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FERC permitting policies leave regulatory uncertainty on viability of natural gas infrastructure development

By Kirstin E. Gibbs, Esq., and Pamela T. Wu, Esq., Morgan, Lewis & Bockius LLP

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Increasing exports of U.S. natural gas due to geopolitical concerns has put a spotlight on the Biden-Harris administration's efforts to change the way that the Federal Energy Regulatory Commission ("FERC") processes permits to develop new natural gas infrastructure. During the first days of the new administration, President Biden embarked on a "whole of government" approach to combating climate change, pushing FERC to consider changes to the way it reviews applications to approve and construct new natural gas infrastructure projects by addressing greenhouse gas ("GHG") emissions and environmental justice concerns.

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In response, in February, FERC released a new certificate policy statement, which governs the process for approving new natural gas infrastructure projects. It also released an "interim" policy statement on how it will consider GHG emissions and climate change impacts from new natural gas infrastructure. FERC stated that it would apply the policy statements to both pending and new certificate applications.

Unsurprisingly, not all of the recommended changes to FERC's permitting process and GHG policies were well received, especially since the rules were made effective immediately without a comment period or transition schedule. In fact, after receiving considerable backlash from Capitol Hill, FERC abruptly changed its issuances to "draft" policy statements rather than "updated" and "interim" policy statements just over one month after their issuance. In addition to opening a comment period to solicit feedback and input from the industry, FERC reversed course by noting that any policy change would apply prospectively to new proposed projects and not affect any pending projects.

While it is true for many years FERC has been considering whether to make revisions on how it approves new natural gas infrastructure, the proposed revisions to the certificate policy statement are significant, having the potential to stifle the development of greenfield projects and major expansions if they are allowed to go forward. The updated draft certificate policy statement is intended to provide a more comprehensive framework on how FERC makes decisions to approve new projects and to clarify how it will evaluate factors relevant to the public interest. It also is intended to provide more transparency around how environmental and economic interests are balanced.

However, the draft certificate policy statement doesn't just make minor tweaks or updates to existing policies, and many in the energy industry are concerned the draft raises more questions than it provides answers. Most notably, FERC held that precedent agreements, which typically form the financial support for a new project, aren't the sole factor and may not provide sufficient evidence to demonstrate the "need" for a new project. Instead, FERC will look for examples of the intended end-use of the gas as a major determining factor of whether the project is needed.

The burden to provide specific end-user examples now falls to the project applicant to show how the gas that is transported by the proposed project will be used to support a public interest determination. If the applicant does not include this data, or if FERC deems the information provided to be insufficient to demonstrate project need, FERC could deny certification of the project.

The draft certificate policy statement expands the consideration of the adverse impacts of proposed projects from the applicant's existing customers, pipelines and their captive customers. It also expands consideration of environmental interest to include the potential impact on landowners and surrounding communities, including environmental justice concerns and communities. FERC may deny an application as a result of any of the types of adverse interest. There is also a new expectation that the applicants propose mitigation measures for these adverse impacts. This includes an expectation of robust and early engagement with all interested landowners and for developers to continue to evaluate landowner input during the life of a project.

The draft GHG policy statement, on the other hand, purports to explain how FERC will assess the impacts of natural gas infrastructure projects on climate change in reviews conducted under the National Environmental Policy Act (NEPA). If the project might produce 100,000 metric tons per year of carbon dioxide equivalents, the project will be deemed to have a significant impact on climate change. FERC encourages applicants to develop and propose mitigation efforts to offset any potential climate change impacts.

Like the draft certificate policy statement, FERC amended its original proposal to clarify that this interim guidance would not apply to projects currently pending and instead made the proposal applicable to only new projects.

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As expected, comments received to date fall along party lines, with energy companies generally pushing back against significant changes in policies and growing burdens to project applicants, while environmental groups and landowners are urging FERC to adopt more restrictive measures. There is no deadline by which FERC must act, allowing the agency to continue to process applications pursuant to existing precedent. This regulatory uncertainty, however, has left some developers to question the viability of new natural gas infrastructure projects that could address today's geopolitical and global energy transition pressures.

It is worth noting that as a response to the war in Ukraine, the United States has pledged to send more natural gas to Europe to combat much of the continent's reliance on Russian energy supplies. During the first four months of 2022, the United States exported 74% of its liquefied natural gas (LNG) to Europe, compared with an annual average of 34% last year. U.S. exports are a key part of the EU Energy Platform, which seeks to coordinate measures to secure reliable and diversified energy supplies for the European Union.

Uptick in enforcement actions related to permits

In addition to challenges regarding changes to permitting policies, existing natural gas pipelines and infrastructure are seeing an uptick in enforcement actions. In several statements issued over the last year and a half, FERC Chairman Richard Glick clearly set forth his expectations that the holder of a certificate of public convenience and necessity must satisfy and fully comply with each and every condition in the certificate. Failure to adequately fulfill those responsibilities may result in (1) a referral to FERC Office of Enforcement for investigation and potential assessment of civil penalties and other remedies, and/or (2) the revocation of the certificate of public convenience and necessity.

For example, in December 2021, the Commission ordered a pipeline company to show cause why it had not violated the environmental conditions of its certificate requiring environmental remediation of the right-of-way along the project. The Commission also referred the matter to OE for further investigation and, as appropriate, further Commission action that could include the assessment of civil penalties and other remedies.

In addition, in early 2021, FERC approved two separate settlements that were entered into by a developer and FERC's Office of Enforcement to resolve investigations into whether the developer violated the Natural Gas Act and the conditions of the certificate authorization issued by FERC.

FERC OE is expected to continue its efforts toward investigating and pursuing enforcement actions involving threats to the nation's energy infrastructure, environment, and surrounding communities as well as noncompliance with the conditions set forth in a certificate of public convenience and necessity. As outlined in FERC's Revised Policy Statement on Enforcement, among the factors that FERC OE examines in determining the seriousness of a violation are whether there was harm caused by the violation, loss of life, injury, or endangerment to persons, or damage to property or the environment.

With the Commission's heightened focus on environmental impacts and environmental justice as those may be reflected in an updated certificate policy statement, it is also possible that the Commission will impose more extensive conditions in its certificates of public convenience and necessity. Additional conditions will require developers to exhibit further diligence in their compliance efforts to avoid any action initiated by FERC OE.

About the authors


Kirstin E. Gibbs (L) , a partner at **Morgan, Lewis & Bockius LLP** and co-leader of its energy industry team, leader of the climate change and sustainability working group, and member of the firm's hydrogen working group, represents pipelines, producers, traders, marketers, utilities, and end users. She handles transactional matters related to the development of new oil and gas infrastructure and regularly provides assistance with negotiation of midstream transportation and storage agreements, complex asset management agreements, and commodity transactions. She also counsels global clients interested in addressing climate change and sustainability initiatives by investing in clean energy technologies. She is resident in the firm's Washington, D.C., office and can be reached at kirstin.gibbs@morganlewis.com. **Pamela T. Wu** (R), an associate at the firm, advises clients in the natural gas, oil, and electric power industries before the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the U.S. Department of Transportation, and the Texas Railroad Commission on rate, regulatory, and transactional matters. She is an active member of the firm's energy industry team, hydrogen working group, and energy trading working group. She is resident in the firm's Washington, D.C., office and can be reached at pamela.wu@morganlewis.com.

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