limits within which FERC must complete its certificate review process. However, EPAc authorizes FERC to establish a schedule for all related federal authorizations and provides for judicial petition if an agency fails to comply with that schedule. Congress included these provisions in EPAc to address concerns that some interstate gas pipeline and other energy infrastructure approvals were being unduly delayed by a lack of coordination or insufficient action among agencies involved in the certification process. FERC has promulgated regulations requiring certificate-related final decisions from other agencies no later than 90 days after the commission issues its final environmental document.

Notwithstanding the EPAc provisions, there is continuing concern by some in the gas industry and in Congress that FERC review of pipeline certificate applications can still take too long. The Natural Gas Pipeline Permitting Reform Act (H.R. 161) seeks to expedite the federal review of certificate applications by imposing deadlines on the agencies involved. H.R. 161 would impose an explicit 12-month deadline on FERC certificate reviews for projects using FERC’s pre-filing procedures and would codify the commission’s 90-day regulatory deadline for any certificate-related agency decisions. Any agency decision not meeting the 90-day deadline would be approved by default.

The optimal time for any deadline that Congress might impose on FERC or cooperating agencies is open to debate. The 12-month deadline in H.R. 161 would be approximately the same as the average FERC certificate review time today. However, 12 months could represent a reduction in the review time that might be expected for atypically lengthy or complex pipeline projects. In light of FERC’s recent record approving new gas pipelines, FERC commissioners have been neutral or modestly supportive towards legislative proposals for stronger certificate review authorities. However, deadlines imposed on FERC or cooperating agencies could raise the possibility that they might deny permits for some projects solely on the grounds that they lack sufficient time for an adequate review. The ability of FERC and any other federal or state agencies it works with to expedite their parts of certificate review to meet an expedited schedule may be limited by available resources.

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Introduction

The United States' supply of natural gas is growing due to technological improvements, such as horizontal drilling and hydraulic fracturing, which have increased producers' ability to extract natural gas from shale formations. Shale gas is projected to become the dominant source of the U.S. natural gas supply by 2040.¹ The growth in U.S. shale gas production requires the expansion of natural gas pipeline infrastructure at the local level (to extract and gather the gas) and at the national level to transport natural gas from producing regions to consuming markets, typically in other states. Over 300,000 miles of interstate transmission pipeline already transport natural gas across the United States.² However, if the growth in U.S. shale gas continues as projected, the requirement for new pipelines could be substantial. For example, an analysis by the INGAA Foundation, a pipeline industry research organization, estimates that the total cost of new gas gathering and transmission pipelines, including storage, could average over \$8 billion per year and total over \$200 billion through 2035.³ This ongoing expansion has increased congressional interest in the role of the federal government in the certification (permitting) of interstate natural gas pipelines. The Natural Gas Pipeline Permitting Reform Act (H.R. 161) seeks to expedite the federal review of certificate applications by imposing deadlines on the agencies involved.⁴

This report provides an overview of the federal certification process for interstate natural gas pipelines. It discusses the length of the review for recent interstate gas pipeline applications—a topic of specific interest to Congress and industry. In this context, the report discusses the key provisions in H.R. 161 and their implications for gas pipeline certificate approval. Issues associated with Presidential Permits for natural gas pipelines crossing the international border are discussed in CRS Report R43261, *Presidential Permits for Border Crossing Energy Facilities*, by (name redacted) and (name redacted).

FERC Pipeline Certification Process

Under Section 7(c) of the Natural Gas Act of 1938 (NGA), the Federal Energy Regulatory Commission (FERC) is authorized to issue certificates of “public convenience and necessity” for “the construction or extension of any facilities ... for the transportation in interstate commerce of natural gas” (15 U.S.C. §717f(c)). Thus, companies seeking to build interstate natural gas pipelines must first obtain certificates of public convenience and necessity from FERC.⁵ FERC's

¹ U.S. Energy Information Administration, *Annual Energy Outlook 2014*, May 7, 2014, Fig. MT-44, http://www.eia.gov/forecasts/aeo/MT_naturalgas.cfm#shale_gas.

² Pipeline and Hazardous Materials Safety Administration, “Annual Report Mileage for Natural Gas Transmission and Gathering Systems,” web page, January 2, 2015, <http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/%3Fvgnextoid%3D78e4f5448a359310VgnVCM1000001ecb7898RCRD&vgnnextchannel%3D3b6c03347e4d8210VgnVCM1000001ecb7898RCRD&vgnnextfnt%3Dprintfnt=print>.

³ INGAA Foundation, “North American Natural Gas Midstream Infrastructure Through 2035: A Secure Energy Future,” June 28, 2011, <http://www.ingaa.org/File.aspx?id=14911>. The INGAA Foundation is affiliated with the Interstate Natural Gas Association of America (INGAA), the interstate gas pipeline industry trade association.

⁴ The bill was introduced on January 6, 2015, by Representative Mike Pompeo and 13 cosponsors. A bill with identical provisions, H.R. 1900, was passed in the House in the 113th Congress.

⁵ FERC must also approve the abandonment of gas facility use and services. The commission does not have similar siting authority over oil pipelines, nor over natural gas pipelines located entirely within a state's borders not involved in interstate commerce. Siting of oil and *intrastate* natural gas pipelines is, instead, variously regulated by the states.

regulatory process for interstate gas pipeline certification consists of several principal steps, which may vary somewhat depending upon whether or not a pipeline developer opts to enter into a voluntary pre-filing process before formally applying for a pipeline certificate.

Pre-Filing and Environmental Review

Prior to applying to FERC for a pipeline certificate, developers may file a request with FERC to use the commission's pre-filing procedures (18 CFR §157.21). The commission established the pre-filing process to encourage the pipeline industry to engage in early project-development involvement with the relevant public and government agencies. Through this process a developer notifies all stakeholders—including state, local, and other federal agencies, and potentially affected property owners—about a proposed project so that the developer and commission staff can provide a forum to hear stakeholder concerns. The pipeline developer may then incorporate proposed environmental mitigation measures into the project design, taking into account stakeholder input. The expectation is that the pre-filing will improve a developer's proposal and avoid problems during the review of a subsequent FERC certificate application.

The pre-filing process involves a set of specific activities by the developer. These activities would typically include the study of potential project sites, identifying stakeholders, and holding an open house for stakeholders to discuss the project. At the conclusion of pre-filing, the developer conducts pipeline route studies and field surveys to develop a final application and submit it to FERC. Concurrent with the developer's activities, FERC staff participate in the open house and publish in the *Federal Register* a Notice of Intent for Preparation of an Environmental Assessment or an Environmental Impact Statement (40 CFR §1508.22), opening a scoping period to seek public comments. FERC consults with interested stakeholders, including government agencies, and also holds public scoping meetings and site visits in the proposed project area.⁶

Although pre-filing precedes a certificate application, it is, nonetheless, part of the regulatory process and requires a written request to FERC's Office of Energy Projects. Developers wishing to begin the pre-filing process must do so seven to eight months prior to filing a certificate application.⁷ If the commission approves pre-filing, it will issue to the developer a pre-filing docket number establishing an official public record associated with the proposed pipeline project. There is, however, no provision at this stage for third parties to become formal "intervenor" in the pre-filing process, further discussed below.

Application for FERC Certificate

A pipeline developer formally files an application with FERC for a certificate of public convenience and necessity. Among other requirements, the application must contain a description of the proposed pipeline, route maps, construction plans, schedules, and a list of other statutory and regulatory requirements, such as permits needed from other agencies. The application must also include environmental reports analyzing route alternatives and studies of potential environmental impacts (on water, plants, and wildlife), cultural resources, socioeconomics, soils,

⁶ Federal Energy Regulatory Commission, "EIS Pre-Filing Environmental Review Process," web page, May 28, 2013, <http://www.ferc.gov/help/processes/flow/process-eis.asp>.

⁷ Federal Energy Regulatory Commission, "Guidance: FERC Staff NEPA Pre-Filing Process for Natural Gas Projects," 2004, http://www.fws.gov/habitatconservation/gas_pre_filing_FERC_staff_NEPA_guidance_2004.pdf.

geology, aesthetic resources, and land use. Upon receiving an application, the commission issues a public Notice of Application for authorization to construct and operate a new pipeline in the *Federal Register* and begins the application review process.

FERC's decision whether to grant or deny a pipeline certificate is based upon a determination whether the pipeline project would be in the public interest. FERC accounts for several factors, including a project's potential impact on pipeline competition, the possibility of overbuilding, subsidization by existing customers, potential environmental impacts, avoiding the unnecessary use of eminent domain, and other considerations.⁸ FERC may also take into account safety concerns, but generally defers to the Department of Transportation, which has primary authority to regulate pipeline safety under the Natural Gas Pipeline Safety Act of 1968 and subsequent acts.⁹ Of the factors above, environmental review typically comprises the bulk of FERC's review. Key aspects of this review process are illustrated in **Figure 1** and further discussed below.

Environmental Review

Among other factors, review of certificate applications requires examination of environmental impacts of the action in compliance with the National Environmental Policy Act (NEPA, 42 U.S.C. §4321 et seq.) and associated regulations promulgated by the Council of Environmental Quality (CEQ, 40 C.F.R. §§1500-1508). NEPA requires federal agencies to consider the potential environmental impacts of an action (e.g., granting a pipeline certificate) and to inform the public of those potential impacts before proceeding with that action. The Energy Policy Act of 2005 (P.L. 109-58, EPAct) designates FERC as the lead agency for coordinating NEPA compliance and "all applicable Federal authorizations" in reviewing pipeline certificate applications (§313(b)).

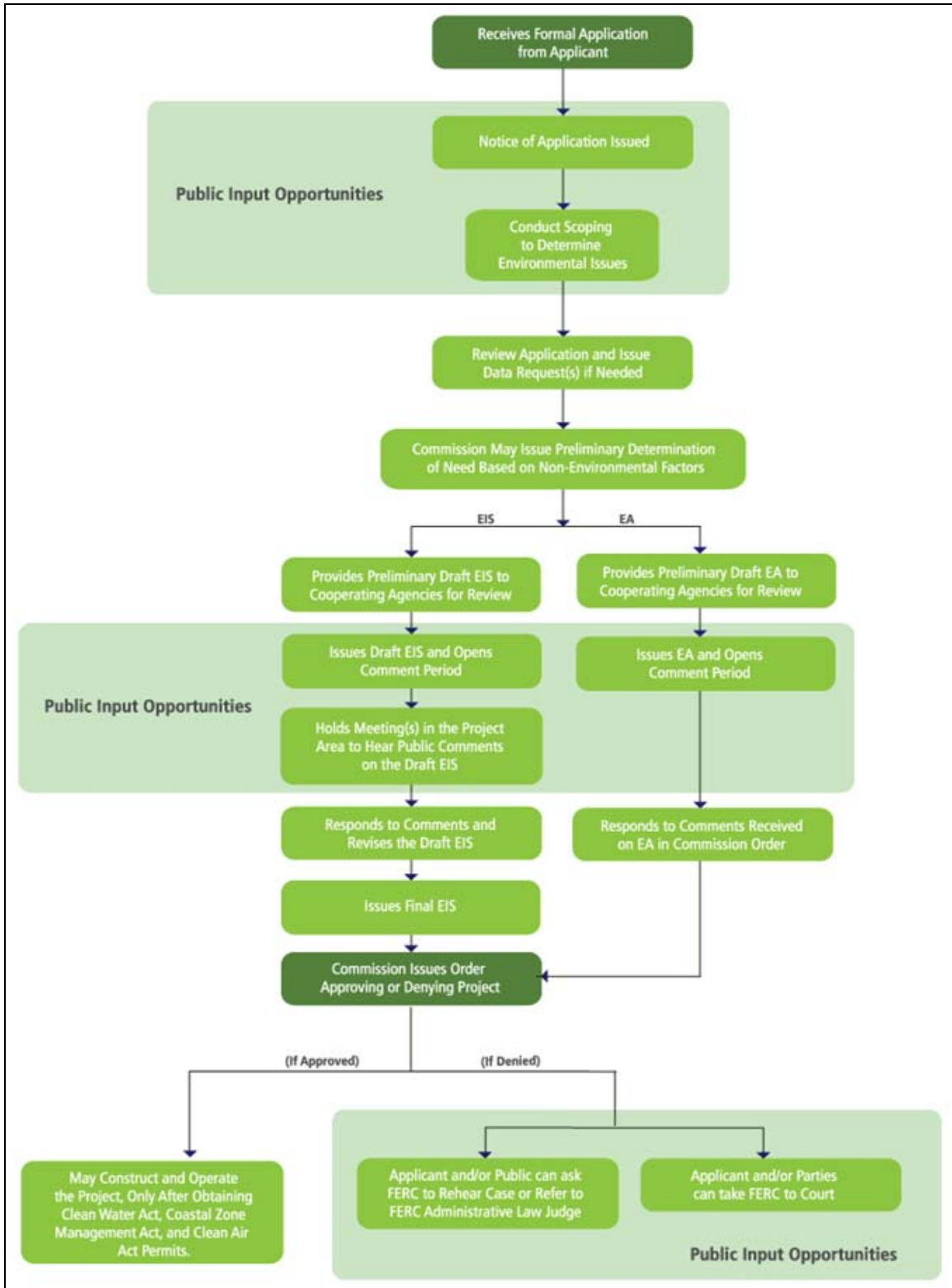
If the applicant did not pre-file, FERC begins the environmental review process by publishing a Notice of Intent for Preparation of an Environmental Assessment or an Environmental Impact Statement. In reviewing environmental impacts associated with a certificate, the commission typically prepares an environmental assessment (EA), which is "a concise public document" intended to "briefly provide sufficient evidence and analysis" to determine whether a finding of no significant impact can be issued (40 C.F.R. §§1508.9). If the EA determines impacts are significant, a more extensive and detailed environmental impact statement (EIS) must be prepared (42 U.S.C. §4332(C)).¹⁰ If FERC determines a project falls within a category of activities that has already been found to have no significant environmental impact, the commission may classify it as a "categorical exclusion." For example, one of FERC's categorical exclusions allows certain pipeline construction and modification projects under "blanket" certificate applications and prior notice filings (18 C.F.R §380.4a(21)). As such, they are categorically excluded from the requirement to prepare an EIS or EA (18 C.F.R §380.4a).

⁸ Federal Energy Regulatory Commission, *Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)*, 88 FERC ¶ 61,227, 1999 and orders clarifying policy, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094, 2000 as summarized in Carolyn Elefant, "Knowing and Protecting Your Rights When an Interstate Gas Pipeline Comes to Your Community," white paper, Law Offices of Carolyn Elefant, Washington, DC, May 17, 2010, <http://lawofficesofcarolynelefant.com/wp-content/uploads/2010/06/FINALTAGguide.pdf>.

⁹ Pipeline safety regulations are covered in Title 49 of the *Code of Federal Regulations*. In granting pipeline certificates, FERC requires that developers comply with DOT pipeline safety standards for design, construction, operation, and maintenance. For further analysis, see CRS Report R41536, *Keeping America's Pipelines Safe and Secure: Key Issues for Congress*, by (name redacted).

¹⁰ Federal Energy Regulatory Commission, "Preparing Environmental Documents," September 2008, p. v, <http://www.ferc.gov/industries/hydropower/gen-info/guidelines/eaguide.pdf>.

Figure I. FERC Review Process for Natural Gas Pipeline Certificates



Source: Federal Energy Regulatory Commission, “Processes for Natural Gas Certificates,” web page, May 28, 2013, <http://www.ferc.gov/help/processes/flow/gas-2.asp>.

When an EIS is required, it is generally prepared in two stages: a draft and final EIS. Among other requirements, the EIS must include a statement of the purpose and need for the proposed project, a description of all reasonable alternatives to meet that purpose and need, a description of the environment that would be affected by those alternatives, and an analysis of the direct and indirect effects of the alternatives, including cumulative impacts. In preparing an EIS, FERC is the “lead agency” required to obtain input from other “cooperating agencies” with jurisdiction by law or with special expertise regarding any environmental impact associated with the project (40 C.F.R. §1508.5). Cooperating agencies for a pipeline project often include the Environmental Protection Agency; the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration; the Department of the Interior’s Bureau of Land Management, Fish and Wildlife Service, and National Park Service; and the Army Corps of Engineers, among others.

After FERC staff complete their environmental analysis and cooperating agency consultations regarding a certificate application, the commission issues a draft EIS that will include its initial recommendations for approval or denial of the pipeline certificate. Issuance of the draft EIS also begins a public comment period of at least 45 days, during which FERC will hold public meetings in the proposed project area.¹¹ Notice of the availability of the draft EIS for public comment and the times and locations of public meetings are published in the *Federal Register*.

Although FERC considers all public comments in its application review, simply filing comments does not make a commentator a party to the certificate proceeding. Only intervenors to the proceeding have the right to file briefs, attend hearings, and appeal the commission’s decision regarding the certificate. They may also challenge final commission actions in the U.S. Circuit Courts of Appeal. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to the commission’s rules (18 C.F.R. §385.214). Intervenors receive the certificate applicant’s filings and other FERC documents related to the case, as well as materials filed by other interested parties.¹²

After the conclusion of the public comment period for the draft EIS, FERC reviews the comments it received and revises its draft EIS as necessary in response to comments. When these revisions are completed, FERC issues a final environmental statement with final recommendations for approval or denial of the certificate. Under NEPA, a final agency record of decision—in this context a FERC order—cannot be issued until at least 30 days after FERC publishes a notice of availability of the final EIS (40 C.F.R. §1506.10(b)(2)). However, there is no additional opportunity for public comment after the final EIS is issued. After the 30-day period is over, the commission may issue an order approving or denying the pipeline certificate application.

Certificate Authorities

If FERC grants a pipeline certificate, the commission’s order will state the terms and conditions of the approval, including the pipeline route that has been authorized, as well as any construction or environmental mitigation measures required for the project. A FERC certificate confers on the developer eminent domain authority (15 U.S.C. §717f(h)). Also, federal law preempts any state or local law that duplicates or obstructs that federal law (e.g., siting or zoning) relevant to the

¹¹ FERC usually establishes a 45-day comment period, the minimum required under 40 C.F.R. §1506.10(c). In some cases involving very large projects or complex environmental issues, FERC has established longer periods.

¹² Intervenors are also obligated to mail copies of *their own* filings to all other parties to the proceeding.

project. In this way a FERC certificate provides a pipeline developer with the authority to secure property rights to lay the pipeline if the developer cannot secure the necessary rights-of-way from landowners through negotiation. In practice, however, eminent domain authority is considered a last resort and is seldom used by developers.

Although a FERC certificate authorizes a pipeline under the Natural Gas Act, it cannot preempt other federal laws that may apply—such as the Endangered Species Act, the Coastal Zone Management Act, or the Clean Water Act—so any requirements under other federal statutes must still be met by the developer. These may include, for example, securing authorizations for water crossings from the Army Corps of Engineers, permission to cross federal lands from the Bureau of Land Management, and other federal approvals. A developer must secure these other federal approvals before proceeding with pipeline construction.

Post-Certificate Proceedings

Once FERC issues an order granting or denying a pipeline certificate, parties to the proceeding (e.g., intervenors) who object to the order for any reason may formally request a rehearing so that the commission can reconsider its decision. A party to the proceeding must file a request for rehearing within 30 days after issuance of the final order—a statutory deadline which the commission cannot waive or extend (15 U.S.C. §717(r)). There is no time limit for FERC to consider or conclude a rehearing. If a pipeline certificate is approved after rehearing, the pipeline project may proceed even if additional challenges have been filed in federal court. Once the developer has provided FERC with any outstanding information or taken other actions to satisfy the terms and conditions of the certificate order, including an implementation plan, FERC can issue a Notice to Proceed with Construction Activities and construction can begin. The pipeline developer must then file weekly status reports with the commission documenting project inspection and certificate compliance until construction is completed.

Timing of FERC Certification and H.R. 161

There are no statutory time limits within which FERC must complete its own certificate review process, issue an order, or complete a rehearing. However, EPOA authorizes FERC to establish a schedule for all federal authorizations and provides for judicial petition “if a Federal or State administrative agency” fails to comply with that schedule (§313(c)). Congress included these provisions in EPOA to address concerns that some interstate gas pipeline and other energy infrastructure approvals were being unduly delayed by a lack of coordination or insufficient action among agencies involved in the certification process.¹³ FERC has promulgated regulations under the EPOA authority requiring certificate-related final decisions from federal agencies or state agencies (acting pursuant to delegated federal authority) no later than 90 days after the commission issues its final environmental document, unless another schedule is established by federal law (18 C.F.R §157.22).

¹³ Senate Committee on Environment and Public Works, Oversight Hearing to Review the Permitting of Energy Projects, S. Hrg. 109-856, May 25, 2005.

The Natural Gas Pipeline Permitting Reform Act

The Natural Gas Pipeline Permitting Reform Act (H.R. 161) would strengthen the EAct provisions by imposing a 12-month deadline on FERC certificate reviews for projects using FERC's pre-filing procedures and by codifying the commission's 90-day regulatory deadline for any certificate-related agency decisions. Any agency decision not meeting the 90-day deadline would be approved by default. The relevant provisions in the bill as amended are as follows:

(i)(1) The Commission shall approve or deny an application for a certificate of public convenience and necessity for a prefiled project not later than 12 months after receiving a complete application that is ready to be processed, as defined by the Commission by regulation.

(2) The agency responsible for issuing any license, permit, or approval required under Federal law in connection with a prefiled project for which a certificate of public convenience and necessity is sought under this Act shall approve or deny the issuance of the license, permit, or approval not later than 90 days after the Commission issues its final environmental document relating to the project.

(3) The Commission may extend the time period under paragraph (2) by 30 days if an agency demonstrates that it cannot otherwise complete the process required to approve or deny the license, permit, or approval, and therefor will be compelled to deny the license, permit, or approval. In granting an extension under this paragraph, the Commission may offer technical assistance to the agency as necessary to address conditions preventing the completion of the review of the application for the license, permit, or approval.

(4) If an agency described in paragraph (2) does not approve or deny the issuance of the license, permit, or approval within the time period specified under paragraph (2) or (3), as applicable, such license, permit, or approval shall take effect upon the expiration of 30 days after the end of such period. The Commission shall incorporate into the terms of such license, permit, or approval any conditions proffered by the agency described in paragraph (2) that the Commission does not find are inconsistent with the final environmental document.

H.R. 161 addresses continuing concern by some in the gas industry and in Congress that, despite the EAct provisions, FERC review of gas pipeline certificate applications can still take too long, in large part because other involved agencies have not been complying with FERC's 90-day deadline for agency decisions. Under EAct, the possibility of judicial action is the only consequence of failing to meet FERC's deadlines—and it may not be sufficient. A December 2012 study by the INGAA Foundation concluded that, despite the schedule provisions in EAct 2005 intended to expedite the review of FERC certificate applications for gas pipelines, “anecdotal evidence has suggested that the time required to secure regulatory approvals for such projects is increasing.”¹⁴ The study reported that nearly 20% of FERC certifications in the study sample were delayed 90 days or longer beyond FERC's agency deadline.¹⁵ According to the report, few developers have petitioned the courts to compel agency compliance with FERC's 90-day deadline, perhaps because that process, like any litigation, can be costly and time-consuming as well, with its own sources of delay.

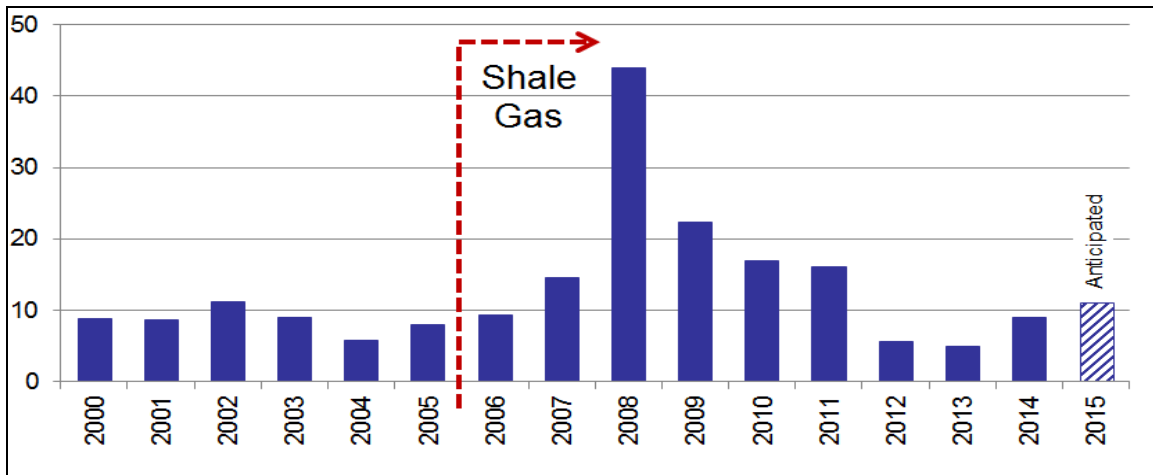
¹⁴ INGAA Foundation, *Expedited Federal Authorization of Interstate Natural Gas Pipelines: Are Agencies Complying with EAct?*, Washington, DC, December 21, 2012, p. 2.

¹⁵ *Ibid.*, p. 14.

Notwithstanding the findings of the INGAA Foundation study, whether FERC’s existing authorities and process for pipeline certification adequately meet the needs of the market for new pipeline infrastructure is open to debate. A February 2013 Government Accountability Office (GAO) study of FERC pipeline certificate reviews reported that the average time from pre-filing to certification was 558 days (18.6 months), and the review time was 225 days (7.5 months) for projects—typically smaller ones—that skipped pre-filing and began at the application phase.¹⁶ However, the pre-filing process (18 CFR §157.21) takes place prior to a developer’s applying to FERC for a pipeline certificate, which is when the 12-month “clock” under H.R. 161 would start. Unfortunately, the GAO study did not report how many of the 558 days for the pre-filed applications were after the applications were actually filed. In 2004 regulatory guidance, FERC states that developers wishing to begin the pre-filing process must do so at least seven months (210 days) prior to filing a certificate application.¹⁷ Subtracting an estimated 210-day pre-filing period from the 558 days reported by GAO for the whole process suggests a post-application review period of at most 348 days, or about 11.6 months, on average, for projects that pre-filed.

As **Figure 2** shows, federal and state agencies have approved numerous pipelines associated with U.S. shale gas production since EPlact. In particular, FERC-regulated gas transmission capacity increased quickly with the onset of the shale gas expansion in 2006-2008 and continues to grow.

Figure 2. U.S. Natural Gas Transmission Pipeline Capacity Additions
(Billion cubic feet per day)



Source: Energy Information Administration, “U.S. Natural Gas Pipeline Projects,” spreadsheet, December 2014, <http://www.eia.gov/naturalgas/data.cfm>. Figures are based on regulatory filings and industry reports.

Notes: 2015 figures are anticipated. Generally, only interstate and intrastate transmission lines are included; gathering lines, distribution lines, and liquefied natural gas marine terminals are excluded.

¹⁶ Government Accountability Office (GAO), *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary*, GAO-13-221, February 2013, p. 26. Note that the projects GAO reviewed “varied in size and function and included pipelines, pipeline expansions, compressor stations, and other pipeline facilities,” so its calculations of the time required for certification may not be generalizable to any specific future project.

¹⁷ Federal Energy Regulatory Commission, “Guidance: FERC Staff NEPA Pre-Filing Process for Natural Gas Projects,” 2004, http://www.fws.gov/habitatconservation/gas_preiling_FERC_staff_NEPA_guidance_2004.pdf.

Recent F.E.R.C. Perspectives

In light of their record approving new gas pipelines, FERC commissioners were neutral or modestly supportive toward legislative proposals in the 113th Congress for stronger certificate review authorities. In March 2013, FERC Commissioner Cheryl LaFleur stated in her written testimony before the House Committee on Energy and Commerce, Subcommittee on Energy and Power, that the nation’s system for expanding pipeline capacity “has worked well overall—over the last decade, FERC has issued permits for construction of nearly 10,000 miles of new pipeline.”¹⁸ At the same hearing, FERC Commissioner Philip Moeller similarly stated that “for the most part, people have been fairly satisfied with the process we have at FERC for new pipelines,” although “it could be done quicker.”¹⁹ Nonetheless, both commissioners acknowledged that FERC’s review of certain pipeline applications had experienced significant delays, largely due to approvals needed from cooperating agencies after FERC’s environmental reviews under NEPA had been completed. Both commissioners also expressed support for greater FERC authority to enforce its certificate review deadlines. Outgoing FERC Chairman Jon Wellinghoff reportedly was not opposed to legislation increasing FERC’s deadline authority in this way, but did not necessarily see a need for it because, in his view, the commission had been moving quickly on pipeline certificate reviews.²⁰

Potential Effects of H.R. 161

As stated above, H.R. 161 would make three major changes to FERC’s pipeline certification process, all schedule-related. Thus, the bill would not change the way pipeline certificate applications are currently reviewed in terms of subject matter, funding, or inter-agency relationships. The bill would solely seek to impose explicit time limits on the existing process. The potential effects of the three proposed changes are discussed below.

12-Month Certification Deadline

H.R. 161 would mandate a FERC certification process deadline of 12 months. The imposition by Congress of explicit agency deadlines for the review of energy project permit applications is not new. CRS has identified other statutes and legislative proposals with similar deadline provisions for the review of permit applications: for oil and gas drilling, liquefied natural gas terminals, electric transmission lines, and other facilities. These provisions are provided as examples in the **Appendix**.

¹⁸ Honorable Cheryl LaFleur, Federal Energy Regulatory Commission, testimony before the House Committee on Energy and Commerce, Subcommittee on Energy and Power hearing on American Energy Security and Innovation: The Role of Regulators and Grid Operators in Meeting Natural Gas and Electric Coordination Challenges, March 19, 2013.

¹⁹ Honorable Philip Moeller, Federal Energy Regulatory Commission, testimony before the House Committee on Energy and Commerce, Subcommittee on Energy and Power hearing on American Energy Security and Innovation: The Role of Regulators and Grid Operators in Meeting Natural Gas and Electric Coordination Challenges, March 19, 2013.

²⁰ Sean Sullivan, “FERC Chairman on Gas Pipeline Reviews: We Are Fast But Could Be Faster,” *SNL Daily Gas Report*, April 11, 2013.

The optimal time for any deadline that Congress might impose on FERC is unclear. Compared to an 11.6-month benchmark implied by the GAO study, the 12-month deadline in H.R. 161 would be approximately the same as the average FERC certificate review time today. However, 12 months could represent a reduction in the review time that might be expected for atypically lengthy or complex pipeline projects, perhaps routed through heavily populated or environmentally sensitive areas. The safety or environmental reviews for such projects might place them in the “tail” of the review time distribution reported by GAO. For example, according to the GAO report, one pre-filed certificate review lasted 886 days.²¹ Assuming a 210-day pre-filing period for this project implies a certificate review time of 676 days, or 22.5 months. For such pipeline projects, it is unclear what FERC could do differently to shorten its review process if the bulk of the review involves a complex NEPA environmental evaluation. More information might be required to understand how FERC could adapt its process to meet a 12-month deadline for such projects and to gauge the possible impact of this provision.

If the 12-month deadline under H.R. 161 were imposed upon FERC, it raises the possibility that the commission might deny certificate applications for some projects solely on the grounds that it lacks sufficient time for an adequate (and legally defensible) review, especially in the case of NEPA compliance.²² This kind of denial is what occurred in 2012 when the State Department denied an application by TransCanada for a Presidential Permit to construct the Keystone XL oil pipeline, citing insufficient time under a 60-day deadline imposed by Congress under the Temporary Payroll Tax Cut Continuation Act of 2011 (P.L. 112-78) to obtain all the necessary information to assess the project.²³ When the 112th Congress considered delegating permit authority for the Keystone XL Pipeline to FERC and mandating permit approval within 30 days under H.R. 3548 (see **Appendix**), a senior FERC official testified that such a proposal would not provide enough time for an “adequate” public record, among other concerns.²⁴ Another such permit review statute, the Mineral Leasing Act, includes a provision conditioning the deadline upon satisfying review requirements under NEPA and “other applicable law” within the given timeframe (30 U.S.C. 226(p)(2)(A)).

In July 2013 testimony before the House Committee on Energy and Commerce, Commissioner Moeller stated that FERC could likely achieve the 12-month deadline proposed in H.R. 161 as long as gas pipeline certificate applications are complete when the process begins.²⁵ Nonetheless, a 12-month deadline imposed upon all FERC certificate reviews may lead to the rejection or delay (due to re-application) of otherwise worthy proposals on administrative grounds if unanticipated issues arise. It might also force developers to reconfigure, or break up, larger projects into smaller proposals more “reviewable” within 12 months. The southern leg of the original Keystone XL pipeline project (now called the Gulf Coast Project) was separated this way and proceeded to construction under its own permit process. Reconfiguration of complex pipeline projects might lead to inefficiencies both in FERC certification and in the design or use of the

²¹ GAO, p. 26. GAO did not provide details on the review time for each project in its sample.

²² Citizens can initiate a judicial challenge of a federal agency’s environmental review (after any required administrative appeals) pursuant to the Administrative Procedure Act (5 U.S.C. §§706 et seq.).

²³ U.S. Department of State, “Briefing on the Keystone XL Pipeline,” briefing transcript, January 18, 2012, <http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm>.

²⁴ Jeff Wright, Director, Office of Energy Projects, Federal Energy Regulatory Commission, testimony before the House Energy and Commerce Committee, Subcommittee on Energy and Power Hearing on the North American Energy Access Act, January 25, 2012.

²⁵ Honorable Philip Moeller, Federal Energy Regulatory Commission, testimony before the House Committee on Energy and Commerce hearing on H.R. 1900, the Natural Gas Pipeline Permitting Reform Act, July 9, 2013.

infrastructure itself. Congress may consider whether a 12-month deadline could be made more flexible to accommodate projects which may require more review time due to their size and complexity at the discretion of FERC.

Codifying the 90-Day Agency Deadline

H.R. 161 codifies FERC’s deadline—established through regulation—for other federal or state agencies to make final certificate-related decisions within 90 days after FERC issues its final environmental document. Because FERC has the statutory authority to establish such deadlines under EAct, the only change to the *status quo* of this provision would be to mandate the 90-day time period rather than leaving the length of the time period up to FERC to determine.

Like the 12-month deadline imposed by FERC, it is difficult to determine whether 90 days is optimal for a statutory deadline—although FERC, in this case, has an administrative record examining the question through its rulemaking process. Note that this deadline occurs only after FERC’s environmental review is completed, so other agencies would presumably have months during FERC’s NEPA review to conduct reviews of approvals under their jurisdiction. Although it affirms FERC’s current regulatory judgment as to how long the cooperating agency deadline should be, H.R. 161 may tie the hands of the commission if, at some future date, FERC concludes that 90 days is no longer appropriate. In that case, FERC would have to seek new legislation rather than changing the deadline under its existing EAct authority through the regulatory process. Some might view this provision as being insurance against the commission becoming more lax in the future with respect to review deadlines. Others might view this provision as being too prescriptive. Congress may consider whether imposing a prescriptive 90-day deadline strikes the best balance between FERC’s deadline enforcement authority and the commission’s ability to manage its own review process.

Default Approval of Delayed Agency Decisions

H.R. 161 would effectively issue by default any license, permit, or approval requested from a cooperating agency if the agency does not make its decision on the request within FERC’s 90-day deadline. Statutory approval by default of agency decisions failing to meet a deadline appears to have few precedents in the specific context of energy project approvals. The clearest example CRS has been able to identify is P.L. 112-78, which would have put “in effect by operation of law” the permit for the Keystone XL pipeline if the President failed to act on the permit prior to the mandated 60-day deadline (§501(b)(3)). In that case, the result was denial of the permit. However, additional statutes with default approval provisions not involving energy projects have been cited as precedents for the provisions like those in H.R. 161.²⁶

To date, FERC has had little enforcement authority under EAct over its 90-day deadline. H.R. 161 might lead some cooperating agencies to increase efforts to meet the deadline. If those agencies view the deadline as inadequate, however, some of them may deny approvals on the basis of having insufficient time for review and the development of necessary permit conditions as discussed above in the context of the 12-month deadline for FERC. Opponents of this provision have cited, for example, statements from the Army Corps of Engineers, the

²⁶ Representative Mike Pompeo, Remarks before the House Committee on Energy and Commerce, Energy and Power Subcommittee Vote on H.R. 1582, H.R. 1900, and H.R. 83, July 10, 2013.

Environmental Protection Agency, the Bureau of Land Management, and the Fish and Wildlife Service expressing this concern if a 90-day deadline for their respective permit reviews were imposed.²⁷ In the 113th Congress, the Obama Administration opposed deadline and default approval provisions like those in H.R. 161 because they

could create conflicts with existing statutory and regulatory requirements and practices related to agencies' programs, thereby causing confusion and increasing litigation risk. The ... requirements could force agencies to make decisions based on incomplete information or information that may not be available within the stringent deadlines, and to deny applications that otherwise would have been approved, but for lack of sufficient review time. For these reasons, the bill may actually delay projects or lead to more project denials, undermining the intent of the legislation.²⁸

Congress may consider maintaining FERC's existing authorities to set the agency review schedule, while providing alternative ways to strengthen FERC's ability to enforce those authorities at the commission's discretion.

Resource Considerations

The principal effect of H.R. 161 would appear to be imposing explicit (strict) time limits on the existing process for FERC certification of new natural gas pipelines. The ability of FERC and any other federal or state agencies it works with to expedite their parts of certificate review may be limited by available resources. The agencies may well have the administrative capability to meet these deadlines. That is, the review periods, public notice periods, and other regulatory requirements associated with the certificate review schedule may all be feasible. However, a shorter deadline under H.R. 161 might require more resources for agency staff, contractors, and external consultants to achieve the same level of review as a longer deadline. In considering the ability of FERC and other agencies to meet these deadlines, the availability and allocation of resources within the agencies may be important. This may be a concern not only for FERC, but also for various other federal, state, and local agencies whose ability to increase funding for regulatory review may vary considerably and may be limited due to budget constraints.

²⁷ House Committee on Energy and Commerce Staff, Memorandum regarding Full Committee Markup of H.R. 1582, the "Energy Consumers Relief Act of 2013;" H.R. 1900, the "Natural Gas Pipeline Permitting Reform Act;" H.R. 83, a bill to require the Secretary of the Interior to develop an action plan to address the energy needs of the insular areas of the United States and the Freely Associated States; H.R. 2094, the "School Access to Emergency Epinephrine Act;" H.R. 698, the "HIV Organ Policy Equity Act;" and H.R. 2052, the "Global Investment in American Jobs Act of 2013," July 15, 2013, p. 5, <http://democrats.energycommerce.house.gov/sites/default/files/documents/Memo-FC-Markup-HR-1582-HR-1900-HR-83-HR-2094-HR-698-HR-2052-2013-7-15.pdf>.

²⁸ Executive Office of the President, *Statement of Administration Policy, H.R. 1900 – Natural Gas Pipeline Permitting Reform Act*, November 19, 2013, http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr1900r_20131119.pdf.

Appendix. Statutory Deadlines for Energy Permits

Requirements similar to those proposed in H.R. 161 have been imposed by Congress on other agencies to approve or deny energy projects. A number of statutes or bills over the last 10 years have included explicit deadlines (i.e., a specific number of days) for various types of federal energy permits—including drilling permits, liquefied natural gas (LNG) terminals, a nuclear waste repository, and electric transmission lines. They are summarized below. Note that, due to the limitations of such a legislative search, there may be additional statutes CRS has not identified.²⁹

- The Mineral Leasing Act as amended (30 U.S.C. 226(p)) requires the Secretary of the Interior to approve or disapprove of drilling permit applications submitted by federal leaseholders within 30 days of submission unless they fail to meet certain required criteria.
- The Maritime Administration (MARAD) has a 330-day time limit for granting or denying a deepwater port license (33 U.S.C. §1504), including a 45-day deadline after the last public hearing for specific agency reviews (33 U.S.C. §1504(e)(2)). Notably, this provision applies to offshore LNG terminal applications.
- The Outer Continental Shelf Lands Act as amended (43 U.S.C. 1340(c)) requires the Secretary of the Interior to approve or disapprove of oil and gas exploration plans (drilling permits) submitted by federal leaseholders within 30 days of submission unless the plans fail to meet certain required criteria.
- The Nuclear Waste Policy Act of 1982 (P.L. 97-425) requires the Nuclear Regulatory Commission to issue a final decision approving or disapproving a nuclear waste repository project proposal “not later than the expiration of 3 years after the date of the submission of such application” (§405(b)(2)).
- The Energy Policy Act of 2005 (P.L. 109-58) gives FERC authority to permit an electric transmission siting application if “a State commission or other entity that has authority to approve the siting of the facilities has—(i) withheld approval for more than 1 year...” (§1221).
- The Energy Policy Act of 2005 (P.L. 109-58) requires the Secretary of Energy to approve or disapprove a tribal energy resource agreement from an Indian tribe not later than 270 days after receiving an initial agreement or not later than 60 days after the Secretary receiving a revised agreement (§2604(e)).
- The Temporary Payroll Tax Cut Continuation Act of 2011 (P.L. 112-78) required the Secretary of State to issue a permit for the Keystone XL pipeline within 60 days, unless the President determined the project not to be in the national interest (§501(a)).

In addition to these statutes, CRS identified a few recent unenacted legislative proposals that would have imposed statutory deadlines on energy project permit decisions. Examples are listed below.

²⁹ Information provided was found through keyword searches of legislative databases performed by L. J. Cunningham in the CRS Knowledge Services Group.

- The Energy Policy Act of 2003 (H.R. 1644, 108th Congress) would have required the Federal Energy Regulatory Commission to approve or deny any permit application for an Alaska natural gas pipeline project “not more than 60 days after the issuance of the final environmental impact statement” (§2004(c)).
- The American Clean Energy and Security Act of 2009 (H.R. 2454, 111th Congress) would have required the Federal Energy Regulatory Commission or the Department of the Interior to complete review of “all permit decisions and related environmental reviews under all applicable Federal laws” for electric transmission project applications in the Western Interconnection within one year or, if provisions in another federal law required more time, as soon as practicable thereafter (§216B).
- The Energy Exploration and Production to Achieve National Demand Act (H.R. 4301, 112th Congress) would have required the Administrator of the Environmental Protection Agency and the state or governing body of an Indian tribe to approve or disapprove a consolidated permit application for the construction of a new oil refinery within 365 days, or, if all parties agreed, within an additional 90 days (§501(b)(4)(A)). For the expansion of an existing refinery, the respective deadlines were 120 and 30 days (§501(b)(4)(B)).
- The North American Energy Access Act (H.R. 3548, 112th Congress) would have transferred the permitting authority over the Keystone XL pipeline project from the State Department to the Federal Energy Regulatory Commission, requiring the commission to issue a permit for the project within 30 days of enactment. The bill would have deemed a permit to have been issued if the commission did not act upon a permit application within 30 days after receipt (§3(a)).

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