

Federal Energy Regulatory Commission (FERC) Natural Gas Permitting and Litigation

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Federal Energy Regulatory Commission (FERC) Natural Gas Permitting and Litigation

Under the Natural Gas Act (NGA), companies seeking to build interstate natural gas pipelines or liquefied natural gas (LNG) import or export terminals need authorization from the Federal Energy Regulatory Commission (FERC or the Commission). FERC's review of siting applications for these kinds of projects has been the subject of controversy and litigation, especially with respect to its consideration of environmental impacts, project need, and environmental justice concerns. The ability of the public to participate in FERC proceedings has also been an issue.

Under the NGA, the U.S. Courts of Appeals have jurisdiction over FERC pipeline and LNG certificate-related litigation. A series of recent federal court rulings have found deficiencies in FERC's environmental review of permit applications, its market assessment, or both. Among these rulings, on July 30, 2024, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) vacated FERC's authorization of a pipeline across several states in the Mid-Atlantic region. A week later, on August 6, 2024, the same court vacated FERC reauthorizations of an LNG terminal and associated pipeline facilities in and near Brownsville, Texas. FERC has responded to these and other decisions by revising its permit evaluations for such projects—at the court's direction—and by changing its review of new permit applications to avoid future litigation.

In evaluating pipeline permit applications, FERC is currently guided by its *Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities*, which was issued in 1999. In April 2018, FERC initiated a Notice of Inquiry to review its permitting policies and procedures for interstate natural gas pipelines. In February 2022, FERC issued two statements updating its policies “to improve the legal durability of the Commission's natural gas certificate and LNG decisions.” In March 2022, facing criticism in Congress, FERC redesignated both policy statements as drafts. The Commission announced plans to continue considering stakeholder comments on its draft policy statements in FY2024 but has made no commitments regarding if or when it might reissue them. How the latest court decisions may factor into FERC's process remains to be seen.

Congress may view the ongoing back-and-forth between FERC and the D.C. Circuit as a satisfactory means for FERC to refine its permitting practices in light of evolving federal energy and environmental policies. However, if Congress is dissatisfied with the status quo, Congress could provide explicit policy guidance to FERC to conclude its ongoing pipeline and LNG permitting policy review. Alternatively, Congress could establish FERC's permitting review policies directly by amending the NGA to modify FERC's mission or limit the Commission's discretion. Another option would be for Congress to restrict the processes or authority of the federal courts with respect to FERC permit litigation, similar to what it did in the Fiscal Responsibility Act of 2023 for the Mountain Valley Pipeline, or as proposed in the Protect LNG Act of 2024, or by some other statutory means. Congress could also change the requirements of the National Environmental Policy Act, with which the Commission must comply to limit future legal challenges. Enacting such changes could affect federal permitting both within and outside FERC's jurisdiction.

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Introduction

The United States is the world's largest producer, consumer, and exporter of natural gas.¹ Therefore, federal policies affecting U.S. natural gas infrastructure have been a focus of Congress—especially as they may affect natural gas resource development, supply reliability, and climate change.² These policies may also have implications for expanding U.S. liquefied natural gas (LNG) exports to Europe and other trade partners.

Under the Natural Gas Act (NGA), companies seeking to build interstate natural gas pipelines or LNG import/export terminals need authorization from the Federal Energy Regulatory Commission (FERC or the Commission).³ FERC's review of siting permit applications for such facilities has been the subject of controversy and litigation. Since 2017, federal courts have issued a series of rulings that have found deficiencies in FERC's reviews of natural gas permit applications.⁴ These rulings have occurred concurrent with FERC's ongoing reconsideration of its own policies for evaluating natural gas permit applications. In the 118th Congress, the House Natural Resources Committee considered a discussion draft bill to more broadly limit the environmental analysis required of federal permitting agencies and limit judicial review, among other provisions.⁵

Some stakeholders, especially in environmental organizations and affected local communities, view legal challenges to FERC natural gas permits as appropriate checks on natural gas industry expansion, which they view as unnecessary and environmentally harmful.⁶ Others, especially in the energy industry, view such challenges as misguided, impeding the development of critical infrastructure needed to ensure reliable, low-cost energy supplies to domestic consumers and U.S. allies.⁷ Members of Congress have expressed a range of views on these issues.⁸ Irrespective of particular policy positions, many stakeholders view FERC permit-related litigation in federal

¹ THE ENERGY INSTITUTE, 2024 STATISTICAL REVIEW OF WORLD ENERGY 37, 39, 42 (73rd ed. 2024), https://www.energyinst.org/_data/assets/pdf_file/0006/1542714/684_EI_Stat_Review_V16_DIGITAL.pdf.

² For further discussion of the U.S. natural gas market, see CRS Report R47980, *U.S. Energy Supply and Use: Background and Policy Primer*, coordinated by Brent D. Yacobucci (2024). For more on natural gas supply reliability, see CRS Report R48127, *Natural Gas Reliability: Issues for Congress*, by Paul W. Parfomak, Ashley J. Lawson, and Michael Ratner (2024).

³ Natural Gas Act of 1938, 15 U.S.C. §§ 717 *et seq.*, ch. 556, 52 Stat. 822.

⁴ See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (finding that FERC had failed to adequately consider the greenhouse gas emissions associated with a proposed pipeline).

⁵ A Bill to Amend the National Environmental Policy Act of 1969, and for Other Purposes, 118th Cong. (draft bill, Oct. 16, 2024), https://naturalresources.house.gov/uploadedfiles/discussion_draft_of_h.r._pdf.pdf.

⁶ See Press Release, Natural Resources Defense Council, Commercial Fishermen and Landowners Challenge FERC's Approval of CP2 LNG Project in D.C. Circuit (Sept. 4, 2024), <https://www.nrdc.org/press-releases/nrdc-selc-challenge-fercs-approval-cp2-lng-project-dc-circuit>; Maria Gallucci, *Inside the Fight to Stop LNG Export Projects in South Texas*, CANARY MEDIA (Feb. 28, 2024), <https://www.canarymedia.com/articles/liquefied-natural-gas/inside-the-fight-to-stop-lng-export-projects-in-south-texas>.

⁷ See Chris Newman, *Natural Gas Industry Condemns Court for Axing FERC Approval of Transco Expansion*, NATURAL GAS INTELLIGENCE (Aug. 1, 2024, 9:57 AM), <https://naturalgasintel.com/news/natural-gas-industry-condemns-court-for-axing-ferc-approval-of-transco-expansion/>.

⁸ See Press Release, Sen. Ted Cruz, Sen. Cruz Sends Letter Urging Biden Administration to Appeal LNG Decision Undermining American Energy (Sept. 25, 2024), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-sends-letter-urging-biden-administration-to-appeal-lng-decision-undermining-american-energy>; Press Release, Sen. Jeff Merkley, Merkley: FERC Continues to Rubber Stamp Fossil Gas Projects Without Any Regard for Our Future (Oct. 19, 2023), <https://www.merkley.senate.gov/merkley-ferc-continues-to-rubber-stamp-fossil-gas-projects-without-any-regard-for-our-future/>.

courts as costly and time-consuming for all parties involved, contributing to undesirable regulatory and economic uncertainty.⁹

This report examines key issues related to FERC reviews of pipeline and LNG terminal permit applications, some of which have been the subject of litigation. It reviews the laws and regulations that govern the process and summarizes significant court rulings over the last 10 years that have addressed deficiencies in FERC’s permit review and have required the Commission to supplement or reconsider its reviews of permitted facilities. The report discusses FERC’s ongoing review of its permit policies in the context of these court decisions. The report concludes with a brief discussion of policy options for Congress.

FERC’s Pipeline and LNG Permitting Processes

Under Section 7 of the NGA, parties seeking “the construction or extension of any facilities . . . for the transportation in interstate commerce of natural gas” must obtain a “certificate of public convenience and necessity,” commonly referred to as a “permit,” from FERC.¹⁰ The NGA also assigns FERC permitting authority for facilities associated with the import or export of natural gas.¹¹ Under Section 3, FERC exercises approval authority over the place of entry and exit, siting, construction, and operation of new onshore LNG terminals as well as modifications to or extensions of existing LNG terminals.¹² Therefore, companies seeking to build interstate natural gas pipelines or onshore LNG import or export terminals must first obtain authorization from FERC.¹³ Separately, the Department of Energy (DOE) is responsible for approving the import and export of natural gas as a commodity.¹⁴

Section 7 of the NGA requires FERC to authorize the construction and operation of a proposed LNG facility unless the Commission finds that the facility “will not be consistent with the public interest.”¹⁵ With respect to interstate pipelines, Section 3 provides that FERC must issue a certificate if it determines that the pipeline “is or will be required by the present or future public convenience and necessity.”¹⁶

⁹ For example, the Commission on Environmental Quality (CEQ) has stated “that efficiency is an important goal, and that resolving claims of NEPA noncompliance can result in costly and time-consuming litigation.” See National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35455 (May 1, 2024).

¹⁰ Natural Gas Act of 1938, ch. 556, § 7, 52 Stat. 822, 824–825; 15 U.S.C. § 717f(c).

¹¹ See 15 U.S.C. § 717b.

¹² Natural Gas Act of 1938, ch. 556, § 3, 52 Stat. 822; see 18 C.F.R. § 153 (2024). The Federal Energy Regulatory Commission (FERC) also exercises permitting authority over land-based natural gas pipelines that cross international borders. Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Electric Power and Natural Gas Facilities Located on the Borders of the United States, Exec. Order No. 10,485, 18 Fed. Reg. 5397 (Sept. 3, 1953).

¹³ FERC must also approve the abandonment of natural gas facility use and services (15 U.S.C. § 717f(c)). The Commission does not have similar siting authority over oil pipelines, nor does it have such authority over natural gas pipelines located entirely within a state’s borders and not involved in interstate commerce. Siting of oil and intrastate natural gas pipelines is, instead, variously regulated by the states.

¹⁴ See 18 C.F.R. § 153. Under Section 3 of the Natural Gas Act, ch. 556, § 3, 52 Stat. 821, 822 (1938), as amended, the Department of Energy (DOE) exercises independent authority to approve the importation or exportation of natural gas (i.e., the entry into transactions with foreign LNG buyers and sellers). See 10 C.F.R. § 590. DOE’s permitting of LNG commodity exports has also been controversial and a focus of Congress. For further discussion, see CRS Report R48038, *U.S. LNG Exports to Non-FTA Countries: Frequently Asked Questions*, by Michael Ratner (2024).

¹⁵ 15 U.S.C. § 717b(a).

¹⁶ 15 U.S.C. § 717f(e).

FERC employs similar processes for the review of permit applications for both natural gas pipelines and LNG terminals.¹⁷ These processes generally begin with a pre-filing stage, in which a prospective applicant studies potential project locations, identifies stakeholders, convenes project open houses, conducts siting studies, performs field surveys, and develops a formal application.¹⁸ During the pre-filing stage, FERC initiates a scoping period to seek public comments—which may include public scoping meetings—and visits sites in the project area.¹⁹ After the pre-filing stage is completed, the developer may file a formal application.²⁰ The application must contain a description of the proposed project, siting maps, construction plans, schedules, and other items required by statute or regulation, such as permits from other agencies.²¹ The application must also include environmental reports analyzing siting alternatives and studies of potential impacts on the environment (e.g., on water, plants, and wildlife), cultural resources, socioeconomics, soils, geology, aesthetic resources, and land use.²²

National Environmental Policy Act (NEPA) Compliance

Under NEPA, FERC must identify and consider environmental impacts in its review of a pipeline or LNG terminal siting application.²³ NEPA requires federal agencies to “take a hard look at environmental consequences” of their proposed actions (e.g., issuing a permit), consider alternatives, and publicly disseminate such information before taking final action.²⁴ Although an agency must consider these impacts, it need not elevate these environmental concerns above others. Under NEPA, federal agencies must prepare an environmental impact statement (EIS) for major federal actions “significantly affecting the quality of the human environment.”²⁵ FERC generally prepares EISs for all LNG terminal and major pipeline permit applications, including applications to significantly modify or expand already authorized facilities.²⁶

After FERC staff complete their environmental analysis and cooperating agency consultations, the Commission issues a draft EIS with initial recommendations for approval or denial of the

¹⁷ *FERC Processes*, FERC (March 15, 2021), <https://www.ferc.gov/industries-data/resources/ferc-processes>.

¹⁸ *EA Pre-Filing Environmental Review Process*, FERC (June 25, 2020), <https://www.ferc.gov/resources/processes/flow/process-ea>.

¹⁹ *Processes for Natural Gas Certificates*, FERC (June 25, 2020), <https://www.ferc.gov/resources/processes/flow/gas-2>.

²⁰ *Id.*

²¹ FERC’s regulatory requirements for natural gas permit applications are found at 18 C.F.R. § 157. Depending upon its specific location, a pipeline or LNG terminal project could also require independent authorizations from a range of other federal agencies, such as the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Coast Guard, and federal land management agencies. In addition, a project could require water quality certification from the states under Section 401 of the Clean Water Act, 33 U.S.C. § 1342, and other state and local authorizations.

²² 1 FERC, OFFICE OF ENERGY PROJECTS, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT PREPARATION FOR APPLICATIONS FILED UNDER THE NATURAL GAS ACT (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

²³ National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321 *et seq.*).

²⁴ 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²⁵ National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, § 102(2)(C), 83 Stat. 852, 853 (1970); 42 U.S.C. § 4332(2)(C). Of note, *federal actions* subject to NEPA are defined to include actions that require federal agency approvals via a permit or other regulatory approval. 40 C.F.R. § 1508.18. For more NEPA information, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite (2023).

²⁶ 18 C.F.R. § 380.6. The Commission may first prepare an Environmental Assessment (EA) to determine whether or not its proposed federal action has the potential to cause significant environmental effects and, therefore, requires an EIS.

project authorization.²⁷ Issuance of the draft EIS also begins a public comment period of at least 45 days, during which FERC is to hold public meetings in the proposed project area.²⁸ After the conclusion of the comment period, FERC reviews the comments and revises its draft EIS in response.²⁹ FERC then issues a final EIS with recommendations for approval or denial of the project authorization.³⁰ FERC permits typically carry project-specific terms and conditions, which the Commission can impose in accordance with the NGA.³¹ For example, FERC, in consultation with the Pipeline and Hazardous Materials Safety Administration (which regulates pipeline safety), may impose additional design or construction requirements for a pipeline proposed along certain types of terrain or in environmentally sensitive areas.

Post-Authorization Proceedings

Once FERC issues an order granting or denying a project authorization, parties to the proceeding (e.g., the developer or intervenors) who object to the order for any reason may formally request a rehearing so that the Commission can reconsider its decision.³² A party to the proceeding must file a request for rehearing within 30 days after issuance of the final order—a statutory deadline that the Commission cannot waive or extend.³³ Upon receiving a rehearing request, FERC has 30 days to rule on it or the request is deemed denied; in either case, an involved party may appeal FERC’s ruling in a United States Court of Appeals.³⁴ If the Section 7 certification survives rehearing, work on the project may proceed. Once the developer has provided FERC with any outstanding information or taken other actions to satisfy the terms and conditions of the authorization, FERC can issue a Notice to Proceed with Construction Activities and construction can begin.³⁵

FERC Permit Review Considerations: Recent Issues

In recent years, several aspects of FERC’s permit application review process have been the subject of debate among stakeholders, both in Congress and within the Commission itself. These debates have been complicated, in some cases, by presidential policies related to permitting that, while not directed at FERC, nonetheless impact FERC’s review of permit applications. Key issues are the Commission’s consideration of environmental impacts, project need, environmental justice concerns, and public participation.

²⁷ 40 C.F.R. § 1502.9(b).

²⁸ 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.

²⁹ 40 C.F.R. § 1503.4.

³⁰ 40 C.F.R. § 1502.9.

³¹ 15 U.S.C. § 717f(e).

³² 18 C.F.R. § 385.713. An *intervenor* is an official party to a FERC proceeding, playing a formal role in FERC’s processes. An intervenor may first apply for rehearing of a final decision by the Commission and then seek review in federal court. See FERC, Office of Public Participation, “Frequently Asked Questions (FAQs),” web page, last updated on January 12, 2024, <https://www.ferc.gov/frequently-asked-questions-faqs>.

³³ See 15 U.S.C. § 717(r).

³⁴ 15 U.S.C. § 717r(b).

³⁵ Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, 85 Fed. Reg. 40113, 40114 (July 6, 2020).

Direct and Indirect Environmental Effects

FERC is obligated under NEPA to consider both the direct and indirect environmental effects of certificate proposals.³⁶ Direct effects are often relatively easy to identify. In the context of a pipeline project, a direct effect would be associated with the pipeline itself, such as forest impacts from clearing rights-of-way or water quality impacts from construction across waterways. For an LNG terminal project, direct impacts could include impacts to coastal wetlands where a marine terminal would be built or air emissions from onsite facilities used to liquefy natural gas.

Identifying the indirect effects of a proposed project presents challenges. One issue is determining the extent to which “upstream” impacts of a proposed project, such as impacts associated with the production of natural gas, can and should be accounted for. Upstream impacts could include, for example, fugitive methane emissions (e.g., leaks) from natural gas wells and pipelines supplying the new project. Similarly, there is debate about evaluating indirect “downstream” environmental impacts of using natural gas, such as carbon dioxide emissions from natural gas combustion, especially where natural gas is potentially displacing other energy sources that produce fewer greenhouse gas (GHG) emissions.³⁷ Additionally, the Supreme Court has agreed to review a decision by the Surface Transportation Board to exclude detailed consideration of upstream and downstream environmental effects in deciding whether to allow the construction and operation of a rail line in Utah.³⁸ While that case does not involve the NGA, the Court’s ruling could potentially affect the scope of environmental effects agencies must consider as part of their NEPA analyses.

Evaluation of Project Need

FERC’s review of a certificate application requires the Commission to evaluate the public benefit from the proposed project.³⁹ For pipeline projects, the principal component of this evaluation historically has been the demonstrated market need for a pipeline in the form of contracts (known as *precedent agreements*) with future customers for transportation capacity. Such evaluation has been controversial, especially where pipeline developers have relied on precedent agreements with their own corporate affiliates to prove market need or when a pipeline is planned in conjunction with a new LNG export facility to supply foreign customers.⁴⁰ Further complexity may also arise due to federal, state, and local environmental policies that could broadly affect future demand for natural gas. For example, some localities and states are pursuing policies to restrict or ban altogether the use of natural gas in new homes or certain commercial buildings.⁴¹ Accounting for the potential impact of such policies on the need for a pipeline project introduces new considerations and uncertainty.

³⁶ 40 C.F.R. § 1508.1; 18 C.F.R. § 380.7.

³⁷ See Press Release, Sierra Club, FERC Further Abdicates Its Obligations in Favor of More Pollution (May 18, 2018), <https://www.sierraclub.org/press-releases/2018/05/ferc-further-abdicates-its-obligations-favor-more-pollution>.

³⁸ Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 144 S. Ct. 2680 (2024) (mem.).

³⁹ 15 U.S.C. § 717h.

⁴⁰ Caroline Keefe, *No Deals in the Pipeline: The Use of Precedent Agreements to Demonstrate Demand for New Natural Gas Infrastructure After Environmental Defense Fund v. Federal Energy Regulatory Commission*, 67 VILL. L. REV. TOLLE LEGE 52, 52–80 (2023).

⁴¹ Adam Burns, Kelly Lear Nordby & Agustin Ros, *Natural Gas Restrictions in the U.S.: Examining the State of Play, Policy Objectives, Legal Developments, and Antitrust Implications*, ANKURA (Feb. 29, 2024), <https://angle.ankura.com/post/102j0y2/natural-gas-restrictions-in-the-u-s-examining-the-state-of-play-policy-objecti>.

Environmental Justice

Environmental justice, which involves concerns about disproportionate risks to health and safety across communities with differing demographics (e.g., race, national origin, or income), has become an important factor in energy infrastructure siting.⁴² Since 1997, the Council on Environmental Quality has provided guidance for taking into account environmental justice in NEPA reviews.⁴³ In 2020, FERC officials reportedly stated that the Commission “takes environmental justice concerns very seriously” and that the agency’s environmental reviews properly analyze “socioeconomic issues such as environmental justice.”⁴⁴ In May 2021, the FERC chairman announced the appointment of a Senior Counsel for Environmental Justice and Equity to build “a culture and program that ensures FERC appropriately integrates environmental justice and equity issues into our decisionmaking.”⁴⁵ On January 27, 2023, FERC convened “a Commissioner-led roundtable to discuss environmental justice and equity in its jurisdictional infrastructure permitting processes.”⁴⁶

Public Participation

Some have expressed concern about the ability of landowners and other members of the public to understand and participate effectively in FERC’s permitting process.⁴⁷ Specific issues have included landowner notification, understanding of property rights, securing intervenor status, and providing input and comments to FERC during project scoping and review of permit applications, including NEPA review.

In 1978, Congress amended the Federal Power Act to authorize FERC to establish an Office of Public Participation (OPP) to “coordinate assistance to the public with respect to authorities exercised by the Commission” and “also coordinate assistance available to persons intervening or participating or proposing to intervene or participate in proceedings before the Commission.”⁴⁸ However, funds were not subsequently appropriated for this office and FERC did not establish it. In the joint House-Senate Appropriations Committee Report accompanying the Consolidated Appropriations Act, 2021, appropriators directed FERC to submit a report detailing how the

⁴² For further discussion of the concept of environmental justice, see CRS Legal Sidebar LSB11008, *Environmental Justice and the National Environmental Policy Act*, by Kristen Hite (2023). See CRS Legal Sidebar LSB10590, *Addressing Environmental Justice Through NEPA*, by Nina M. Hart and Linda Tsang (2021).

⁴³ COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 10, 1997). This guidance was issued consistent with Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁴⁴ Arianna Skibell & Niina H. Farah, *FERC Faces Environmental Justice Reckoning*, E&E NEWS (July 31, 2020, 7:20 AM) (quoting Neil Chatterjee, FERC Chairman, and Tamara Young-Allen, FERC Spokesperson), <https://www.eenews.net/articles/ferc-faces-environmental-justice-reckoning/>.

⁴⁵ Press Release, FERC, Glick Names Montina Cole to Top Environmental Justice Post at FERC (May 20, 2021), <https://www.ferc.gov/news-events/news/glick-names-montina-cole-top-environmental-justice-post-ferc>.

⁴⁶ Press Release, FERC, Roundtable on Environmental Justice and Equity in Infrastructure Permitting, Docket No. AD23-5-000 (June 20, 2023), <https://www.ferc.gov/news-events/events/roundtable-environmental-justice-and-equity-infrastructure-permitting>.

⁴⁷ See Press Release, U.S. Senator Jeanne Shaheen, Shaheen Reintroduces Legislation to Boost Public Participation in Approval of Energy Projects and Rates (May 15, 2019), <https://www.shaheen.senate.gov/news/press/shaheen-reintroduces-legislation-to-boost-public-participation-in-approval-of-energy-projects-and-rates>.

⁴⁸ Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), as added by Federal Power Act, ch. 687, tit. II, § 213, 49 Stat. 803, 847 (1935) (Waterways Commission abolished, established the Federal Power Commission), amended by Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, title II, § 212, 92 Stat. 3117, 3148. See 16 U.S.C. § 825q-1 (Office of Public Participation (OPP)).

Commission would establish and operate the OPP.⁴⁹ In accordance with this requirement, in June 2021 FERC established the OPP and made plans to develop the office, including staffing to help the public learn about, and participate in, FERC proceedings.⁵⁰ Subsequently FERC continued to staff the newly established OPP in an effort to fulfill the statutory mission of the office.

Biden Administration Executive Orders

President Biden has issued several executive orders related to the aforementioned issues that could affect interstate natural gas pipeline and LNG terminal siting:

- On January 20, 2021, the President issued Executive Order 13,990 asserting a policy to, among other things, “hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; . . . and to prioritize . . . environmental justice.”⁵¹ The order directs all executive departments and agencies to review and address the promulgation of regulations and other actions during the last four years that conflict with these objectives “and to immediately commence work to confront the climate crisis.”⁵²
- On January 25, 2021, President Biden issued Executive Order 13,992, which “revokes harmful policies and directives that threaten to frustrate the Federal Government’s ability to confront . . . problems,” including economic recovery, racial justice, and climate change.⁵³
- On January 27, 2021, President Biden issued Executive Order 14,008, which asserts an Administration policy “to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy” and “delivers environmental justice,” among other objectives.⁵⁴
- On April 21, 2023, President Biden issued Executive Order 14,096, “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” directing agencies to analyze and address impacts, burdens, and historical inequalities of federal activities; provide opportunities for engagement in agency decisionmaking; and develop environmental justice strategic plans.⁵⁵

Although FERC, as an independent agency, is not directly subject to executive orders, the Commission and individual Commissioners have in the past taken account of such orders in

⁴⁹ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182; STAFF OF THE H. COMM. ON APPROPRIATIONS, 117TH CONG., REP. ON H.R. 133, PUBLIC LAW, 116-260, LEGISLATIVE TEXT AND EXPLANATORY STATEMENT 933-934 (Comm. Print 2021). *See* 166 CONG. REC. H8378 (daily ed. Dec. 21, 2020) (statement of Mrs. Lowey, Chairwoman of the House Committee on Appropriations).

⁵⁰ *The Office of Public Participation (OPP)*, FERC (June 24, 2021), <https://www.ferc.gov/OPP>.

⁵¹ Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

⁵² *Id.*

⁵³ Revocation of Certain Executive Orders Concerning Federal Regulation, Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021). The order revokes Executive Order 13,777, issued by President Trump in 2017, which required agencies to evaluate existing regulations and identify regulations for repeal, replacement, or modification. Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,777, 82 Fed. Reg. 12285 (Feb. 24, 2017).

⁵⁴ Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

⁵⁵ Revitalizing Our Nation’s Commitment to Environmental Justice for All, Exec. Order No. 14,096, 88 Fed. Reg. 25251 (April 26, 2023).

permitting decisions. For example, FERC’s 2021 environmental assessment for the East Lateral Express Project states that FERC staff “considered” Executive Order 14,008 and Executive Order 12,898 (which was issued in 1994 and which also deals with environmental justice).⁵⁶ In a 2024 dissent to a rehearing order involving the Transcontinental Gas Pipe Line Company, Commissioner Allison Clements argued that FERC’s analysis should have used Social Cost of Greenhouse Gas values published in accordance with Executive Order 13,990.⁵⁷ A future President could revoke or modify these executive orders, or issue new ones, to reflect a change in Administration policy priorities, which could influence FERC’s review of permit applications in the future.⁵⁸

Pipeline and LNG Permit Litigation

Over the last decade, proposals for new interstate natural gas pipelines and LNG terminals have been subjected to increased public scrutiny. Some proposed projects have faced significant delays in review, in some cases due to protracted litigation involving the issues discussed above. As a result, aspects of FERC’s permitting practices remain a focus of attention among policymakers, due in part to increased attention to environmental justice as well as upstream and downstream environmental effects. Additionally, the D.C. Circuit has on occasion ruled that some aspect of a FERC permitting decision was deficient. The cases described below shape the current process and dialogue with respect to these evolving issues.

Federal appellate courts have jurisdiction over challenges to FERC’s permitting decisions for interstate natural gas pipelines and LNG terminals.⁵⁹ Those challenges may include arguments that FERC failed to comply with NEPA when analyzing the potential environmental effects of a proposed project. The standard of review in such cases is supplied by the Administrative Procedure Act (APA), which—among other things—authorizes federal courts to set aside final agency actions the court finds to be arbitrary and capricious, contrary to law, or unsupported by the applicable facts.⁶⁰ The cases listed below represent a selection of recent instances in which the courts remanded a Section 7 certificate to FERC to address some sort of identified shortcoming.⁶¹

Sabal Trail Pipeline (*Sierra Club v. FERC*)

In August 2017, in a challenge to a Section 7 pipeline certificate FERC had issued, a divided panel of the D.C. Circuit held that FERC failed to include enough information in its EIS on the GHG emissions that would result from burning the natural gas to be carried in the proposed pipeline.⁶² The court found that since the natural gas to be carried in the pipeline was destined for

⁵⁶ See FERC, OFFICE OF ENERGY PROJECTS, EAST LATERAL XPRESS PROJECT, ENVIRONMENTAL ASSESSMENT, DOCKET NO. CP20-527-000, at 56, 72 (March 16, 2021), <https://cms.ferc.gov/sites/default/files/2021-03/EA%20CP20-527.pdf>.

⁵⁷ Commissioner Allison Clements, FERC, “Commissioner Clements’ Dissent Regarding Transcontinental Gas Pipe Line Company, LLC, et al.,” statement, April 18, 2024, https://www.ferc.gov/news-events/news/commissioner-clements-dissent-regarding-transcontinental-gas-pipe-line-company-llc#_ftn37.

⁵⁸ See, e.g., Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (rescinding certain energy- and climate-related actions of the Obama Administration).

⁵⁹ 15 U.S.C. § 717r(b).

⁶⁰ 5 U.S.C. § 706. For further background on the APA and legal challenges to agency action, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

⁶¹ During the time span covering the cases discussed in this report, courts have also upheld other Section 7 certificates. E.g., *Ala. Municipal Distributors Grp. v. FERC*, 100 F.4th 207 (D.C. Cir. 2024) (upholding Section 7 certificate for the Evangeline Pass Expansion Project in the Southeastern United States).

⁶² *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*).

use in specific power plants, downstream emissions were foreseeable and quantifiable, and therefore FERC must “either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”⁶³ Accordingly, the court vacated FERC’s certificate for the pipeline and remanded to FERC for the preparation of an EIS consistent with its opinion.⁶⁴

On remand, FERC prepared a supplemental EIS that sought to evaluate the impact of the proposed project and alternatives on GHG emissions. The Commission found that “there is no way to determine the significance of the . . . Project’s downstream GHG emissions using the Social Cost of Carbon tool or other methodologies” and that the emissions the Commission did project “do not alter the analysis of reasonable alternatives in the [EIS] and do not justify additional mitigation measures.”⁶⁵ Accordingly, FERC reinstated the certificate for the Sabal Trail project in 2018.⁶⁶ However, two Commissioners raised objections to the majority’s conclusion, arguing that the significance of the downstream GHG emissions could—and should—be quantified.⁶⁷

Since the 2017 *Sabal Trail* decision, the appellate courts have heard dozens of appeals of FERC Section 7 certificate proceedings. There are no easily identifiable trends in the case law since that time, as courts continue to grapple with questions related to consideration of indirect environmental effects and other matters related to the certificate process. Thus, subsequent cases remanded to FERC in which the courts have found flaws in the certificate process may provide useful guidance for parties seeking to understand FERC’s Section 7 obligations.

Spire STL Pipeline (*Environmental Defense Fund v. FERC*)

In *Environmental Defense Fund v. FERC*, the D.C. Circuit vacated a Section 7 certificate for an in-service natural gas pipeline and remanded to the Commission for further consideration.⁶⁸ The pipeline, proposed by Spire STL, sought to provide “enhance[d] reliability and supply security” to homes and businesses in the St. Louis, Missouri, area.⁶⁹ A number of parties (including the Missouri Public Service Commission) opposed the project, noting the absence of any new demand for a facility that was, by the operators’ admission, intended to serve existing demand.⁷⁰ FERC nevertheless issued a Section 7 certificate for the pipeline in 2018.⁷¹ Several parties appealed to the D.C. Circuit, continuing to allege that FERC’s evaluation of project need was flawed.⁷²

The court agreed, finding that FERC’s decision to issue the certificate in the absence of adequate evidence of project need through market study was arbitrary and capricious and thus a violation

⁶³ *Id.* at 1375. The Sabal Trail pipeline was approved as part of the larger “Southeast Market Pipelines Project” in Alabama, Georgia, and Florida.

⁶⁴ *Id.* at 1379.

⁶⁵ Order on Remand Reinstating Certificate and Abandonment Authorization, Fla. Se. Connection, LLC, Transcon. Gas Pipe Line Co., LLC, Sabal Trail Transmission, LLC, 162 FERC ¶ 61,233 (2018) (Nos. CP14-554-002, CP15-16-003, CP15-17-002), 2018 WL 1364645.

⁶⁶ *Id.*

⁶⁷ *Id.* at *16–18 (LaFleur, Comm’r, dissenting in part), *19–22 (Glick, Comm’r, dissenting).

⁶⁸ 2 F.4th 953 (D.C. Cir. 2021).

⁶⁹ *Id.* at 963.

⁷⁰ *Id.* at 964.

⁷¹ *Id.* at 965.

⁷² *Id.* at 967.

of the APA.⁷³ The court noted that “the evidence necessary to establish the need for [a] project will usually include a market study Vague assertions of public benefits will not be sufficient.”⁷⁴ The court then turned to the appropriate remedy for this flaw, weighing whether to vacate the permit in addition to remanding to FERC for further analysis to correct the flaw.⁷⁵ The court acknowledged that vacating the certificate was more problematic given that the pipeline was operational at the time but found that the public interest in correcting “serious deficiencies” in FERC’s analysis outweighed these concerns.⁷⁶ In addition, the court noted that “remanding without vacatur under these circumstances would give the Commission incentive to allow ‘build[ing] first and conduct[ing] comprehensive reviews later.’”⁷⁷ The court thus vacated the certificate and remanded to FERC.⁷⁸

Following the court’s decision, FERC issued a temporary certificate to the pipeline owner to continue operations.⁷⁹ The Commission subsequently issued a new EIS for the pipeline to update its environmental review, concluding that “impacts from the continued operation of the Spire STL would be less than significant, with the exception of climate change impacts resulting from GHG emissions that are not characterized as significant or insignificant.”⁸⁰ Taking account of these findings and the fact that customers were already dependent upon the new pipeline (as the old pipeline facilities had since been dismantled), FERC reissued the Spire STL pipeline’s certificate in December 2022.⁸¹

261 Upgrade Project (*Food & Water Watch v. FERC*)

In this 2022 decision, the D.C. Circuit addressed challenges to a Section 7 certificate issued by FERC for the construction and operation of a pipeline and natural gas compressor station in Massachusetts.⁸² In the initial order granting a certificate for the project, FERC stated that the downstream natural gas consumption and resulting GHG emissions from the project were not reasonably foreseeable indirect effects of the project; thus, FERC declined to analyze those effects.⁸³ Petitioners challenged several aspects of FERC’s NEPA compliance efforts, including the agency’s Environmental Assessment (EA).⁸⁴ The court rejected most of the petitioners’ challenges, but it found that FERC had not adequately considered indirect impacts of the proposed project in the EA.⁸⁵

⁷³ *Id.* at 976 (quoting 88 FERC ¶ 61,748).

⁷⁴ *Id.* at 972.

⁷⁵ *Id.* at 976.

⁷⁶ *Id.*

⁷⁷ *Id.* (citations omitted).

⁷⁸ *Id.*

⁷⁹ Press Release, FERC, FERC Extends Temporary Operations for Spire STL Pipeline, Docket No. CP17-40-007 (Dec. 3, 2021), <https://www.ferc.gov/news-events/news/ferc-extends-temporary-operations-spire-stl-pipeline>.

⁸⁰ Spire STL Pipeline LLC; Notice of Availability of the Final Environmental Impact Statement for the Spire STL Pipeline Project, 87 Fed. Reg. 62406 (Oct. 14, 2022).

⁸¹ Order on Remand and Reissuing Certificates, Spire STL Pipeline LLC, 181 FERC ¶ 61,232 (2022) (No. CP17-40-006), 2022 WL 17731035.

⁸² *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022).

⁸³ *Tennessee Gas Pipeline Co., LLC*, 169 FERC ¶ 61,230, 62837 (Dec. 19, 2019).

⁸⁴ *Id.* at 285. Among other things, the EA concluded that the upgrade project did not constitute a major federal action significantly affecting the environment so as to trigger preparation of an EIS.

⁸⁵ *Id.* at 286–87.

Analogizing the record in this case to that in *Sabal Trail*, the court concluded that FERC’s argument for its inability to quantify and consider downstream effects was unreasonable.⁸⁶ The court thus remanded the proceedings to the agency to cure the NEPA deficiencies, but it did not vacate the Section 7 certificate.⁸⁷ Citing multiple previous cases, the court explained that “[t]he decision to vacate depends on two factors: the likelihood that ‘deficiencies’ in an order can be redressed on remand, even if the agency reaches the same result, and the ‘disruptive consequences’ of vacatur.”⁸⁸ Applying these factors, the court concluded that vacatur was unnecessary because FERC could address the deficiency in the EA readily and that it might not change the ultimate conclusion. The court also stated that vacating the Commission’s orders would be “quite disruptive” in that most of the project in question was already either under construction or operational. For these reasons, the court chose not to vacate the Certificate.⁸⁹

Transcontinental Gas Pipe Line Company (New Jersey Conservation Foundation v. FERC)

In January 2023, FERC issued a Section 7 certificate to the Transcontinental Gas Pipe Line Company (Transco) authorizing a pipeline across several states in the Mid-Atlantic region. The Commission declined to make a case-specific determination about the significance of the pipeline project’s GHG emissions, nor did it explain why it would not do so.⁹⁰ A number of parties brought legal challenges, claiming that FERC had overlooked potential environmental consequences and had failed to adequately consider the long-term market needs, particularly in light of state policies seeking to limit natural gas consumption.⁹¹

In an opinion issued on July 30, 2024, the D.C. Circuit agreed with the petitioners that FERC had “violated NEPA by failing to assess significance regarding GHG emissions” and that FERC had acted arbitrarily in granting the certificate without responding to some of the material challenges to its finding of market need.⁹² On this basis, the court vacated FERC’s authorization for the pipeline and remanded the case to the Commission for reconsideration.⁹³ However, the court rejected arguments that FERC had violated NEPA and the APA by failing to account for environmental impacts upstream and downstream of the facilities.⁹⁴ The court found that the petitioners had failed to note anything in the record that would indicate increased production and that FERC was justified in not reaching a conclusion regarding downstream emissions of ozone or ozone precursors given the lack of information in the record regarding such impacts.⁹⁵

Following the court’s decision, Transco requested a FERC rehearing on its vacated pipeline certificate; Transco also requested that FERC issue a temporary certificate allowing the pipeline facilities to continue operating until the Commission responded to the court’s decision.⁹⁶

⁸⁶ *Id.* at 287.

⁸⁷ *Id.* at 292.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *N.J. Conservation Found. v. FERC*, 111 F.4th 42, 54 (D.C. Cir. 2024).

⁹¹ *Id.* at 49–50.

⁹² *Id.* at 56, 58–59.

⁹³ *Id.* at 57.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Transcontinental Gas Pipe Line Company, LLC; Notice of Application and Establishing Intervention Deadline, 89 Fed. Reg. 76109 (Sept. 17, 2024).

LNG Terminal and Associated Pipeline Facilities (*City of Port Isabel v. FERC*)

On August 6, 2024, the D.C. Circuit issued an opinion in response to consolidated petitions for review of FERC reauthorization orders for an LNG terminal and associated pipeline facilities in and near Brownsville, Texas.⁹⁷

The D.C. Circuit also reviewed FERC’s initial orders for the facilities and ruled in 2021 that FERC’s environmental reviews were deficient because the agency had “failed to adequately justify its decision to examine environmental justice impacts within only a two-mile radius of the projects, when some environmental impacts of the projects would extend beyond that area.”⁹⁸ The court held in 2021 that FERC had failed “to assess whether the climate impact of the projects’ GHG emissions would be significant or not.”⁹⁹

On remand, FERC took a more detailed look at environmental justice issues, but it did not prepare a supplemental EIS.¹⁰⁰ The petitioners challenged this decision, arguing that bypassing the supplemental EIS “was arbitrary and capricious and prejudiced their ability to comment meaningfully on the Commission’s new environmental justice analysis.”¹⁰¹ The D.C. Circuit agreed, citing federal regulations that mandate a supplemental EIS if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”¹⁰² The court found that the new information and circumstances following the previous remand were significant enough to trigger the supplemental EIS requirement.¹⁰³ The court further concluded that the deficiencies in FERC’s response to its prior remand “warrant vacating the reauthorization orders for the projects,” which were already under construction, although the court did “not take this step lightly.”¹⁰⁴ On September 13, 2024, FERC published a Notice of Intent to prepare a supplemental EIS for the LNG terminal and associated pipeline projects.¹⁰⁵ The full court (as opposed to the initial three-judge panel) may also revisit its decision at a later date.

FERC’s Natural Gas Permitting Policy Review

Concurrent with and partly motivated by the D.C. Circuit’s various decisions regarding FERC’s natural gas facility permits, the Commission has been conducting an ongoing reconsideration of its own discretionary policies for evaluating pipeline and LNG terminal permit applications. Currently, FERC’s review of pipeline certificate applications is guided by its *Policy Statement on*

⁹⁷ *City of Port Isabel v. FERC*, 111 F.4th 1198 (D.C. Cir. 2024).

⁹⁸ *Id.* at 1205. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021), *vacated and remanded sub nom.* *City of Port Isabel v. FERC*, 111 F.4th 1198 (D.C. Cir. 2024), and *vacated and remanded sub nom.* *City of Port Isabel v. FERC*, 111 F.4th 1198 (D.C. Cir. 2024).

⁹⁹ *Port Isabel*, 111 F.4th at 1205 (quoting *Vecinos*, 6 F.4th at 1328–30).

¹⁰⁰ *Id.* at 1198.

¹⁰¹ *Id.* at 1207.

¹⁰² *Id.*

¹⁰³ *Id.* at 1208–09.

¹⁰⁴ *Id.* at 1218.

¹⁰⁵ Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Proposed Rio Grande LNG, LLC and Rio Bravo Pipeline Company, LLC Rio Grande LNG Terminal and Rio Bravo Pipeline Project, Request for Comments on Environmental Issues, and Schedule for Environmental Review, 89 Fed. Reg. 77129 (Sept. 20, 2024).

Certification of New Interstate Natural Gas Pipeline Facilities issued in 1999.¹⁰⁶ In April 2018, the Commission issued a Notice of Inquiry (NOI) “to examine its policies in light of changes in the natural gas industry and increased stakeholder interest in how it reviews natural gas pipeline proposals.”¹⁰⁷ More specifically, the Commission’s notice posed “a range of questions that reflected concerns raised in numerous public comments, court proceedings and other forums” and sought input on “potential changes to both the existing policy statement and the structure and scope of the Commission’s environmental analysis,” as well as “feedback on the transparency, timing, and predictability of its certification process.”¹⁰⁸

FERC’s inquiry was opened for public comments through July 25, 2018.¹⁰⁹ However, the Commission took no further action related to the NOI until 2021.

Renewal of the Policy Review

On January 21, 2021, President Biden appointed a new FERC chairman (elevating Commissioner Richard Glick, who joined FERC in 2017).¹¹⁰ The appointment followed the November 30, 2020, Senate confirmation of two new Commissioners.¹¹¹ On February 18, 2021, under its new chairman, FERC announced that it had “reopened” its review of the 1999 policy statement and published an NOI “asking for new information and additional perspectives that would assist the Commission in moving forward with its review . . . looking to build upon the record already established.”¹¹² In the announcement, the FERC chairman stated, “[I]t’s important to recognize that many changes have occurred since our initial inquiry three years ago.”¹¹³ At an industry event, the FERC chairman subsequently stated, “[W]e have . . . reinvigorated a proceeding that was begun many years ago,” noting that “our whole process has come under some criticism—I’ve been critical of some aspects of it.”¹¹⁴

The 2021 NOI reaffirmed the Commission’s interest in the aspects of its certificate application review covered in its 2018 NOI, with some modification.¹¹⁵ It also posed new questions examining FERC’s “identification and addressing of any disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on environmental

¹⁰⁶ FERC, STATEMENT OF POLICY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS PIPELINE FACILITIES (Sept. 15, 1999), <https://www.ferc.gov/sites/default/files/2020-04/PL99-3-000.pdf>.

¹⁰⁷ Press Release, FERC, Commission Initiates Notice of Inquiry into Pipeline Certificate Policy Statement, Docket No. PL18-1-000 (April 19, 2018), <https://www.ferc.gov/news-events/news/commission-initiates-notice-inquiry-pipeline-certificate-policy-statement>.

¹⁰⁸ *Id.*

¹⁰⁹ Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 24780 (May 30, 2018). The comment period was extended 30 days from an original closing date of June 25, 2018.

¹¹⁰ Press Release, FERC, President Biden Names Glick Chairman of FERC (Jan. 21, 2021), <https://www.ferc.gov/news-events/news/president-biden-names-glick-chairman-ferc>.

¹¹¹ Press Release, FERC, Senate Votes to Confirm Christie, Clements to Commission (Nov. 30, 2020), <https://ferc.gov/news-events/news/senate-votes-confirm-christie-clements-commission>.

¹¹² Press Release, FERC, FERC Revisits Review of Policy Statement on Interstate Natural Gas Pipeline Proposals (Feb. 18, 2021), <https://www.ferc.gov/news-events/news/ferc-revisits-review-policy-statement-interstate-natural-gas-pipeline-proposals>.

¹¹³ *Id.*

¹¹⁴ Richard Glick, FERC Chairman, Remarks at the Women’s Council on Energy and the Environment, Virtual Executive Series, YouTube (April 29, 2021), <https://youtu.be/NT0jnNl6tpw>.

¹¹⁵ Certification of New Interstate Natural Gas Facilities, 86 Fed. Reg. 11268 (Feb. 24, 2021); Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 18020 (April 25, 2018).

justice communities and the mitigation of those adverse impacts and burdens.”¹¹⁶ The NOI solicited new information and stakeholder perspectives related to the following five aspects of review (in the following order), with specific questions posed under each aspect:

- potential adjustments to determination of need,
- eminent domain and landowner interests,
- environmental impacts,
- efficiency of the Commission’s review process, and
- effects on environmental justice communities.¹¹⁷

The deadline for comments in the NOI, after extension, was May 26, 2021.¹¹⁸ The Commission established no deadline at that time for taking further actions with respect to the NOI.

Issuance of New Policy Statements

On February 17, 2022, FERC issued two statements updating its policies and procedures for the permitting of interstate natural gas pipelines and LNG facilities. The first statement, *Certification of New Interstate Natural Gas Facilities*, established a new policy “to provide a more comprehensive analytical framework” for how FERC would evaluate certificate applications.¹¹⁹ The second statement, *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, established the Commission’s interim policy for evaluating the GHG impacts of proposed gas pipeline and LNG terminal projects.¹²⁰ It also described how FERC would “integrate climate considerations into its public interest determinations.”¹²¹ In testimony before Congress at the time, then-FERC Chairman Richard Glick stated that the new policies were developed primarily in response to the federal court’s recent rulings in FERC permit litigation:

Over the last several years, I expressed concern that the Commission was not implementing section 3 and section 7 of the NGA consistent with federal courts’ interpretations of those provisions. On multiple occasions the courts of appeals have come to the same conclusion, which has led them to vacate or remand Commission orders approving interstate natural gas pipelines and import/export LNG facilities . . . The goal of the two Policy Statements is to provide an updated, legally durable framework that incorporates the guidance the Commission has received from the federal courts into its approach for permitting interstate natural gas pipelines and LNG facilities.¹²²

¹¹⁶ *Certification of New Interstate Natural Gas Facilities*, 86 Fed. Reg. 11268, 11269 (Feb. 24, 2021).

¹¹⁷ *Id.*

¹¹⁸ FERC, NOTICE EXTENDING TIME FOR COMMENTS, DOCKET NO. PL18-1-000 (March 31, 2021), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210331-3029.

¹¹⁹ *Certification of New Interstate Natural Gas Facilities*, 87 Fed. Reg. 11548, 11556 (March 1, 2022).

¹²⁰ 87 Fed. Reg. 14104 (March 11, 2022). Although this policy statement was issued as an interim policy subject to future revision based on the proceeding record, the Commission intended to apply the policy to pending and future environmental reviews. FERC invited public comments on the interim policy to be submitted by April 4, 2022.

¹²¹ *Id.*

¹²² *Review FERC’s Recent Guidance on Natural Gas Pipelines: Hearing Before the S. Comm. on Energy and Natural Resources*, 117th Cong. 2–3 (2022) [hereinafter *FERC Hearing*], <https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines> (testimony of Hon. Richard Glick, FERC Chairman).

Reaction and Reconsideration

Reaction in Congress to the new FERC policy statements was mixed. For example, at a March 3, 2022, hearing of the Senate Energy and Natural Resources Committee, both Chairman Joe Manchin and ranking member John Barrasso were critical of the policy statements, with the chairman asserting that FERC was “setting in motion a process that will serve to further shut down the infrastructure we desperately need as a country and further politicize energy development.”¹²³ However, other committee members were supportive of the policy statements, agreeing that they were required by the courts and characterizing them, for example, as “common sense regulation.”¹²⁴ The then-chairman of the House Energy and Commerce Committee also expressed support for FERC’s policies as “necessary and long-overdue actions” that were “consistent with . . . court directives.”¹²⁵

Following reactions in Congress and among energy sector stakeholders, on March 24, 2022, FERC issued an order redesignating both of its policy statements as drafts.¹²⁶ According to the then-FERC chairman,

[I]n light of concerns that the policy statements created further confusion about the Commission’s approach to the siting of natural gas projects, the Commission decided it would be helpful to gather additional comments from all interested stakeholders, including suggestions for creating greater certainty, before implementing the new policy statements.¹²⁷

FERC’s order invited additional comments by April 25, 2022 (and reply comments by May 25, 2022), but did not indicate when revised policy statements might be issued.¹²⁸ The Commission stated that the two draft policy statements would not apply to pending or new permit applications.¹²⁹ As a FERC policy statement is a guidance document, not a regulation or statute, the Commission has considerable discretion regarding if, when, and how it will apply any policy changes to pending certificate applications.¹³⁰

In November 2021, the Senate confirmed Willie Phillips as a new FERC Commissioner.¹³¹ In January 2023, President Biden named Phillips the new acting chairman of FERC (and redesignated him as chairman in February 2024).¹³² In June 2024, Congress confirmed three new FERC Commissioners, maintaining a full complement of five Commissioners.¹³³

¹²³ *Id.* (statement of Sen. Joe Manchin).

¹²⁴ *Id.* (statement of Sen. Angus King).

¹²⁵ Press Release, Rep. Frank Pallone Jr., House Energy and Commerce Committee, Pallone Applauds FERC’s Decision to Consider Climate, Environmental Justice in Natural Gas Certification Process (Feb. 17, 2022), <https://democrats-energycommerce.house.gov/newsroom/press-releases/pallone-applauds-ferc-s-decision-to-consider-climate-environmental-justice>.

¹²⁶ Certification of New Interstate Natural Gas Facilities; Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews: Order on Draft Policy Statements, 178 FERC ¶ 61,197 (March 24, 2022).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316 (D.C. Cir. 2003).

¹³¹ 167 CONG. REC. S8316 (daily ed. Nov. 16, 2021).

¹³² *Commission Members & Senior Staff, Chairman Phillips*, FERC (Oct. 2, 2024), <https://www.ferc.gov/about/Commission-members/Commissioner-phillips>.

¹³³ Press Release, FERC, Senate Confirms Rosner, See and Chang to FERC (June 13, 2024), <https://www.ferc.gov/news-events/news/senate-confirms-rosner-see-and-chang-ferc>.

Under Chairman Phillips, the Commission has made no commitments regarding if or when it might reissue its draft policy statements. FERC's *FY2025 Congressional Justification*, issued March 11, 2024, stated that

[t]he Commission will review the comments on the draft Updated Certificate Policy Statement in order to evaluate whether changes to the draft policy statement should be made before issuing a final policy statement . . .

The Commission will review the comments on the draft GHG Policy Statement in order to create a more robust record for the Commission's evaluation of GHG emissions for proposed natural gas infrastructure projects, which the Commission will consider before issuing a final policy statement.¹³⁴

Following the D.C. Circuit's 2024 decisions, Chairman Phillips remarked, "[T]he shift that we've seen in the legal landscape regarding our certifications, on LNG in particular, I think does present an opportunity for us to revisit the 25-year-old policies that we have regarding those authorizations."¹³⁵ Whether and when FERC may choose to issue revised policy statements remains to be seen.

Policy Options for Congress

Notwithstanding any uncertainties it may create, Congress could view the D.C. Circuit as providing a satisfactory check on the Commission's permitting practices in light of evolving federal energy and environmental initiatives. However, if Congress seeks to change the status quo to reduce the prospects for future litigation, it could consider various options, including (1) providing greater natural gas policy direction to FERC, (2) limiting judicial review of FERC permits, or (3) changing NEPA requirements with which the Commission must comply. These three options are discussed below.

Changing FERC's Policies or Mission

If Congress is dissatisfied with FERC's natural gas permitting policies, either as expressed in the Commission's current policy statement or as stated in its certificate orders, Congress could direct FERC to conclude its ongoing permitting policy review—perhaps with explicit policy guidance—and issue new policy statements. Alternatively, Congress could directly establish FERC's permitting review policies, by modifying FERC's mission, or Congress could limit the Commission's discretion under the NGA.¹³⁶ Congress adopted such an approach in its reauthorization of the Pipeline and Hazardous Materials Safety Administration (PHMSA) under the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act).¹³⁷ The act mandates that PHMSA promulgate pipeline leak repair regulations "to meet the need for gas pipeline safety, as determined by the Secretary; and . . . to *protect the environment*."¹³⁸ The inclusion by Congress of specific language about protecting "the environment" could be

¹³⁴ FERC, CHAIRMAN WILLIE L. PHILLIPS, FY 2025 CONGRESSIONAL JUSTIFICATION 51 (March 11, 2024), <https://www.ferc.gov/media/fy-2025-congressional-justification>.

¹³⁵ James Downing, DC Circuit Orders Could Lead FERC to Rethink Its Natural Gas Policies, RTO INSIDER (Sept. 19, 2024), <https://www.rtoinsider.com/87601-dc-circuit-rulings-force-ferc-reconsider-gas-infrastructure-regs/>.

¹³⁶ Natural Gas Act of 1938, ch. 556, 52 Stat. 822.

¹³⁷ *Pipeline and Hazardous Materials Safety Administration*, U.S. DEPT. OF TRANSPORTATION, <https://www.phmsa.dot.gov/> (last visited Oct. 18, 2024); Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act), Pub. L. No. 116-260, div. R, 134 Stat. 2210.

¹³⁸ PIPES Act, Pub. L. No. 116-260, div. R, § 113, 134 Stat. 2210, 2229 (emphasis added).

interpreted as an expansion of PHMSA's traditional safety mission to include climate considerations—for example, requiring explicit consideration of GHG impacts in agency rulemaking.

Restricting Judicial Review

Another approach for Congress to address FERC permit-related litigation could be to restrict the processes or authority of the federal courts with respect to such litigation. Congress has taken this approach with respect to a specific project in the Fiscal Responsibility Act of 2023 (FRA). In the FRA, Congress included language to stop further consideration of legal challenges to federal approvals for the Mountain Valley Pipeline by the U.S. Court of Appeals for the Fourth Circuit.¹³⁹ Opponents of the pipeline had challenged various authorizations from the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, the U.S. Forest Service, and the Bureau of Land Management.¹⁴⁰ Section 324(e)(1) of the FRA provides that “no court shall have jurisdiction to review” actions of certain federal or state agencies granting approvals necessary for the construction and operation of the pipeline, “whether issued prior to, on, or subsequent to the date of enactment of this Section, and including any lawsuit pending in a court as of the date of enactment of this section.”¹⁴¹

Congress could also limit the availability of judicial review for a broader category of projects or FERC actions. The proposed Protect LNG Act adopts this approach specifically for environmental review of FERC-jurisdictional LNG facilities.¹⁴² It would shield the validity of FERC permits for LNG facilities from civil litigation involving environmental review under the NGA or NEPA. It would bar the courts from vacating such permits, and it would require remand to the relevant agencies if the courts found that the environmental review violated the NGA or NEPA. It would also assign jurisdiction of such cases to the U.S. Court of Appeals for the circuit in which the facility is, or will be, located—not automatically the D.C. Circuit—and require such cases to receive expedited review, among other provisions. Congress could also choose to expand or otherwise amend judicial review to mandate vacatur or other relief, or it could choose to amend judicial review in any other manner that conforms with the Constitution.

¹³⁹ Fiscal Responsibility Act of 2023 (FRA), Pub. L. No. 118-5, tit. III, § 324, 137 Stat. 10, 47.

¹⁴⁰ For further details, see CRS Insight IN12032, *Mountain Valley Pipeline: Past the Finish Line*, by Paul W. Parfomak and Adam Vann (2024). In 2019, the D.C. Circuit denied petitions for review of FERC's 2017 approval of the pipeline. See *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

¹⁴¹ FRA, *supra* note 139. For further discussion of the Mountain Valley Pipeline provisions in the Fiscal Responsibility Act, see CRS Legal Sidebar LSB11010, *Mountain Valley Pipeline Litigation Tests Congress's Power to Limit Federal Court Jurisdiction*, by Joanna R. Lampe (2023).

¹⁴² S. 5290 (2024).

Changing NEPA Requirements

To limit future legal challenges, Congress could also change the NEPA requirements with which the Commission must comply as part of its permit review process. For example, in the FRA, Congress amended NEPA, seeking to clarify its scope and streamline its implementation in permitting decisions, among other changes.¹⁴³ The Building Chips in America Act of 2023 amends the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to effectively exempt from NEPA and the National Historic Preservation Act specified proposals to build semiconductor manufacturing plants that receive financial assistance under the latter act, among other provisions.¹⁴⁴

In the 118th Congress, another legislative proposal, released as a discussion draft in the House Natural Resources Committee, would have limited the analysis required of agencies in environmental documents, clarified NEPA applicability to federal actions, and limited judicial review.¹⁴⁵ Congress is also free to codify an expanded scope for NEPA reviews or to provide further detail on the nature of the impacts that must be considered during such reviews. Enacting such changes could affect federal permitting both within and outside FERC's jurisdiction, however, as NEPA potentially may apply to any major action by any federal agency. Evaluating the overall implications of changing NEPA requirements is beyond the scope of this report but could be challenging for Congress.

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¹⁴³ FRA, *supra* note 139. Fiscal Responsibility Act of 2023 (FRA), Questions and Answers on the Fiscal Responsibility Act of 2023's Amendments to NEPA and CEQ's Bipartisan Permitting Reform Implementation Rule (Phase 2), NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), <https://ceq.doe.gov/laws-regulations/fra.html> (last visited Oct. 17, 2024).

¹⁴⁴ Building Chips in America Act of 2023, Pub. L. No. 118-105 (Oct. 2, 2024); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388; NEPA, Pub. L. No. 91-190, § 102(2)(C), 83 Stat. 852, 853 (1970); National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915.

¹⁴⁵ A Bill to Amend the National Environmental Policy Act of 1969, and for Other Purposes, 118th Cong. (draft bill, Oct. 16, 2024), https://naturalresources.house.gov/uploadedfiles/discussion_draft_of_h.r._.pdf.pdf; House Energy and Mineral Resources Subcommittee Staff, Legislative Hearing on H.R. ___, H.J. Res. 168 and H.R. 6129, Full Committee Hearing, YouTube (Sept. 11, 2024), <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=416441>.

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