CLEARING THE PATH FOR POWER

LESSONS FROM THE NATURAL GAS ACT FOR FEDERAL TRANSMISSION SITING

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Americans for a Clean Energy Grid

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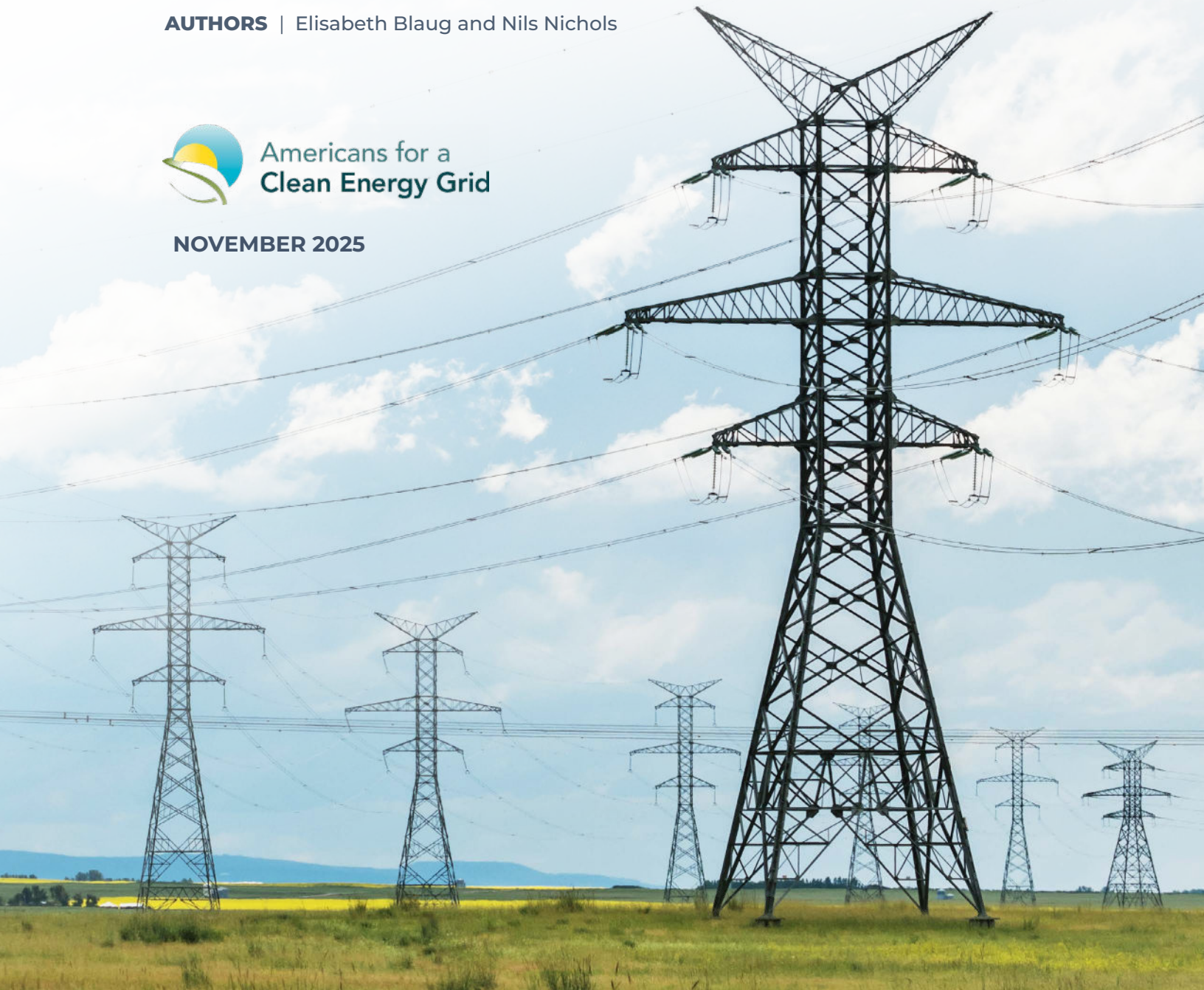

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About This Report

ACEG contracted the expert services of **Elisabeth Blaug** and **Nils Nichols** to draft this paper as both their professional and personal experience gives them considerable insight into the complexity of siting energy infrastructure. Currently, both serve as senior fellows at the Niskanen Center. Both Ms. Blaug and Mr. Nichols served as senior attorneys at the Federal Energy Regulatory Commission. Mr. Nichols was Director of the Division of Pipeline Regulation in the Office of Energy Market Regulation with responsibility for oil and natural gas tariff and rate issues. He also served as the Director of the Office of Administrative Litigation with responsibility for oil, natural gas, and electric matters set for hearing. Ms. Blaug was a senior attorney in the Office of General Counsel — Energy Projects, where she focused on environmental issues, primarily NEPA, relating to the permitting process for natural gas pipelines, liquefied natural gas facilities, and hydroelectric projects. Elisabeth served as an advisor on energy and environmental issues to FERC Commissioner Suedeen Kelly. Further, as a landowner in West Virginia, Mr. Nichols has had numerous interactions with energy infrastructure developers, including developers of electric transmission lines.

This report was developed with the valuable guidance and support of an Advisory Group, whose collective expertise in policy and legal matters concerning electric transmission and interstate natural gas pipelines provided important insight throughout the drafting process. Thanks to the following Advisory Group members:

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Christina Hayes, Executive Director, Americans for a Clean Energy Grid (ACEG). Christina Hayes represents ACEG, a diverse coalition of utilities, customers, developers, environmental advocates, and labor interests who support the development of high-capacity transmission to expand and modernize the grid cost-effectively and reliably. She previously served as Vice President for Federal Regulatory Affairs at Berkshire Hathaway Energy and held multiple roles at FERC, including in the Office of General Counsel and as an advisor to Chairman Wellinghoff.

This paper also received the support of a utility partner and review assistance provided by Grid Strategies.

INTRODUCTION

Interstate natural gas pipelines and high-capacity electric transmission lines serve the same purpose: They transport energy from producers to consumers, often across significant distances. The process of deciding where to site the facilities and the need to obtain authorizations, often from multiple agencies, are similar. For both types of infrastructure, the developer must demonstrate that the project is needed; secure easements, sometimes through eminent domain; and the project must undergo environmental review.

These similarities notwithstanding, the relative ease of siting and permitting interstate natural gas pipelines pursuant to the Natural Gas Act has resulted in a robust national network, with approvals for new and upgraded projects routinely issued in a timely, predictable manner that includes public participation and efficient judicial review. The result is a reliable, resilient pipeline grid that delivers energy at just and reasonable rates.

In contrast, the siting and permitting of high-capacity electric transmission lines can be slow and unpredictable, subject to conflicting regulatory regimes and parochial interests. Judicial review poses challenges, with potentially lengthy timelines that can result in significant delay and even project cancellation. The result is a struggle to build new transmission and upgrade existing lines. Consequently, the reliability and resilience of the grid is declining, and the system may not be able to meet increasing electricity demand and provide reasonably priced energy.

In response to calls for leveling the playing field between interstate natural gas pipelines and electric transmission lines, this report examines the Natural Gas Act to identify what makes it successful, and by implication how that process might be adopted to accelerate the siting and permitting of electric transmission lines.

EXECUTIVE SUMMARY

Congress delegated authority to regulate interstate natural gas pipelines to the Federal Energy Regulatory Commission (FERC) in the Natural Gas Act of 1938 (NGA). FERC has successfully sited natural gas pipelines for nine decades. Pipelines, often of considerable length and diameter, are routinely approved in less than two years through a predictable process that balances competing interests and provides opportunities for public participation. The NGA readily accommodates the construction of pipelines — as additional supplies of natural gas have been developed in recent decades, new and expanded pipelines have been built to deliver those resources to markets. The result is a nationwide transmission system that reliably transports natural gas to consumers at just and reasonable rates.

In contrast, the addition of new high-capacity electric transmission lines has slowed over the past decade, even as the need for additional transmission has increased. In 2024, 888 miles were completed; by comparison, nearly 4,000 miles were built in 2013 alone.[1] All the while, the existing grid is aging and increasingly vulnerable. This failure impedes reliable operation of the grid and its ability to meet growing demand. The system increasingly lacks resilience to withstand, respond to, and recover from disruptions like extreme weather events and wildfires. This poses risks to hu-

FERC has approved pipelines relatively quickly — 18 months on average, which is less than half the average time for the environmental review alone for interstate electric transmission lines.

man life, the economy and developing sectors like semiconductor manufacturing, artificial intelligence and advanced manufacturing.

While the difficulty in building electric transmission can be attributed in part to issues surrounding cost allocation, a key difference is the respective siting and permitting processes for interstate natural gas pipelines and electric transmission lines, resulting in markedly different timelines. Although it is difficult to precisely calculate the average time it takes to approve interstate natural gas pipelines and electric transmission lines given their varying sizes and functions, a 2024 Niskanen Center report stated that in recent decades FERC has approved pipelines relatively quickly — 18 months on average[2], which is less than half the average time for the environmental review alone for interstate electric transmission lines.[3]

The NGA vests the siting and permitting of interstate natural gas pipelines in a single independent regulatory agency — FERC. Congress, in the Federal Power Act of 1935 (FPA), granted FERC authority to set rates and perform other functions related to electric transmission. However, FERC was not given responsibility for siting and permitting, in large part because, at that time, most transmission lines were localized and owned by state regulated public utilities.[4]

There have been bipartisan calls to establish common siting and permitting frameworks between electric transmission lines and interstate natural gas pipelines.

As a result, siting for transmission primarily lies with the states and, in some instances, localities. Permitting can involve multiple levels of government, including federal agencies where federal authorizations are required. Electric transmission lines that cross state boundaries require authorization from each state and each state process is essentially unique. Consequently, developers must navigate siting and permitting regimes that do not have uniform standards. Congress has made limited efforts to address these challenges in recent years, but these efforts have not been successful.

Recognizing the need for action, there have been bipartisan calls to establish common siting frameworks between electric transmission lines and interstate natural gas pipelines.[5] This report examines the NGA to identify how it has facilitated development of a robust interstate natural gas system, briefly reviews the array of approaches taken by states with regard to electric transmission and considers how the NGA framework could accelerate the buildout of the electric grid. This report also explores the existing limited federal role in siting and permitting electric transmission lines, including FERC's jurisdiction over electric transmission lines associated with FERC-regulated hydroelectric projects.

This report concludes that similar siting and permitting treatment for interstate natural gas pipelines and electric transmission lines could eliminate many challenges inhibiting further development of the electric grid while retaining a significant role for states. Key reasons include:

- The NGA places approval authority for pipelines in one agency, with one set of regulatory standards; in contrast, each state has its own siting and permitting requirements for electric transmission, creating a fragmented approval process.
- The NGA sets forth a coordinated process that applies to all federal permits required for a pipeline.
- The NGA considers local, regional and national energy needs, while states generally consider only benefits to their state.
- The NGA grants eminent domain authority — including over state lands — to projects that are in the public interest. In contrast, eminent domain authority for transmission lines differs from state to state; some states skew eminent domain in favor of purely in-state projects built by in-state actors, while others limit eminent domain authority to in-state utilities that serve retail customers within that state.
- The NGA pre-empts state and local actions that may delay or obstruct pipeline construction, while retaining a supporting role for states.
- The NGA establishes a uniform appellate process where parties aggrieved by a FERC certificate or federal authorization issued in connection with the certificate file appeals directly to the United States Circuit Court of Appeals (Courts of Appeals). State laws concerning how and when to challenge a siting or permitting decision vary, creating a fractured appellate timeline.

BACKGROUND

In 1938, Congress reacted to actions of states inhibiting the use of natural gas by establishing a uniform federal system for regulating the transportation of natural gas in interstate and foreign commerce, declaring in NGA Section 1(a) that: "[T]he business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[6] NGA Section 2(7) defines "interstate commerce" as: "[C]ommerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."[7]

The NGA vested the Federal Power Commission, predecessor to today's FERC, with authority to administer the Act, including authority to approve interstate natural gas pipelines.[8] The NGA pre-empts state and local laws and regulations to the extent they prohibit or unreasonably delay the construction or operation of interstate natural gas facilities.[9] Accordingly, individual states authorize only the transportation of natural gas within their boundaries.

In response to states continuing to impede the development of natural gas pipelines, Congress in 1947 added NGA Section 7(h) to grant eminent domain authority to the holder of a FERC certificate authorizing an interstate natural gas pipeline.[10] This allows a pipeline developer to obtain the right to use a landowner's property in exchange for just compensation as approved by a court. The Senate Report accompanying the amendment

noted that some states would not grant eminent domain to pipelines that did not distribute gas in the state and that conferring that right by federal eminent domain would "correct this deficiency and omission in the [NGA]."[11]

Placing authority over interstate natural gas pipelines in a single regulatory body that applies uniform standards, and pre-empting state and local jurisdictions from impeding the exercise of that authority, has been crucial to the development of the interstate natural gas pipeline system. The efficacy of this approach is clear:

> [B]etween 1950 and the 1980s, U.S. natural gas production grew significantly with the discovery of new natural gas reserves and new technological developments. Because of a streamlined federal siting process, pipeline companies were able to triple and quadruple their capacity to meet the demand created by new supplies. The same was true beginning in the late 2000s, with the advent of hydraulic fracturing, which allowed natural gas companies to access massive new reserves of natural gas trapped in shale rock in Pennsylvania, Texas, Oklahoma, and other states. Between 2000 and 2011, pipeline companies built 14,600 miles of interstate natural gas pipelines, and twice as much transmission capacity was added to the U.S. natural gas pipeline network in 2008 as in 2007.[12]

IV OVERVIEW OF THE NGA PROCESS

NGA Section 7 is the core of the interstate natural gas pipeline program. Section 7(c) provides that a natural gas company seeking to construct and operate an interstate natural gas pipeline must obtain a certificate of public convenience and necessity (certificate) authorizing such acts. Section 7(e) charges FERC with issuing the certificate if it finds that the requested pipeline "is or will be required by the present or future public convenience and necessity." Beyond this, however, Congress was not prescriptive. The NGA does not define "public convenience and necessity," thus allowing FERC to consider proposed pipelines based on the facts and circumstances of individual cases.

FERC's consideration of the public convenience and necessity begins with the developer filing an application. Before an application is filed, a developer may engage in a pre-filing process in which FERC and the developer work with stakeholders — including federal, state and local agencies — to identify and resolve concerns.

Once an application is filed, FERC initiates a hearing that includes an opportunity for the public to intervene and participate as a party. Within 90 days of receipt of the application, FERC also issues a schedule for other federal agencies to issue authorizations.

KEY STAGES IN CERTIFICATE PROCESS

1. FERC Pre-Filing—6-12 Months

- Most developers of large projects elect to use pre-filing to initiate discussions about the proposed route, permitting requirements and options to mitigate adverse impacts.
- Developer consults with federal, state and local permitting agencies.
- The goal is to Identify and resolve issues before filing an application.

2. Application

- Developer files an application.
- FERC prepares an environmental assessment or an environmental impact statement, as appropriate.
- FERC reviews proposed and alternative routes.
- Developer works with federal, state and local agencies to acquire authorizations.

3. Certificate

- FERC issues a certificate after it completes its review. Adequate market support must be demonstrated, typically in the form of contracts.
- Almost all certificates contain conditions that must be met prior to construction.
- Once developer meets conditions and acquires necessary authorizations FERC will issue a Notice to Proceed with construction.

4. Post-Certificate

- If relevant, rehearing and judicial review.

In assessing whether to grant a certificate, FERC weighs the benefits of a proposed pipeline against its potential harms. This determination is based on the facts and circumstances of each project, as well as the analysis of environmental impacts.

At the conclusion of the hearing, FERC issues an order approving or denying the certificate application. FERC routinely places conditions in the certificate which the holder must meet before construction can commence. Once a developer meets the conditions and obtains all required authorizations, FERC will issue a Notice to Proceed with construction.

Parties who have intervened have 30 days to seek rehearing of FERC's order. FERC must act on rehearing requests within 30 days, after which aggrieved parties have 60 days to file an appeal in the relevant Court of Appeals.

V THE CERTIFICATE APPLICATION

FERC developed the pre-filing process to encourage companies to engage with agencies and the public prior to submitting an application. The pre-filing process typically involves studying potential project routes, identifying stakeholders, and holding open houses to discuss project impacts. These interactions improve a developer's proposal through early identification and resolution of issues.

The construction of a large interstate natural gas pipeline may disturb thousands of acres of land, including agricultural land, forest land and areas of scenic value. The pipeline may cross hundreds of streams, rivers and wetlands. It may affect numerous cultural resources and historic properties. The pipeline may impact endangered species and their habitat, as well as state, local and national parks, and other public lands. The pipeline may require easements on thousands of tracts of land, most owned by private citizens. It may be located near sensitive areas such as homes, schools, churches, businesses, towns and cities. It will likely require authorizations from multiple state and federal agencies to satisfy the requirements of the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Rivers and Harbors Act, the Coastal Zone Management Act, the National Historic Preservation Act and other federal statutes. FERC has developed a multi-step process to review these effects. The core elements of the NGA and FERC's regulatory program are discussed below in the approximate chronological order in which they occur.

PRE-FILING STEPS

1. Developer requests approval to use pre-filing.
2. FERC formally approves use of pre-filing, which starts a six-month clock.
3. Developer studies potential locations.
4. Developer identifies stakeholders.
5. Developer holds open houses to discuss project.
6. Developer conducts route studies and field surveys.
7. Application filed with FERC.

A. Pre-Filing

To assist in the review of a proposed pipeline, FERC developed the pre-filing process to encourage companies to engage in project development with: FERC; federal, state and local agencies; and the public prior to submitting an application.[13] The pre-filing process typically involves studying potential project routes, identifying stakeholders and holding open houses to

discuss project impacts. These interactions improve a developer's proposal through early identification and resolution of issues, helping to avoid problems during the review of the application. Although voluntary, developers of major pipeline projects almost always participate in pre-filing.

FERC must approve requests to use pre-filing. FERC regulations contemplate a minimum six-month process before an application can be filed. During pre-filing, a pipeline proposal may undergo route changes, design revisions, and modifications to mitigate or avoid environmental concerns. This results in an efficient review of applications and a high approval rate. Between 1999-2019, FERC approved 474 projects adding 23,773 miles of pipeline. In that timeframe, FERC rejected two pipeline applications.[14]

Over the past 10 years, most pipelines over 100 miles in length have been certificated in under 30 months (including the six to 12-month pre-filing period); the longest pipeline, at 564 miles, was certificated in three years and nine months.[15]

TIMELINE: PRE-FILING TO CERTIFICATE ORDER FOR PIPELINES 100 MILES AND OVER SINCE 2015

***Timeline includes minimum of six-month pre-filing process*

PIPELINE	MILES	CERTIFICATE ISSUANCE	PRE-FILING TO CERTIFICATE
Atlantic Coast	564	August 2018	3 years, 9 months
Sabal Trail Project	516	Feb 2016	2 years, 2 months
Rover Pipeline	511	February 2017	2 years, 8 months
Atlantic Bridge	239	June 2017	1 year, 11 months
Midship Pipeline	233	August 2018	1 year, 10 months
Atlantic Sunrise	200	February 2017	2 years, 10 months
Leach Express	161	January 2017	2 years, 3 months
Gulf Run Pipeline	134	June 2021	2 year, 2 months
Double E Pipeline	133	October 2020	1 year, 10 months
Florida SE Connection	126	February 2016	2 years, 4 months
Dalton Expansion	115	August 2016	1 year, 8 months
Creole Trail	104	April 2015	2 years, 1 month
Empire Pipeline	100	February 2017	2 years, 7 months
N. Bakken Extension	100	June 2021	1 year, 11 months

***Numbers compiled from FERC website*

Of course, a determination that a pipeline is in the public interest does not ensure it will be constructed, although cancellation is relatively rare once a project receives a certificate. According to the Interstate Natural Gas Association of America (INGAA), a trade organization for the interstate natural gas pipeline industry, from 2012-2023 FERC issued certificates to five pipelines that were ultimately cancelled by their developers.[16]

B. Certificate Application

To assess whether a pipeline is in the public convenience and necessity, FERC must compile a record upon which to base that decision. The first step in that process is for the developer to file an application supporting its proposal.

FERC's requirements for what information the application must contain are extensive and explicit.[17] The guiding principle is that "[a]pplications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested...."[18] Further, "every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project ...."[19]

Applications that patently fail to comply with statutory requirements or FERC rules, regulations, and orders may be rejected, thus incentivizing applicants to develop applications that are sufficient to facilitate project review.[20]

C. Hearing

FERC commences a public hearing once an application is filed. NGA Section 7(c)(1)(B) provides that: "[T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary...."[21] NGA Section 15(f) adds: "All hearings ... shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing ... shall invalidate any order...."[22]

FERC does not use a trial-type evidentiary proceeding involving discovery, motions, testimony, cross-examination and briefs. Rather, FERC conducts a "paper hearing" in which the record is developed through written submissions by parties and commenters. The hearing is essentially a compilation of the information filed in the proceeding, including economic, engineering and environmental analyses conducted by FERC staff.

D. Intervention

Any member of the public may provide comments in a certificate proceeding, and all substantive comments are included in the record. However, to participate in the proceeding, and ultimately seek rehearing and judicial review of a FERC decision, one must become a party. This is accomplished by filing a motion to intervene that demonstrates that the movant has an appropriate interest in the matter.

The right to intervene and become a party is not absolute, except for certain governmental and sovereign authorities. A motion to intervene:

- Must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.[23]
- Must state the movant's interest in sufficient factual detail to demonstrate that: The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action; the movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interests as a consumer, customer, competitor or security holder of a party; or the movant's participation is in the public interest.[24]
- May be opposed by other participants, and FERC may deny a motion to intervene if the movant does not demonstrate the required interest.
- Is automatically granted to certain governmental authorities upon filing a motion to intervene, including the Secretary of Energy, any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency or Indian tribe with authority to issue a water quality certification.[25]
- To ensure fairness and administrative efficiency, motions to intervene must be filed at two specified times:
  - The first opportunity arises when FERC issues a public notice that an application has been filed. This notice states the initial deadline for filing comments and motions to intervene.[26]
  - The second opportunity arises if FERC issues a draft environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA).

FERC has discretion whether to grant late motions to intervene. Typically, to ensure fairness, a late intervener must accept the record of the proceeding as the record exists at the time of intervention.[27]

VI OTHER AUTHORIZATIONS REQUIRED FOR PIPELINES

A. Federal Authorizations

In addition to a FERC certificate, a pipeline may require authorizations from other federal agencies, and sometimes from state agencies acting under delegated federal authority. Federal agencies that commonly issue authorizations for pipelines include the Army Corps of Engineers, the Forest Service, the Bureau of Land Management, the Fish and Wildlife Service and the National Park Service. The developer must secure those approvals prior to commencing construction. In recognition of the multiple agencies that may be required to issue authorizations, the NGA has been amended over the years to create a framework that facilitates cooperation among these agencies, as discussed below.

While the NGA does not comprehensively define what constitutes a Federal authorization, NGA Section 15(a) effectively does so, providing that: "In this section, the term 'Federal authorization' (1) means any authorization required under Federal law with respect to an application for authorization under section 3 or a certificate of public convenience and necessity under sec-

KEY FEDERAL AUTHORIZATIONS RELEVANT TO INTERSTATE NATURAL GAS PIPELINES

The Advisory Council on Historic Preservation reviews and comments on pipeline projects that may affect properties listed or eligible to be listed on the National Register of Historic Places pursuant to the National Historic Preservation Act.

The Bureau of Indian Affairs is responsible for, among other things, approving rights-of-way across lands held in trust for an Indian or Indian tribe. In addition, the Bureau of Indian Affairs must consult and coordinate with any affected tribe.

The Bureau of Land Management issues rights-of-way authorizing pipelines to cross Bureau of Land Management lands.

Army Corps of Engineers issues permit for the discharge of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. The Army of Corps of Engineers also has jurisdiction over structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act.

Fish and Wildlife Service is generally responsible for implementing the Endangered Species Act for freshwater and terrestrial species that may be affected by pipeline construction.

The Forest Service issues rights-of-way for pipelines crossing National Forest System lands.

National Marine Fisheries Service implements the Endangered Species Act for most marine species and anadromous fish.

tion 7; and (2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 3 or a certificate of public convenience and necessity under section 7."

B. State Authorizations

In addition to federal authorizations that may be required for an interstate natural gas pipeline, states may issue authorizations under federally delegated authority provided in the Clean Water Act[28], the Coastal Zone Management Act[29] and the Clean Air Act.[30]

Clean Water Act Section 401 provides that any activity requiring a federal license or permit that might discharge into a water of the United States must first obtain water quality certification from the state or tribe where the discharge originates. If a state lawfully denies water quality certification, the pipeline is effectively vetoed. If the state grants a water quality certificate with conditions, those conditions must be met. Natural gas pipeline construction has been blocked on several occasions in recent years by state decisions to deny water quality certifications. Between 2016 and 2020 alone, New York exercised its authority under Section 401 to deny water quality certifications for: Constitution Pipeline, Valley Lateral Pipeline and Northern Access Pipeline.

Coastal Zone Management Act Any federal action, including issuance of a certificate, that has reasonably foreseeable effects on a state's coastal uses or resources must obtain state concurrence that the action is consistent with the state's coastal zone management plan. The state may issue the concurrence, including with conditions, or deny the concurrence. The Secretary of Commerce may override a state's denial if it finds that the activity is consistent with the objectives of an approved state coastal management program or is otherwise necessary in the interest of national security. The Secretary may also request the President to grant an exemption from the state's coastal zone management plan.[31]

Clean Air Act The Environmental Protection Agency delegates authority to states to develop State Implementation Plans, which are plans to attain and maintain air quality. As part of the State Implementation Plan, states can issue certain Clean Air Act permits.[32]

Additional State Roles Aside from the statutory roles discussed above, states may intervene and participate directly in certificate proceedings, entitling them to seek rehearing and judicial review. FERC also encourages applicants to cooperate with state and local entities in siting pipeline facilities and in developing environmental mitigation measures and construction procedures. FERC has found that state and local requirements that are different or go beyond those it imposes do not necessarily make it unreasonable for an

applicant to comply with FERC requirements and with the state and local requirements.[33] There are limits, however. FERC consistently holds that state and local laws may not "prohibit or unreasonably delay the construction of facilities approved by the Commission."[34]

C. FERC As Lead for Coordinating Agency Authorizations

NGA Section 15(b)(1) states that FERC "shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations …."[35]

1. Setting a Schedule

NGA Section 15(c)(1) requires FERC to establish a schedule for all federal authorizations, adding that FERC "shall (A) ensure expeditious completion of all such proceedings; and (B) comply with applicable schedules established by Federal law." FERC requires federal agencies to complete their authorizations no later than 90 days after FERC issues its final NEPA analysis.[36]

To meet this schedule, FERC requires a developer to file applications with each agency from which a federal authorization is required no later than when the developer files its application with FERC. The application must identify each authorization required, the date the request was submitted and the date by which final action has been requested or is expected.[37]

Within 30 days of receiving an application, each federal agency must inform FERC of the anticipated effective date of its decision and, if applicable, the schedule established by law.[38] This information enables FERC to determine a timetable for the NEPA review and to notify authorizing agencies and the public when the review is expected to be completed.[39] In setting a schedule, FERC has no ability to change a deadline established by fed-

eral law, e.g., the statutory one-year deadline by which a state must act on an application for Clean Water Act Section 401 certification.

2. Enforcing the Schedule

NGA Section 15(b)(2) states that: "Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission."[40] Although agencies are required to comply with FERC's schedule, FERC cannot compel them to act. NGA Section 19(d)(2) allows a developer to file for expedited review of agency delay with the Court of Appeals for the D.C. Circuit.[41] NGA Section 19(d)(3) provides that if the court finds the agency order or action "is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility," the Court shall remand the proceeding to the agency to take appropriate action and set a reasonable schedule and deadline for the agency to act on remand.[42]

While NGA Sections 119(d)(2) and (3) provide potential recourse for agency delay, developers do not often seek relief for various reasons, including: The desire to maintain a good relationship with the agency; concern that the agency will deny the permit, thus requiring it to be refiled; and the potential for costly and protracted litigation. However, this remedy has been effectively used. In *Tennessee Gas Pipeline Co. v. Paul*, the D.C. Circuit found that a state agency's failure to act on Tennessee Gas Pipeline Company's Clean Air Act permit application within the 18-month statutory deadline was unlawful and remanded to require agency action.[43]

3. Waiver of Authorizations

Under the Clean Water Act, if a state fails to act within one year of receiving an application for 401 water quality certification, such certification is deemed waived.[44] FERC has deemed waivers under this provision.[45] Similarly, under the Coastal Zone Management Act a state has six months to act on a request for concurrence; if it does not act within that time, concurrence is presumed.[46] FERC has, on occasion, presumed concurrence.[47]

The Clean Air Act requires a state to act on a permit application within 18 months of receiving the application[48] but unlike the Clean Water Act and the Coastal Zone Management Act, there is no automatic waiver or presumption if a state fails to act. Instead, as noted earlier, a developer can challenge the delay in the D.C. Circuit.

Despite the Clean Water Act Section 401 requirement to act within one year, states at times avoided the deadline by asking applicants to withdraw and re-file their requests to initiate a new one-year review period. In 2019, the D.C. Circuit ended this practice, finding

that a state waives its Section 401 certification authority when the state and the applicant engage in a coordinated scheme under which the applicant withdraws and resubmits its application to reset the one-year clock to give the state more time to issue its certification.[49]

The D.C. Circuit has further considered the waiver issue in more recent decisions. In *Turlock Irrigation District v. FERC*,[50] the court addressed a variation on the "withdraw and resubmittal" scheme in which the state repeatedly "denied without prejudice" a Section 401 request. The court allowed this approach. In *Village of Morrisville v. FERC*, the D.C. Circuit found that the Vermont water quality agency did not waive its Section 401 authority because the applicant had withdrawn and resubmitted its application "unilaterally and in its own interest," rather than "at the behest of the state."[51] The court found no evidence of any mutual agreement between the state and applicant to delay the certification process. The court observed that the applicant, not the state, sought and benefited from the additional time.

VII National Environmental Policy Act

Under NEPA, federal agencies are required to consider the environmental impacts of proposed major federal actions significantly affecting the quality of the human environment.[52] FERC generally prepares an EIS for major pipeline projects,[53] but may first prepare a less comprehensive environmental assessment (EA) to determine whether a proposed action has the potential to cause significant environmental impacts that require an EIS.

Environmental reviews begin with scoping meetings that seek public input. Once issues have been identified, they are evaluated in a draft EIS that is released for public review. The draft EIS often generates extensive comments, including from the public and from federal, state and local agencies. Those comments must then be evaluated in a final EIS. Once complete, the environmental analysis becomes part of the record and FERC factors that information into its public convenience and necessity determination.

A. FERC as Lead Agency

If a proposed action requires authorizations from more than one federal agency, NEPA requires a lead agency to supervise the preparation of the environmental analysis.[54] In the past, disputes sometimes arose over which agency should lead the NEPA review of a proposed pipeline. For example, questions might arise if a pipeline was to be located primarily on federal land subject to the jurisdiction of a land managing agency such as the Forest Service or Bureau of Land Management.

NGA Section 15(b)(1) resolves this issue by designating FERC as the lead agency for: "[C]oordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act…." While FERC is the lead agency, other agencies, including state and local agencies and Indian tribes, may participate as co-lead agencies or cooperating agencies. FERC's lead agency status does not mean that other federal agencies are excused from complying with NEPA. Rather, each agency must ensure that the environmental analysis is sufficient to evaluate project impacts that are relevant to its authorization.

B. Third-Party Contractors

Preparing an EIS or EA for a major project can be a significant undertaking requiring extensive resources. FERC meets this challenge by allowing applicants to fund third-party contractors chosen by FERC to assist staff in preparing the EIS or EA.[55] Alternatively, applicants may prepare an EA (but not an EIS) for use by FERC. Whether a third-party contractor prepares an EA or EIS, or an applicant-prepared EA is used, FERC independently evaluates the environmental document and is responsible for its contents.[56]

Congress amended NEPA in 2023 to allow applicants to prepare their own EISs and EAs.[57] The applicant-prepared EIS differs from the third-party contractor approach in that the former explicitly allow applicants to select the contractor or prepare the analysis in-house. However, while an applicant can prepare the analysis, the federal agency retains control and responsibility over the NEPA process and the final decision.[58]

In 2025, Congress amended NEPA to create a fast-track review process through payment of Project-Sponsor Opt-In Fees.[59] Under this approach, applicants can pay the Council on Environmental Quality (CEQ) a fee equal to 125 percent of the relevant agency's anticipated cost

PROJECT-SPONSOR OPT-IN FEE

1. **Applicant Submits a Description:** The applicant submits a project description to CEQ.
2. **CEQ Calculates the Fee:** Within 15 days, CEQ notifies the applicant of the fee amount, which is 125% of the lead agency's anticipated preparation costs for the EA or EIS, or if the applicant prepares the EA or EIS, 125% of the lead agency's anticipated costs to supervise preparation of the EA or EIS.
3. **Fee is Paid:** The applicant pays the fee to CEQ.
4. **Expedited Review:** The lead agency must complete the EA within 180 days or the EIS within one year of the publication of the notice of intent to prepare the EIS.

of preparing the NEPA analysis. Within 15 days of receiving notification from the project sponsor, CEQ will determine the amount the applicant must pay for the completion of an EA within 180 days or an EIS within one year of publication of a notice of intent to prepare the EIS.

It is unclear how the Opt-in Fee process will work. CEQ and federal agencies may not have the resources to act so quickly. Significantly, this provision does not expedite federal authorization processes unrelated to NEPA. Federal agencies and CEQ will have to consider several factors in implementing the Opt-In Fee provision, including how CEQ will staff this effort, how fees will be set, and how this provision will work when agencies, such as FERC, already have an effective NEPA program. It is also unclear how this process will dovetail with FERC's pre-filing process, which starts six-12 months before a notice of intent to prepare an EIS is issued.

VIII THE CERTIFICATE ORDER

Once it concludes its review, FERC issues an order that determines whether, and under what conditions, the proposed project is required by the public convenience and necessity.

A. Public Convenience and Necessity

Since 1999, FERC has relied on its Certificate Policy Statement to determine whether a project is required by the public convenience and necessity.[60] The 1999 Policy Statement expresses FERC's intent to ensure that its decisions strike an appropriate balance between enhancing market competition and the potential for overbuilding natural gas infrastructure, with a focus on how to best balance public benefits against adverse impacts to landowners, communities and the environment.

FERC first assesses whether there is market need for the project. The need assessment is considered especially important because the grant of a certificate conveys the ability to exercise eminent domain authority, if needed, and FERC seeks to avoid the unnecessary use of eminent domain.

Before filing an application, developers assess whether shippers are willing to financially support construction of the proposed pipeline. If a project does not receive sufficient support, it will not progress. Once a developer files an application, FERC determines whether the project can proceed without economic subsidies from existing customers and whether the project can stand on its own financially by securing contracts from shippers or submitting other evidence of market need.

If the developer meets the no-subsidy requirement, FERC will determine whether a project is in the public convenience and necessity by balancing its public benefits against its adverse effects. The public benefits may include meeting unserved demand, eliminating transportation bottlenecks, creating access to new supplies, creating lower costs for consumers, providing new interconnects that improve the grid, providing competitive alternatives, increasing electric reliability or advancing clean air objectives. Among the adverse effects FERC considers are the effects on the developer's existing customers, the interests of existing pipelines and their captive customers, and the extent to which the use of eminent domain is required. At this point, FERC also considers the NEPA analysis. Ultimately it issues a certificate if the public benefits outweigh the project's adverse impacts.

B. Eminent Domain

NGA Section 7(h) authorizes certificate holders to exercise eminent domain.[61] In 2021, the U.S. Supreme Court confirmed that eminent domain authority extends to state lands, noting that:

> From humble beginnings in central Indiana, the Nation's interstate pipeline system has grown to span hundreds of thousands of miles. This development was made possible by the enactment of §717f(h) in 1947. By its terms, §717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States.[62]

A recent analysis of natural gas pipelines showed that a judicial determination was required to acquire less than two percent of all easements needed.

FERC requires applicants to report the extent to which they have been able to obtain easements through negotiation.[63] In determining whether a pipeline proposal is in the public convenience and necessity, FERC considers the extent to which the use of eminent domain may be required, which it characterizes as an option of "last resort."[64] Virtually all projects have been successful in obtaining a high percentage of their easements through negotiation. In 2018, INGAA analyzed 81 certificated projects that were placed in service in the previous 10 years. Each project exceeded 10 miles in length, and the 81 projects collectively covered 15,694 tracts of land requiring an easement. The survey found that a judicial determination was required to acquire less than two percent of all easements needed.[65]

C. Ability to Condition Certificates

NGA Section 7(e) provides that: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Conditions placed on certificates typically require that facilities be constructed and made available for service within a specified time and that the certificate holder obtain all required federal and state permits before construction may begin.

The ability to condition certificates is significant because a developer can receive authorization to move forward with pre-construction activities such as the exercise of eminent domain, and conducting field surveys, even if other conditions, such as the receipt of additional federal and state authorizations, are pending. Ultimately, placing conditions on certificates can avoid delays and allow projects to proceed. FERC has explained that this approach:

> [I]s a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a natural gas project in advance of the Commission's issuance of its certificate without unduly delaying the project. To rule otherwise could place the Commission's administrative process indefinitely on hold until states with delegated federal authority choose to act. Such an approach, which would preclude companies from engaging in what are sometimes lengthy pre-construction activities while awaiting state or federal agency action, would likely delay the in-service date of natural gas infrastructure projects to the detriment of consumers and the public in general.[66]

D. Notice to Proceed

Pipeline construction does not necessarily begin immediately after FERC issues a certificate. The certificate holder must file an implementation plan identifying how it will comply with construction and mitigation measures, as well as the conditions set forth in the certificate. It must also obtain any outstanding federal authorizations and may need to obtain remaining easements. A company must file a request and receive written authorization (Notice to Proceed) from the Director of FERC's Office of Energy Projects before commencing construction.

E. Permit-by-Rule – FERC's Blanket Certificate Program

FERC has sought to limit the need to obtain a certificate by creating a "permit-by-rule" program for certain types of jurisdictional projects. Permit-by-rule describes requirements that are codified into a rule, allowing similar facilities to obtain a permit by complying with those rules rather than by undergoing a case-specific review.

To engage in permit-by-rule activities, an applicant for a Section 7 certificate must request what is known as blanket certificate authority. A blanket certificate allows the holder to acquire, construct, replace, or operate eligible facilities without the need for a Section 7 certificate. The activities must comply with cost caps, which are adjusted annually to reflect inflation.[67]

AUTOMATIC PROJECT COST LIMIT	PRIOR NOTICE PROJECT COST LIMIT	STORAGE PROJECT COST LIMIT
$14,500,000	$61,650,000[68]	$7,900,000

Automatic Authorizations: For smaller projects, a natural gas company must notify potentially affected landowners at least 45 days before commencing construction. The notice must describe the planned project and provide the company's contact information. FERC and the broader public do not receive notification of the planned project. The project may proceed once the landowner notification requirement has been met.

Prior Notice Authorization: In addition to notifying potentially affected landowners, the natural gas company must file a description of the planned project and certain other information with FERC, which issues a public notice providing a 60-day window for protests. If no protest is filed, the project may proceed. If a protest is filed (including by FERC staff) and the issues are not resolved within 30 days, the company must obtain a Section 7 certificate to conduct the activities.

Natural gas companies rely on their blanket certificates to undertake maintenance and modernization activities. For example, the National Fuel Gas Supply Corporation recently undertook several projects under its blanket certificate authority as part of a modernization program intended to replace aging infrastructure to ensure system reliability, reduce emissions and comply with pipeline safety regulations. These projects included constructing the Line N to Monaca Project comprising 4.5-miles of 12-inch-diameter pipeline and appurtenances, a pipeline connection, and modifications to existing facilities to deliver 133,000 dekatherms per day of firm transportation service;[69] and the Brockway Modernization Project, which included installing 9.7 miles of 12-inch-diameter pipe, and approximately 0.40 miles of six-inch-diameter pipeline.[70]

While issuing blanket certificate authorization is routine, it is not automatic. In 2017, FERC issued a certificate authorizing Rover Pipeline to construct and operate approximately 510.7 miles of new pipeline and related facilities but denied Rover's request for blanket certificate authority. In doing so, FERC concluded that it was not confident Rover would comply with the blanket certificate's environmental requirements. This was because FERC found Rover intentionally circumvented the National Historic Preservation Act by purchasing and demolishing a historic property along the project route during the certificate proceeding.[71]

IX POST-CERTIFICATE PROCEEDINGS

Once FERC grants or denies a certificate, parties may challenge its order. The first step is to apply for rehearing asking FERC to reconsider its decision. FERC must act on the rehearing request within 30 days. Once FERC acts, that party may seek judicial review in a Court of Appeals within 60 days of FERC's action.

A. Rehearing

NGA Section 19(a) states that a rehearing request must be filed within 30 days after issuance of the certificate order. This is a statutory deadline which FERC cannot waive or extend.[72] Section 19(a) requires FERC to grant or deny a rehearing request within 30 days; if FERC fails to act within 30 days, the rehearing request is deemed to have been denied.[73]

NGA Section 19(c) states that a request for rehearing does not automatically stay the certificate unless specifically ordered by FERC. Until recently, FERC regulations prohibited project construction while a request for rehearing was pending.[74] On October 7, 2025, FERC issued an order permanently rescinding the regulations.[75]

TIMELINE FOR REVIEW

1. **FERC issues certificate order.**
2. **Party must request rehearing within 30 days.**
3. **FERC must grant or deny the rehearing request within 30 days.**
4. **Petition for review. The aggrieved party must file a petition for review in the appropriate Court of Appeals within 60 days after FERC issues a rehearing order.**
5. **FERC retains authority to modify its order until it files the record with a Court of Appeals, which is typically no later than 40 days after the petition for review is filed.**

Challenges to federal authorizations issued by an agency other than FERC are not part of FERC's rehearing process; rather, the challenge must be made through that agency's administrative appeal process and be deemed "final agency action" that has legal effect, before seeking review in a Court of Appeals.[76]

If a certificate order is appealed, FERC retains jurisdiction over the proceeding until it files the record with the court, which is typically no more than 40 days after FERC is served with a petition for review initiating the appeal.[77]

B. Judicial Review

NGA Section 19(b) grants those appealing FERC certificate orders immediate access to Courts of Appeals. A party challenging a FERC order must file a petition for review within 60 days after resolution of the rehearing request. Importantly, this timeline also applies to challenges to a FERC order on NEPA grounds, thus superseding the six-year statute of limitations set forth in the Administrative Procedure Act that is applicable to most NEPA challenges.[78]

A party challenging a natural gas certificate order issued by FERC must file a petition for review within 60 days after resolution of the rehearing request. Importantly, this supersedes the six-year statute of limitations that applies to most NEPA challenges.

When challenging other federal authorizations issued for a pipeline, the NGA requires parties to bypass state courts and federal district courts. NGA Section 19(d)(1) states:

> "The United States Court of Appeals for the Circuit in which a facility subject to section 3 or section 7 is proposed to be constructed, expanded or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act...."[79]

As noted by the Second Circuit Court of Appeals, NGA Section 19(d)(1) precludes "sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts."[80]

NGA Section 19(c) provides that an appeal does not operate as a stay of a FERC order, unless specifically ordered by the court.

C. Consolidated Record

The Courts of Appeals do not take evidence; they rely on the record developed by FERC and other agencies to evaluate the merits of an appeal. As part of its coordination responsibilities, NGA Section 15(d) directs FERC to: "[M]aintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization." FERC's online e-library system provides public access to the consolidated record, allowing interested parties to review case documents, filings and decisions related to specific projects.

X SITING AND PERMITTING ELECTRIC TRANSMISSION LINES

Similar to the Natural Gas Act, the Federal Power Act provides for federal jurisdiction over transmission, stating, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to … the transmission of electric energy in interstate commerce … is necessary in the public interest." (fn. 16 U.S.C. 824(a) (noting also that any related federal regulations will "extend only to those matters which are not subject to regulation by the States").) The importance of federal jurisdiction over transmission was recently highlighted in an Advanced Notice of Proposed Rulemaking, issued by FERC at the direction of U.S. Department of Energy Secretary Chris Wright, which stated that a "core purpose" of the Federal Power Act is tied to FERC's "exclusive jurisdiction over the transmission of electric energy in interstate commerce, including the rates, terms, and conditions of transmission service, and all facilities for such transmission or sale of electric energy at wholesale in interstate commerce." (fn. Interconnection of Large Loads to the Interstate Transmission System, RM26-4-000, 89 Federal Register 57,690). However, the federal jurisdiction over transmission is not total. As discussed below, FERC currently has limited authority over the siting and permitting of electric transmission facilities. Siting is left primarily to states, localities, and other federal agencies (if federal authorizations are required), and permitting may require approvals at all levels of government. Congress has attempted to address these challenges, but such efforts have not been productive. The following is an overview of FERC's narrow backstop siting authority, and a summary of FERC's siting and permitting authority over electric transmission lines associated with hydroelectric facilities. This section also briefly reviews state siting and permitting processes.

A. Federal Siting and Permitting

1. FERC's Backstop Siting Authority

The Energy Policy Act of 2005, as amended by the Infrastructure Investment and Jobs Act of 2021,[81] added Section 216 to the FPA giving FERC "backstop siting authority" to issue permits for electric transmission facilities located in National Interest Electric Transmission Corridors (NIETCs) designated by the Department of Energy (DOE).[82] Under Section

216(h), DOE may establish a NIETC in any geographic area that is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers. Section 216(b) gives FERC backstop siting authority when a state fails to act within one year of a permit application or denies a permit for a proposed project.[83] Section 216(h) designates DOE as a coordinating entity between federal agencies and state and local agencies responsible for issuing permits. On May 16, 2006, the Secretary of Energy delegated to FERC lead agency responsibilities for coordinating federal authorizations and environmental reviews and preparing a single environmental analysis for purposes of backstop siting.[84]

Only two NIETCs have been designated since 2005, both of which were vacated by the Ninth Circuit Court of Appeals in 2011.[85] On April 3, 2025, DOE issued a notice seeking comment on its consideration of three proposed NIETCs.[86] It is unclear if, or when, DOE will designate final NIETCs.

These actions notwithstanding, in May 2024 FERC adopted revised regulations implementing its backstop siting authority to address amendments to Section 216 in the Infrastructure Investment and Jobs Act.[87] Those regulations are modeled on FERC's natural gas pipeline regulations. Among other things, the regulations require applicants to engage in pre-filing. Under Section 216, a permit holder can use eminent domain to acquire rights-of-way after demonstrating that it has made good-faith efforts to engage with landowners and other stakeholders early in the permitting process.

2. Limitations on Backstop Siting Authority

Even if DOE finalizes new NIETCs, this may not facilitate the development of electric transmission lines. FPA Section 216(e) expressly excludes state-owned land from being acquired through eminent domain, in contrast to the NGA. Thus, for projects that cross state land such as riparian areas, state parks and recreation areas, and lands on which there is a state conservation easement, the state can block the line. Further, in most cases, use of backstop siting authority would be delayed at least a year while the state permitting process is underway.

In May 2024, FERC adopted revised regulations implementing its backstop siting authority. Those regulations were modeled on FERC's natural gas pipeline regulations.

3. FERC Jurisdiction Over Electric Transmission for Hydroelectric Projects

FPA Section 4(e) directs FERC to regulate the key components of non-federal hydropower development, including transmission lines that convey electricity to the interconnect-

ed grid.[88] FERC has this authority regardless of who owns or manages the surrounding land. FERC analyzes the environmental impact of these lines in determining whether to approve a hydroelectric project.

For example, for the Swan Lake North Hydroelectric Project, FERC considered the impacts of constructing a 32.8-mile, 230 kV overhead line. It assessed how the transmission line would affect landowners, agricultural operations, avian species, and visual and aesthetic values. The project license required Swan Lake to develop plans in consultation with affected landowners and farmers to avoid or mitigate impacts. The license also required Swan Lake to use monopole-type structures made with specified construction materials, and to minimize the visibility and contrast of the transmission line with the surrounding landscape.[89]

B. State Siting and Permitting

1. State Authorizations

Each state has siting and permitting authority for electric transmission lines on state and private land within its boundaries. Multi-state projects require multi-state approvals. Transmission projects developed through regional planning processes may also be segmented at state borders or utility footprint boundaries, which can alleviate the siting and permitting complexities of multi-state development.

As the map below demonstrates, states approval authorities and processes vary; 33 states assign primary responsibility to state regulatory commissions, eight use special decision entities (i.e., siting boards), and four use a non-utility commission agency.[90] Most remaining states give authority to local government entities such as county zoning boards.

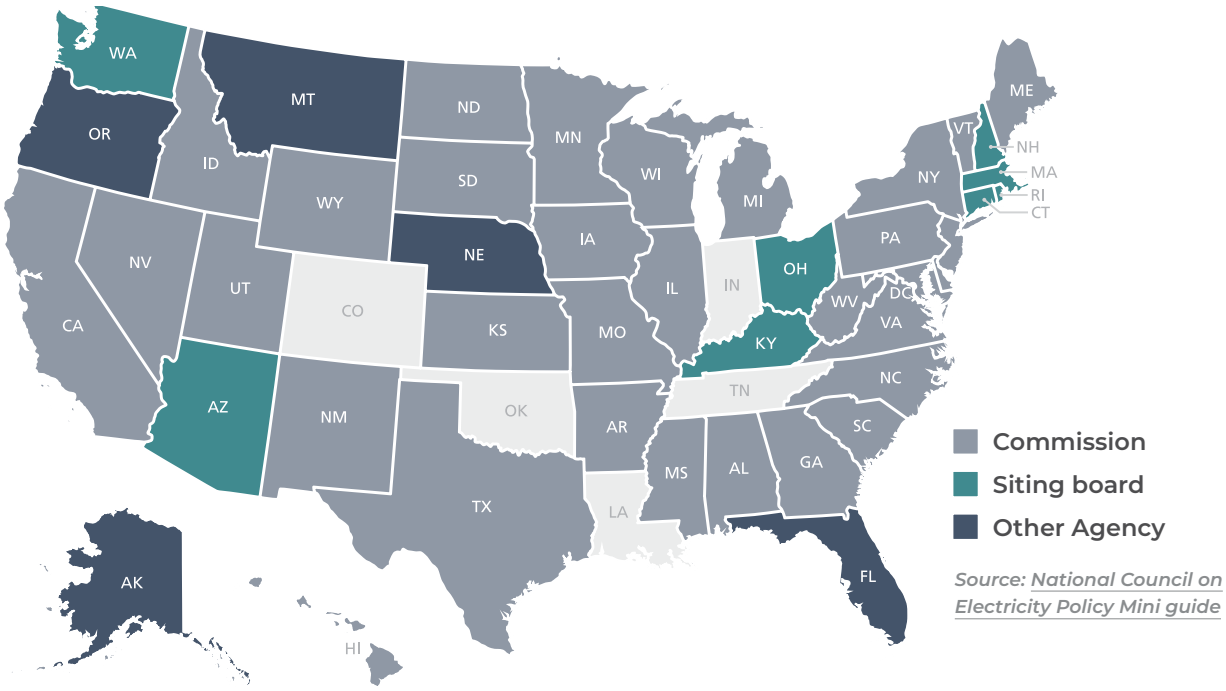
Siting and permitting can mean two different processes: Siting, the selection of the route, and permitting, the regulatory approval process. Each state's process is unique and even within a state, jurisdiction over siting and permitting can be fragmented, with both state and local governments, and sometimes multiple state agencies, exercising authority. In some states, siting and permitting is a joint process; in others, they are separate. For example, in Florida, Louisiana and New Hampshire, decisions about need and cost elements of a proposed project are decided by a regulatory commission while another agency or a siting board decides the project location.[91] In some states, siting can take place at the county level; some states require both state and local approval.[92]

States typically conduct an environmental review of proposed transmission lines within their borders, with each state establishing its own environmental requirements. Al-

though statistics vary, as of 2020, at least 35 states have adopted laws that are modeled to one degree or another after the requirements of NEPA.[93]

In some regions of the country, new transmission lines are planned by regional transmission organizations in which member states participate. Recently, the Third Circuit Court of Appeals limited a state's ability to block transmission projects that result from such a process. In September 2025, the court held that Pennsylvania was pre-empted from denying a siting permit for a transmission project previously approved by PJM Interconnection LLC, a FERC-regulated regional transmission organization that conducts regional transmission planning. The court explained that the federal government has the authority to determine regional transmission system needs and solutions, and a state cannot deny a siting permit based on its determination that transmission is not needed. The court distinguished between legitimate siting concerns — such as environmental and safety impacts — and impermissible reevaluation of regional need already determined by PJM and FERC.[94] This decision is expected to be appealed.

State Designated Transmission Siting Authorities



Source: National Council on Electricity Policy Mini guide

2. Eminent Domain

State eminent domain procedures vary. In most states, eminent domain is authorized for projects that serve a public use or that provide direct benefits to in-state consumers. Some state laws skew eminent domain in favor of purely in-state projects built by in-state actors and do not consider regional or out-of-state benefits. Others restrict out-of-state applicants from applying to build a transmission line; these states typically limit that right to in-state utilities that serve retail domestic customers.

3. Federal Authorizations Associated with Electric Transmission

As discussed previously, although states have siting and permitting authority, federal authorizations and environmental reviews may also be required for electric transmission lines that cross federal lands or require authorization from a federal agency.

In April 2024, DOE launched the Coordinated Interagency Authorizations and Permit Program (CITAP) to accelerate federal permitting and environmental reviews for qualifying transmission lines. CITAP implements FPA Section 216's requirement that DOE act as the lead agency for coordinating federal authorizations and environmental reviews required for interstate transmission projects. CITAP, which incorporates much of the process contained in FERC's backstop siting regulations, seeks to reduce the federal permitting timeline by:

- Requiring a pre-application process;
- requiring developers to submit a comprehensive public participation plan;
- and setting a two-year deadline for agencies to conduct environmental analyses and issue permits, and allowing for an appeal to the President if deadlines are not met.

CITAP has several projects currently under siting process, or underway, but to date has not yet successfully sited a line from start to finish. As with FERC's backstop siting authority, CITAP has its limitations. Even if the program hastens federal authorizations, it does not require states to participate, nor does CITAP alter the fact that states have siting and permitting authority.

XI LESSONS LEARNED

Providing a single siting and permitting process similar to the NGA would likely accelerate the development of electric transmission lines.

- The NGA establishes a uniform, predictable and coordinated approval process that facilitates timely review of projects. In contrast, each state has its own siting and permitting requirements, eminent domain rules and environmental laws. Consequently, developers must navigate a process that can be slow, uncertain and driven by parochial interests.
- By centralizing jurisdiction over interstate natural gas pipelines, the NGA considers local, regional and national energy needs, a perspective that is increasingly relevant to electric transmission. In contrast, states generally consider only state and local benefits; they may not support a transmission line unless it directly benefits their state. This is particularly significant if a line crosses multiple states or the line is high capacity and has a regional impact; one state can veto a line that neighboring states support.
- For interstate natural gas pipelines, FERC's siting authority, as well as the use of eminent domain when needed, rests on FERC's finding of public convenience and necessity, which considers a range of benefits including economic benefits, access to new supplies of natural gas and the need for new interconnects. States may grant eminent domain, but for some, the public benefits must be to their state or is based on the developer's status as a public utility.

- Many electric transmission lines require federal authorizations in addition to state approvals, with the potential for lengthy, sequential, duplicative, or even conflicting environmental reviews in the absence of a controlling lead agency. The NGA preempts state or local requirements that delay or obstruct the construction of interstate natural gas pipelines.
- Challenges to all federal authorizations (except those under the Coastal Zone Management Act) go directly to a Court of Appeals. State laws concerning how and when to challenge a decision vary. For transmission lines that require federal authorizations, appeals can be filed up to six years after permitting decisions, including challenges to the NEPA review. Additionally, developers must navigate both state and federal courts, creating a fractured appellate process.
- FERC has a permit-by-rule program that excludes certain jurisdictional activities from the requirement to obtain a Section 7 certificate.
- FERC is well-suited to regulate interstate energy infrastructure. It is a nimble, independent agency with a clearly defined statutory mission. FERC has an experienced multidisciplinary staff of approximately 200 experts dedicated to certificating interstate natural gas pipelines.[95] In contrast, states have diverse statutory missions and goals, some of which may be inconsistent with high-capacity electric transmission buildout that has broader regional and national benefits.

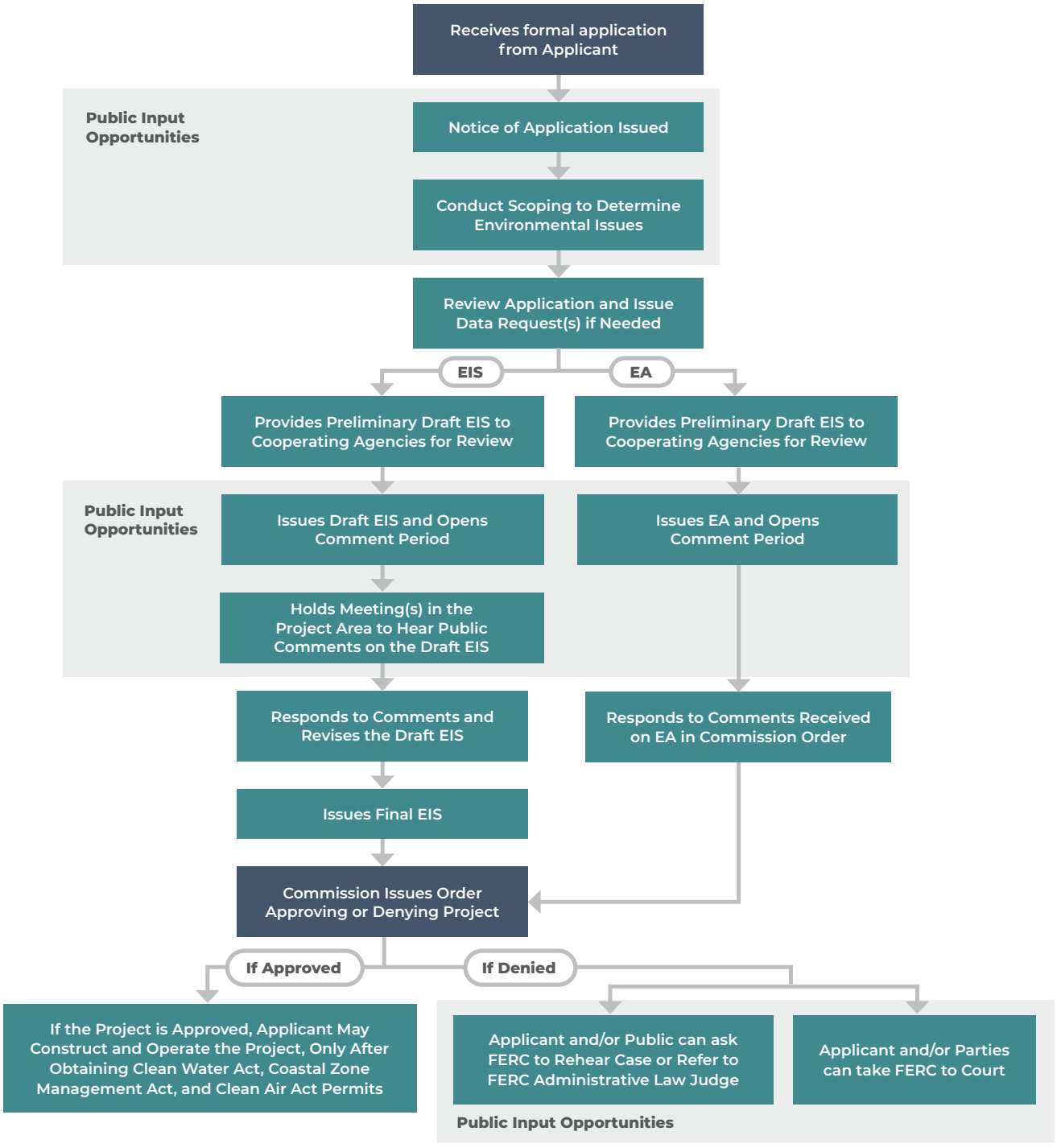
XXII CONCLUSION

The NGA establishes an efficient regime for constructing interstate natural gas pipelines. Approvals are vested in a single authority, with a uniform, predictable regulatory process. Developers make limited use of eminent domain authority, including over state lands, though it allows developers to secure easements that cannot be acquired through negotiation. While the NGA pre-empts state and local actions that may delay or obstruct the construction of interstate natural gas pipelines, states have the ability to exercise a significant role in the development and approval of these facilities. This includes participating in pre-filing, commenting throughout the application process, providing input in the environmental review (including as a co-lead or cooperating agency in the preparation of an EIS), and developing construction procedures and mitigation measures. The NGA sets forth a coordinated process for federal authorizations and environmental reviews. This well-defined approach creates a robust record with opportunities for public participation, an efficient environmental analysis and streamlined judicial review. Establishing a similar framework holds promise for minimizing barriers to the development of electric transmission lines.

APPENDIX A

PROCESSES FOR NATURAL GAS CERTIFICATE

Application Process



Source: FERC

APPENDIX B

STATE ROLE IN NGA PROCESS

Pre-application and scoping	**Provide input** to shape the proposed project.
Siting and permits	**Water quality certification** under Section 401 of the Clean Water Act. **Air quality permits** under the Clean Air Act. **Coastal Zone Management Act** consistency determinations with state coastal zone management plans. **Other Permits:** States can require authorizations for specific regulated activities, provided they don't block or delay an interstate pipeline. **Environmental impacts:** States can be co-lead or cooperating agencies in the preparation of an EA or EIS. They may also choose only to provide input into the environmental analysis.
Certification review	**Intervene as a party** in a FERC proceeding to represent state interests. A state commission, or state fish and wildlife, water quality certification, or water rights agency is automatically a party to a proceeding upon filing a timely motion to intervene. **Present evidence** and comment on any aspect of the project.
Post-certification rehearing and appeal	**Seek rehearing** of a FERC decision and, if necessary, petition for judicial review. Challenge other federal permits related to the project pursuant to the NGA-established appellate process.

Endnotes

1 https://www.cleanenergygrid.org/new-report-reveals-u-s-transmission-buildout-lagging-far-behind-national-needs/ (July 23, 2025)

2 This number is consistent with a 2013 Government Accountability Office study of FERC pipeline certificate reviews, which reported that the average time from pre-filing to certification was 558 days (18.6 months). See GAO *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary*, GAO-13-221, February 2013, p. 26. https://www.congress.gov/crs-product/R43138#:~:text=There are no statutory time,H.R.

3 K. Sercy, J. Cavert, *Siting, Leasing, and Permitting of Clean Energy Infrastructure in the United States* at 7 (March 2024). https://www.niskanencenter.org/wp-content/uploads/2024/03/Energy-Siting_Leasing.pdf

4 A. Klass and J. Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 Harv. Envtl. L. Rev. 423, at 436-437 (2017). https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2017/08/KlassRossi_final.pdf

5 In a June 10, 2025, House Energy Commerce Committee budget hearing, Rep. Scott Peters asked DOE Energy Secretary Chris Wright if he would "be supportive of establishing permitting parity at FERC between natural gas and transmission?" Secretary Wright responded: "Absolutely. The United States needs to build more energy infrastructure of all kinds and certainly including transmission lines." https://scottpeters.house.gov/2025/6/sec-wright-agrees-absolutely-electric-transmission-lines-should-get-parity-with-natural-gas

6 15 U.S.C. §717(a).

7 15 U.S.C. §717a(7).

8 In 1977, Congress passed the Department of Energy Organization Act (P.L. 95-91), terminating the Federal Power Commission and creating FERC as an independent commission administratively situated within the newly formed Department of Energy.

9 In 1988, the U.S. Supreme Court affirmed that that the NGA occupies the field of interstate natural gas rates, facilities, and sale of natural gas, thus pre-empting state law. *See Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 306–08 (1988).

10 15 U.S.C. §717f(h).

11 "*Amending the Natural Gas Act*," Senate Report No. 429 (80th Cong., 1st Session) (July 3, *1947) at 2-3.*

12 A. Klass and J. Rossi, *Reconstituting the Federalism Battle in Energy Transportation,* 41 Harv. Envtl. L. Rev. 423, at 433-434 (2017). https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2017/08/KlassRossi_final.pdf

13 18 C.F.R. §157.21 (2025).

14 S. Tierney, FERC's Certification of New Interstate Natural Gas Facilities, *Revising the 1999 Policy Statement for 21st Century Conditions*, at 8 (November 2019). https://www.analysisgroup.com/globalassets/content/insights/publishing/revising_ferc_1999_pipeline_certification.pdf

15 For cases where an EIS is prepared, the certificate order serves as the NEPA Record of Decision. *FERC Staff Guidance Manual on Implementation of The National Environmental Policy Act* (June 2025), at 18. https://ferc.gov/sites/default/files/2025-06/Staff Guidance Manual on Implementation of The National Environmental Policy Act June 2025.pdf

16 Testimony of Amy Andryszak, President and Chief Executive Officer, INGAA, before the Subcommittee on Energy, Committee on Energy and Commerce, U.S. House of Representatives, *Assuring Abundant, Reliable American Energy to Power Innovation* hearing at 7 (April 30, 2025). https://www.congress.gov/119/meeting/house/118171/witnesses/HHRG-119-IF03-Wstate-AndryszakA-20250430.pdf

17 18 C.F.R. pts. 380 and 157 (2025).

18 18 C.F.R. §157.5(a) (2025).

19 *Id*.

20 18 C.F.R. §157.8(a) (2025).

21 15 U.S.C. §717 (f)(c)(1)(B)

22 15 U.S.C. §717(n).

23 18 C.F.R. § 385.214(b)(1) (2025).

24 18 C.F.R. § 385.214(b)(2) (2025).

25 18 C.F.R. §§385.214(a)(2) (2025).

26 Intervention is not possible during the pre-filing process, because no application has been filed.

27 18 C.F.R. §385.214(d)(3)(ii) (2025).

28 33 U.S.C. §§ 1251 et seq.

29 16 U.S.C. §§ 1451 et seq.

30 42 U.S.C. §§ 7401, et seq.

31 16 U.S.C. § 1451 et, seq., and 15 C.F.R. Part 3930, subpart H.

32 42 U.S.C. § 7661b(c).

33 *Tennessee Gas Pipeline Company, L.L.C.*, 154 FERC ¶ 61,191 (2016); *see also Maritimes and Northeast Pipeline, L.L.C.,* 81 FERC ¶ 61,166,19–22 (1997) (finding that several state conditions, including state review and approval requirements for pipeline route surveys and additional endangered species surveys, would not unreasonably delay the project where there was only a possibility that the conditions would conflict with the pipeline's in-service date).

34 *See, e.g., Northern Natural Gas Company*, 174 FERC ¶ 61,189, at P 40 (2021).

35 15 U.S.C. §717(n)(b)(1).

36 18 C.F.R. § 157.9(b) 2025).

37 18 C.F.R. § 153.8(a)(8) (2025).

38 18 C.F.R. § 385.2013 (2025).

39 FERC's regulations recognize that such information may be provisional and subject to change and will take this into account when first determining a schedule for its NEPA review. Thereafter the schedule may change based on evolving information.

40 15 U.S.C. §717(n)(c)(1).

41 15 U.S.C. §717r(d)(2) and (5).

42 15 U.S.C. §717r(d)(3).

43 *Tennessee Gas Pipeline Co. v. Paul et al.,* No. 17-1048, slip op. (D.C. Cir. June 29, 2017).

44 33 U.S.C. § 1341(a)(1) (stating: "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.")

45 *See, e.g, Millenium Pipeline Co LLC*, 160 FERC 61,065 (2017) *reh'g denied*, 161 FERC ¶ 61,086 (2017).

46 16 U.S.C. § 1456(c)(3)(A).

47 *Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 (2004).

48 *Id.*

49 *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

50 *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022).

51 Village of Morrisville v. FERC, No. 21-1042 (D.C. Cir. 2025).

52 42 U.S.C. §§ 4321 *et seq*. *See also* 18 C.F.R. Part 380 (2025) (FERC's regulations implementing NEPA).

53 18 C.F.R. § 380.6(a)(3) (2025).

54 42 U.S.C. § 4336(a).

55 *FERC Staff Guidance Manual on Implementation of The National Environmental Policy A*ct at 18.

56 *Id.*

57 42 U.S.C. §4336a(f). Congress NEPA through the Builder Act, Pub. L. No. 118-5, § 321, enacted as part of the larger Fiscal Responsibility Act of 2023.

58 42 U.S.C. § 4336a(f).

59 One Big Beautiful Bill Act, H.R. 1, 119th Cong., Sec. 60026 (2025).

60 *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

61 15 U.S.C. §717f(h).

62 *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482 (2021).

63 *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,745.

64 FERC Glossary, https://www.ferc.gov/industries-data/resources/public-reference-room/ferc-glossary

65 *See* INGAA July 18, 2018 comments to FERC, at 58, citing a member survey of 81 NGA projects between 2008 and 2018 covering 7,200 miles of interstate natural gas pipelines. https://ingaa.org/wp-content/uploads/2018/07/34843.pdf

66 *See*, e.g. *Northwest Pipeline, GP*, 145 FERC ¶ 61,013, at P 16 (2013). *See, e.g.*, *Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, at P 81 (2020). Conditional authorizations have been upheld by the courts. *See, e.g., Delaware Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015).

67 18 C.F.R. 157.208(d) (2025). Since 1982 FERC has relied on the Department of Commerce's gross domestic product implicit price deflator as a measure to make annual adjustments to the blanket cost limits.

68 On June 18, 2025, FERC issued an order temporarily raising prior notice cost limits from $41,100,000 to $61,650,000 (191 FERC ¶ 61,206). In a separate proceeding, FERC issued a Notice of Proposed Rulemaking seeking comments on whether the cost limit regulations should be modified on a permanent basis. (Docket No. RM25-12 (June 18, 2025)).

69 *National Fuel Gas Supply Corp. & Empire Pipeline, Inc.*, CP18-135-000, https://www.federalregister.gov/documents/2018/04/04/2018-06787/national-fuel-gas-supply-company-notice-of-request-under-blanket-authorization (2019).

70 *National Fuel Gas Supply Corp & Empire Pipeline, Inc*., CP19-220, https://www.federalregister.gov/documents/2018/04/04/2018-06787/national-fuel-gas-supply-company-notice-of-request-under-blanket-authorization (2019).

71 *Rover Pipeline LLC*, 161 FERC ¶ 61,244, at P 13 (2017) (denying a request for a blanket certificate where the company's actions had eroded the Commission's confidence it would comply with all the requirements of the blanket certificate program, including the environmental requirements).

72 15 U.S.C. §717(r)(a).

73 *Id.*

74 18 C.F.R. §157.23 (2025).

75 *Removal of Regulations Limiting Authorizations to Proceed with Construction Activities Pending Rehearing,* 193 FERC ¶ 61,014 (2025).

76 *See* Delaware Riverkeeper et al. v. Sec PA Dept. Env. Protection, et al. No. 16-2211 (3d Cir. 2018) (finding that only "final" agency actions are reviewable under the NGA's exclusive jurisdiction provision. The court determined, however, that the state-issued water quality certification at issue was reviewable "final" action even though it was subject to further administrative review because, under the relevant state law, the certification had legal effect as issued and was the final action of the agency that issued it).

78 Fed. R. App. P.17(a)(requiring an agency to "file for the record with the circuit clerk within 40 days service of a petition for review…").

78 The statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U. S. C. §2401(a).

79 Under the Coastal Zone Management Act, the Secretary of Commerce may override a state's denial if, among other things, the "activity is consistent with the objectives" of an approved state coastal management program or is otherwise necessary in the interest of national security. See 16 U.S.C. 1451 *et seq.,* and implementing regulations found at 15 CFR part 930, subpart H.

80 *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot*., 482 F.3d 79, 85 (2d Cir. 2006) (citing statement of former FERC Director, Office of Energy Projects, at Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005)).

81 Pub. L. 117-58, sec. 40105, 135 Stat. 429 (2021).

82 16 U.S.C. §824p.

83 FPA Section 216(b) also grants FERC backstop siting authority if: 1) a state does not have authority to approve the siting of the facilities or consider the interstate benefits or interregional benefits of the facility; 2) the permit applicant is a transmitting utility but does not qualify to apply for a permit or siting approval because the applicant does not serve end-use customers in the state; or 3) the state has conditioned its approval in such a manner that it will not significantly reduce transmission capacity restraints or is not economically feasible.

84 DOE Delegation Order No. S1-DEL-FERC-2006 (previously DOE Delegation Order No. 00-004.00A)

85 *California Wilderness Coalition v. U.S. Dept. of Energy,* 631 F.3d 1072 (9th Cir. 2011)

86 https://www.federalregister.gov/documents/2025/04/03/2025-05698/notice-of-early-public-and-governmental-engagement-for-potential-designation-of-tribal-energy-access

87 Applications for Permits To Site Interstate Electric Transmission Facilities, Order No. 1977, 187 FERC ¶ 61,069 (May 13, 2024). https://www.federalregister.gov/documents/2024/05/29/2024-10879/applications-for-permits-to-site-interstate-electric-transmission-facilities

88 Hydroelectric projects convert the potential energy of water into electricity. This flow of water turns a turbine that is connected to a generator that produces electricity. Electricity flows from the generator to a substation, where the voltage is increased. From there, the electricity is transmitted via a transmission line to an end-user or to the grid. It is these transmission lines over which FERC has jurisdiction.

89 *Swan Lake North Hydro LLC*, 167 FERC ¶ 62,077 (2019).

90 https://pubs.naruc.org/pub/C1FA4F15-1866-DAAC-99FB-F832DD7ECFF0.

91 *Id.* at 4.

92 Energy + Economics, *Assessment of Renewable Energy Siting and Permitting Policies* at 13 (April 11, 2024). https://www.ethree.com/wp-content/uploads/2024/04/Renewable-Siting-and-Permitting-Policies-E3-Public-Version-04.17.2024.pdf

93 https://legal-planet.org/2020/01/01/commemorating-the-national-environmental-policy-acts-50th-anniversary/#:~:text=Finally, NEPA is unquestionably America's,state and local government agencies. https://libraryguides.law.pace.edu/nepa

94 *Transource Pennsylvania LLC v. DeFrank*, No. 24-1045 (3d Cir. 2025).

95 FERC's natural gas program for Fiscal Year 2025 had 292 full-time employees, which includes employees who oversee rates, tariffs and other filings, and employees in Office of General Counsel. The FY 2026 request is for 270 full-time employees, FERC's request notes that it will not be reducing staff directly assigned to the permitting of natural gas and hydroelectric infrastructure. *See* FERC FY 2026 Congressional Justification at 6. https://www.ferc.gov/media/fy-2026-congressional-justification.