

**Testimony of**

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**Committee on Energy and Commerce  
Subcommittee on Energy and Power  
United States House of Representatives**

**Hearing on Discussion Drafts Addressing Hydropower Regulatory Modernization  
and FERC Process Coordination under the Natural Gas Act**

**May 13, 2015**

Chairman Whitfield, Ranking Member Rush, and Members of the Subcommittee:

My name is Ann Miles and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (Commission or FERC). The Office is responsible for siting infrastructure projects including: (1) licensing, administration, and safety of non-federal hydropower projects; (2) authorization of interstate natural gas pipelines and storage facilities; and (3) authorization and safety of liquefied natural gas terminals.

I appreciate the opportunity to appear before you to first comment on the discussion draft addressing hydropower regulatory modernization and then comment on the discussion draft addressing FERC process coordination under the Natural Gas Act. As a member of the Commission's staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

## **HYDROPOWER REGULATORY MODERNIZATION**

### **I. Background**

The Commission regulates over 1,600 hydropower projects at over 2,500 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 55.5 gigawatts of hydropower capacity, which is more than half of all the hydropower

capacity in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable, domestic energy source. Public and private hydropower capacity together total about nine percent of U.S. electric generation capacity.

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal land; (3) use surplus water from a federal dam; or (4) are located on non-navigable waters over which Congress has jurisdiction under the Commerce Clause, involve post-1935 construction, and affect interstate or foreign commerce.

The FPA authorizes the Commission to issue licenses for projects within its jurisdiction, and exemptions for projects that would be located at existing dams or within conduits as long as these projects meet specific criteria. Licenses are generally issued for terms of between 30 and 50 years, and are renewable. Exemptions are perpetual, and thus do not need to be renewed.

Congress has established two types of exemptions. First, section 30 of the FPA allows the Commission to issue exemptions for projects that use, for generation, the hydroelectric potential of manmade conduits that are operated for the distribution of water for agricultural, municipal, or industrial consumption, and not primarily for the generation of electricity. Conduit projects can have a maximum capacity of 40

megawatts and are not subject to the Commission's National Environmental Policy Act of 1969 (NEPA) review. Second, in section 405(d) of the Public Utility Regulatory Policies Act as amended by the Hydropower Regulatory Efficiency Act of 2013, Congress authorized the Commission to grant exemptions for small hydroelectric power projects having an installed capacity of up to 10 megawatts. To qualify for this type of exemption, a project must be located at an existing dam that does not require construction or the enlargement of an impoundment, or must use the hydropower potential of a natural water feature, such as a waterfall. Both types of exemptions are subject to mandatory fish and wildlife conditions provided by federal and state resource agencies.

Under the provisions of the Hydropower Regulatory Efficiency Act of 2013, a qualifying conduit facility does not need a license or exemption from the Commission if the facility meets the following requirements: (1) the conduit on which the facility is located operates for the distribution of water for agricultural, municipal, or industrial consumption, and not primarily for the generation of electricity; (2) the facility generates electric power using only the hydroelectric potential of the conduit; (3) the facility has an installed capacity that does not exceed 5 megawatts; and (4) the facility was not licensed or exempted from the licensing requirements of Part I of the FPA on or before the date of enactment of the 2013 Act. To date, 39 projects have qualified under these provisions.

The Commission has established three licensing processes, and allows applicants to request the process best suited to individual proceedings. The integrated licensing

process (ILP) frontloads issue identification, collaboration among stakeholders, and decisions on information needs to the period before an application is filed, and is thus well-suited to complex cases. The alternative licensing process (ALP) allows participants significant flexibility in tailoring the licensing process in a manner that can work well in individual cases. The traditional licensing process (TLP) appears to work best for less controversial projects, and is the process used for exemptions. In addition, Commission staff has developed a pilot licensing process for marine and hydrokinetic projects in which, with the assistance of federal and state resource agencies, a project can be licensed in as little as six months. The Hydropower Regulatory Efficiency Act of 2013 also asked the Commission to investigate the feasibility of a two-year licensing process from the beginning of pre-filing to Commission action on the license application. Only two applications were filed for this program and only one qualified, which was an application for the 5-megawatt Kentucky River Lock and Dam No. 11 Project. The two-year process for the project began in May 2014, and currently Commission staff is reviewing a license application filed for the project in April 2015.

The Commission's hydropower processes give stakeholders the opportunity to participate in collaborative, transparent public processes, where all significant issues are identified and studied. Commission staff develops a detailed, thorough environmental analysis that helps interested entities to understand matters of concern to them and gives them numerous opportunities to provide the Commission with information, comment, and recommendations. While the Commission's regulations establish clear procedures,

Commission staff retains the ability to waive the regulations or to revise the procedures where doing so will lead to a more efficient and cost-effective processing of an application.

It is important to note that in many instances, it is applicants, federal and state agencies, and other stakeholders that determine project success, and control whether the regulatory process will be short or long, simple or complex. For example, where a developer picks a site that raises few environmental issues or works early to build a rapport with stakeholders, and where agencies and other stakeholders commit to fully and timely engage in the regulatory process, project review can move very quickly. In these instances, licenses can be issued in two years or less.

I note that the location of a proposed project and its mode of operation may be at least as significant as project size: a small project that alters the natural flow of a river in a sensitive area may be harder to license than a larger, run-of-river project on a site where there are few environmental issues.

In making licensing decisions, sections 4(e) and 10(a) of the FPA require the Commission to consider and balance many competing developmental and environmental interests. In addition, statutory requirements give other agencies a significant role in licensing cases, thus limiting the Commission's control of the cost, timing, and efficiency of licensing. For example, section 4(e) of the FPA authorizes federal land-administering

agencies to provide mandatory conditions for projects located on federal reservations under their jurisdiction. Further, section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to prescribe fishways. For exemptions, section 30(c) of the FPA allows federal and state agencies to impose conditions to protect fish and wildlife resources. Further, section 401(a)(1) of the Clean Water Act precludes the Commission from licensing a hydroelectric project unless the project has first obtained state water quality certification, or a waiver thereof.

The Commission also must ensure compliance with other statutes, each containing its own procedural and substantive requirements, including: the Coastal Zone Management Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the National Historic Preservation Act.

Compliance with these requirements can involve a variety of processes ancillary to licensing, which can lengthen the time required to obtain a license and adversely affect the economic viability of a project. Even after the Commission staff has completed analysis of a hydroelectric project and is ready to take final action on the application, the case may be delayed, sometimes for years, until the issuance of a water quality certification under the Clean Water Act, or a biological opinion pursuant to the Endangered Species Act. About one-third of all pending hydropower applications before the Commission are awaiting these other agencies' approvals. Further, these mandatory conditions, which the Commission sometimes finds do not meet the Commission's

comprehensive development standard but which the Commission is required by law to include in a license or exemption, may result in increased costs or reduced power production.

In addition to licensing and relicensing projects, and issuing exemptions, the Commission is also responsible for ensuring compliance with license and exemption conditions during the life of regulated projects, and maintains a strong, effective program of inspecting jurisdictional dams to ensure that human life and property are kept safe.

## II. Project Relicensing and License Administration Workload Through FY 2030

Commission staff currently has a full workload processing original license, relicense, and exemption applications, as well as its compliance and dam safety work. The number of projects that will begin the relicensing process will substantially increase beginning in FY 2016 and continuing well into the 2030s. Between FY 2016 and FY 2030, over 500 projects, which represent about 50 percent of our licensed projects and about 30 percent of license capacity under Commission jurisdiction, will begin the pre-filing consultation stages of the relicensing process. Once new licenses are issued, the license implementation phase begins. Currently, the Commission's license compliance and administration division is processing over 3,500 license-related filings per year. This will substantially increase commensurate with the increased relicensing workload.



Many of these projects now on the eve of relicensing were first licensed in the early to mid-1980s, prior to enactment of modern environmental standards, including those of the Electric Consumers Protection Act of 1986, which first directed the Commission, when issuing licenses, to give equal consideration to energy conservation, fish and wildlife protection, recreational opportunities, and environmental quality, and required that licenses be granted upon the condition that the project adopted shall, in the judgment of the Commission, be the one best adapted to a comprehensive plan encompassing fish and wildlife protection, irrigation, flood control, and water supply.

While the Commission staff is dedicated to making the regulatory process as timely and cost-effective as possible, especially in consideration of the number of projects that will be undergoing the relicensing process for the first time, I am concerned that adding additional complexity and required procedures to the Commission's review could hinder our ability to timely process this large workload.

### III. Specific Comments on the Discussion Draft

The discussion draft addressing Hydropower Regulatory Modernization has the commendable goals of improving administrative efficiency and transparency; promoting new hydropower infrastructure, accountability, and efficient and timely decision-making; requiring balanced decision-making; and reducing duplicative oversight. Shared decision-making in the licensing and exemption of hydroelectric projects has oftentimes

complicated our efforts to timely and efficiently process license and exemption applications. Therefore, I support efforts to streamline the license and exemption processes. I will now offer comments on specific sections of this discussion draft.

A. Discussion Draft Section 1301. Administrative Efficiency and Transparency

1. Proposed FPA Section 4(h)

The discussion draft would add to the FPA a new section 4(h), which would give the Commission the exclusive authority to administer the terms and conditions of a license, including all mandatory terms, conditions, and prescriptions submitted by federal and state resource agencies. I support the notion of the Commission's exclusive enforcement authority, which I believe already exists. However, to the extent that the proposed section provides that only the Commission can amend terms, conditions, prescriptions, and certifications, it raises the question of whether agencies that issue mandatory conditions can exercise authority that they have reserved, to add to or revise those conditions. Congress may want to clarify its intent in this regard.

2. Proposed FPA Section 4(i)

The discussion draft would add to the FPA a new section 4(i), requiring any Commission determination on the need for studies or additional information to include an explanation as to why existing information is inadequate.

New FPA section 4(i) is largely redundant with existing Commission regulations and other sections of the FPA. For example, current Commission regulations require Commission staff and other stakeholders to, among other things, describe existing information and the need for additional information; explain the nexus between project effects, the resource to be studied, and how the study would inform the development of license requirements; and consider level of effort and cost, and why any alternative studies would not be sufficient to meet the stated information needs.

Commission staff makes every effort to require only those studies that are necessary for the Commission to obtain an understanding of a project sufficient to carry out its responsibilities under the FPA and NEPA. Further, the regulations encourage the gathering and use of existing information and give applicants and other parties the ability to engage in dispute resolution and to challenge study plans approved by Commission staff. Accordingly, I am uncertain that the proposed new section is necessary.

### 3. Proposed FPA Section 4(j)

The discussion draft would add a new section 4(j) of the FPA, limiting the Commission's control of project shorelines and requiring at least some degree of deference to state and local law.

By way of background, where competing uses of project lands and waters arise, a licensee may either on its own initiative, or as required by the Commission, develop a

comprehensive shoreline management plan to manage the multiple resources and uses of a project reservoir's shorelines in a manner that is consistent with license requirements and project purposes, while addressing the needs of the general public. These plans are prepared by licensees in cooperation with local stakeholders, and submitted to the Commission for approval. Shoreline Management Plans govern only those lands in which licensees have a legal property interest.

Shoreline management plans address issues such as which licensee-owned lands should be reserved for various purposes such as recreation, environmental protection, and residential and commercial development, and what structures, such as piers, boat docks, and patios, may be constructed on licensee-owned shoreline lands or on lands that licensees control. Thus, for example, a plan may prohibit a licensee from authorizing construction on its property of a marina that blocks access to part of a lake or would make boating or swimming unsafe.

It is important to understand that, in enacting the FPA, Congress established a regime in which licensees and exemptees, in exchange for the use of waters belonging to the people of the United States, are required to satisfy the public interest in matters such as hydroelectric generation, recreation, irrigation, water supply, flood control, and environmental protection. Thus, the Commission must consider such issues as whether upstream or downstream residents may be flooded as a result of project operations or whether visitors to a lake have sufficient public access to boat, fish, hike, or swim.

Congress determined that these matters sometimes are more than a local concern, and thus should be resolved by an entity that is required to consider the overall public interest. Therefore, I am concerned that proposed FPA section 4(j) could subordinate the general public interest to a more narrow range of considerations. In addition, as I understand this section, it would require the Commission staff to identify all state and local laws and regulations related to project shorelines and other lands. This will be time consuming and challenging across the fifty states.

B. Discussion Draft Section 1302. Promoting New Hydropower Infrastructure

Discussion draft section 1302 would establish various procedures to promote hydropower development at existing, non-powered dams. This goal is consistent with Commission policy and has been a major focus of Commission staff's effort in the last few years.

Discussion draft section 1302 would add new FPA section 34 to establish a procedure whereby hydropower projects with an installed capacity of 5 megawatts or less would not be required to be licensed, provided the applicant makes a showing that the project meets certain qualifying criteria, including that the qualifying facility be associated with an existing, non-powered dam; be constructed, operated, and maintained to generate electricity; and result in no material change to the water storage and release regime at the non-powered dam. For facilities that otherwise meet the qualifying criteria

but have an installed capacity greater than 5 megawatts, new FPA section 34 would also allow the Commission to issue exemptions after first consulting with federal and state fish and wildlife agencies and conducting an environmental review where full consideration is given to any recommendations for exemption terms and conditions provided by these agencies. Commission jurisdiction over the exempted qualifying facility would only extend to the qualifying facility, and not associated dams, impoundments, transmission lines, or other lands.

I support the intent of these provisions, which would serve to lower the time, effort, and expense needed to develop hydropower projects at existing, non-powered dams. However, as I explained, the small capacity of a proposed project does not necessarily mean that the project has only minor environmental impacts, as projects of this type can still adversely affect water quality, cause fish mortality by turbine strike, and displace terrestrial habitat. Therefore, removing federal jurisdiction for qualifying facilities that are 5 megawatts or less could result in unintended consequences for environmental resources, including federally listed threatened and endangered species.

I am also concerned about some of the specifics of the proposed new FPA section 34, including for example: the extent to which it could be read as elevating economic and operational concerns over other public interest considerations; the proviso that appears to restrict the Commission's determination of what type of environmental document is appropriate in a given case; whether the Commission's jurisdiction would be

essentially limited to project powerhouses, to the exclusion of other project works associated with the development of that powerhouse such as conduits or transmission lines; and the prohibition of altering flow regimes, when doing so might be necessary for project or public safety, flood control, recreation, environmental protection, or other public interest purposes.

Finally, it may be worth considering whether projects at federal dams warrant different treatment from those at non-federal dams. Commission staff has seen increased interest over the last 10 years in developing hydropower facilities at existing, non-powered federal dams. To install hydropower at a federal dam, a developer is required to obtain both a license from the Commission and other approvals from the federal entity to use its dam, resulting in duplicative review and oversight. While the draft legislation would address this issue at federal dams for qualifying projects that are 5 megawatts or less by removing the need to obtain a Commission license, it would not eliminate duplicative oversight at federal dams for projects greater than 5 megawatts. Because federal dam-owners may be best suited to authorize projects at their facilities without a need for duplicate regulation, Congress may wish to consider amending the FPA to give the agencies that own federal dams the exclusive authority to regulate non-federal hydropower development at those dams, regardless of size.

C. Discussion Draft Section 1303. Promoting Accountability, Requiring Balanced and Efficient Decision-Making, and Reducing Duplicative Oversight

1. Adequacy of Mandatory Conditions

With respect to FPA section 4(e) conditions submitted by a federal lands department Secretary and FPA section 18 fishway prescriptions submitted by either the Secretary of the Interior or Commerce, discussion draft section 1303 would amend section 33 of the FPA to require the Commission, rather than the Secretaries, to determine whether a license applicant's alternative FPA section 4(e) condition or section 18 fishway prescription would adequately protect a reservation from project effects, or would provide fish passage in a manner that would be no less protective than the initial prescription, but at a lesser cost or with improved electricity generation. It would be a significant change if the Commission, rather than the land-managing agencies, were to decide if conditions imposed by those agencies adequately protected reservations. I do not support this change. However, the Commission staff, in the course of its NEPA review, regularly assesses the adequacy of all environmental measures proposed, recommended, or required for project lands and waters. This assessment includes consideration of the effects of the measure, and alternatives to it, on project costs and generation. This analysis is available to the conditioning agencies in making their decision on alternative conditions.



## 2. Trial-Type Hearings

Discussion draft section 1303 would amend section 18 of the FPA and add a new section 35 to the FPA which together would shift responsibility for holding trial-type hearings on any disputed issue of material fact with respect to an applicable FPA section 4(e) condition or section 18 fishway prescription, from the Secretaries of the Interior, Agriculture, and Commerce, to the Commission. Licensing stakeholders, including licensees, have informed us that trial-type hearings under the FPA in its current form have not been commonly used because participating in such hearings requires substantial time, money, and staff resources. Parties have instead chosen to forego the hearings in favor of negotiating alternative terms, conditions, or prescriptions. Shifting oversight of these trial-type hearings to the Commission would, in our view, not eliminate the substantial expense associated with such hearings, but instead could encourage the proliferation of these hearings, thereby creating a substantial additional workload for the Commission, which could cause licensing delays and increased administration costs. Instead of moving the trial-type hearings to the Commission, Congress may wish to consider eliminating them entirely from the FPA, and allow the Commission to address disputes on the material facts of a proceeding as part of the Commission's licensing decision, as it has historically done through dispute resolution processes laid out in the Commission's regulations, through use of the Commission's Dispute Resolution Service, or through existing hearing opportunities.

### 3. Amendment of FPA Sections 4(e) and 18

Discussion draft section 1303 would amend section 4(e) of the FPA to prohibit conditions submitted by a department Secretary from imposing a requirement that impairs project operations, management, or utilization of lands or resources outside such portion of a reservation occupied by a hydroelectric project, and amend section 18 of the FPA to specifically require that fishways prescribed by the Secretary of the Interior or Commerce be necessary to mitigate project effects on fish populations.

The amendment to FPA section 4(e) would focus mandatory license conditions on only those resources over which the applicable Secretaries have management and administrative authority, eliminating the potential for overreach and duplicative oversight, which I support. However, Congress may wish to consider clarifying the text by focusing the mandatory license conditions on only those project works located on the federal reservation.

The amendment to FPA section 18 limits prescribed fishways to only those necessary to mitigate project effects on fish populations. Because I am not certain as to the intent of the proposed revision, I have no further comment on it.

D. Discussion Draft Section 1304. Promoting Efficient and Timely Decision-Making

Section 1304 of the discussion draft would amend section 308 of the FPA to establish the Commission as the lead agency for purposes of: (1) coordinating all applicable federal authorizations; and (2) complying with NEPA, and any environmental review under state law associated with a hydroelectric project proposed for licensing or exemption under part I of the FPA. It would also: (1) require all other federal and state agencies considering an aspect of an application for federal authorization to cooperate with the Commission and comply with deadlines established by the Commission; (2) provide the Commission with the authority to establish schedules for the federal authorizations; (3) require the Commission-established schedules to be in compliance with applicable schedules established by federal law; and (4) require the Commission to ensure the expeditious completion of all federal authorizations.

Discussion draft section 1304 would add a new part (d) to section 313 of the FPA, which would deem the failure of an agency to comply with the Commission's schedule inconsistent with federal law. The new part (d) would also establish the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for any circuit wherein the licensee or applicant has its principal place of business, as the exclusive jurisdictional authority for any civil action on review of the failure of an agency, other

than the Commission, to comply with the Commission's schedule, or on review of an agency's decision on the requested federal authorization.

I agree with the goals of this section to bring certainty and timeliness to the licensing process. Federal authorizations that most commonly delay the Commission's ability to make a licensing decision in a timely manner are Clean Water Act water quality certifications and Biological Opinions under the Endangered Species Act. Both the Clean Water Act and Endangered Species Act already have established timelines for completion that the Commission would have to incorporate into its schedule. These timelines can be indirectly extended by actions of both the federal authorizing agency and the applicant, such as having an applicant for the federal authorization withdraw and refile its request for the purpose of resetting the clock or having the federal agency delay the start of the clock by stating that existing information is inadequate for it to make its decision. Section 1304, in our view, would not eliminate these problems. Further, it does not give the Commission the authority to enforce the schedule that it establishes. Congress may wish to consider measures to ensure enforceability such as authorizing the Commission to consider mandatory conditions that are not received in accordance with the Commission's schedule as recommendations, allowing the Commission to move forward with licensing without an agency condition where it is late, or making action on infrastructure siting a priority in these agencies' statutes. This would provide an incentive to act timely.

## V. Conclusion

There is a great deal of potential for the development of hydropower projects at existing, non-powered dams throughout the country. Working within the authority given it by Congress, the Commission continues to adapt its existing, flexible procedures to facilitate the review and, where appropriate, the approval of such projects. With the projected increase in our relicensing workload, we are interested in continuing to explore ways to expedite the completion of all federal authorizations and eliminate or reduce duplicative oversight. Commission staff remains committed to exploring with project developers; its sister federal agencies; Indian tribes; state and local governments; and other stakeholders, every avenue for the responsible and efficient development of our nation's hydropower potential.

This concludes my remarks on the hydropower discussion draft. I will next provide comments on the Natural Gas Act discussion draft.

## **FERC PROCESS COORDINATION UNDER THE NATURAL GAS ACT**

### I. Background

The Commission is responsible under section 7 of the Natural Gas Act (NGA) for authorizing the construction and operation of interstate natural gas pipeline and storage

projects, and under section 3 of the NGA for the construction and operation of facilities necessary to permit either the import or export of natural gas by pipeline, or by sea as liquefied natural gas (LNG). As part of those responsibilities, the Commission conducts both a non-environmental and an environmental review of the proposed facilities. The non-environmental review focuses on the engineering design, and rate and tariff considerations. The environmental review, pursuant to the NEPA, is carried out with the cooperation of numerous federal, state and local agencies; Indian tribes; and with the input of other interested parties. Since 2005, the Commission has authorized nearly 10,500 miles of interstate natural gas transmission pipeline; more than one trillion cubic feet of interstate storage capacity; and 24 LNG facility sites.

The Energy Policy Act of 2005 (EPAAct 2005) amended several sections of the NGA to provide additional authorities and responsibilities to the Commission related to natural gas facilities. In particular, EPAAct 2005 states that the Commission is the lead federal agency for coordinating all applicable federal authorizations and for the purpose of NEPA compliance. As the designated lead agency, the Commission sets the schedule for all federal authorizations, coordinates the regulatory review among federal agencies, and maintains a single, consolidated federal record for any subsequent appeals or judicial reviews. To streamline the permitting process, FERC establishes a publicly-noticed schedule for all decisions or actions taken by other federal agencies and/or state agencies delegated with federal authorizations. This includes federal authorizations issued by both federal and state agencies under the Endangered Species Act, National Historic

Preservation Act, Clean Water Act, Clean Air Act, Coastal Zone Management Act, and other statutes.

The Commission has a well-defined and transparent process for reviewing natural gas facilities under the jurisdiction of sections 3 and 7 of the NGA. The phases include:

- Project Preparation: the project sponsor defines customers and a proposed project before formally engaging with FERC;
- Pre-filing Review (required for LNG terminals but voluntary for natural gas pipelines): FERC staff begins working on the environmental review and engages with stakeholders with the goal of identifying and resolving issues before the application is filed;
- Application Review: the project sponsor files an application with FERC under NGA section 7 for interstate pipeline and storage facilities and under NGA section 3 for import or export facilities. FERC staff completes and issues the environmental document, and analyzes the non-environmental aspects of projects related to the public interest determination; and
- Post-Authorization Compliance: FERC staff works with the project sponsor and stakeholders to ensure compliance with any conditions to FERC approval, including inspections during construction of pipelines and LNG facilities. To ensure continued compliance with the conditions of Commission orders for LNG facilities, Commission staff also inspects these facilities at least biennially for as long as they are in operation. Unlike hydropower projects,

where the Commission has the responsibility to inspect and ensure the facility and public safety of projects throughout their license terms, the Department of Transportation has jurisdiction to establish pipeline and LNG facility safety regulations, and to inspect constructed, operating facilities on an ongoing basis. During construction and operation of the facilities, the Department of Transportation performs inspections to enforce its safety regulations on the design, installation, construction, inspection, testing, operation, and maintenance of pipeline and LNG facilities.

The Commission is committed to making the regulatory process as short as possible, while also providing public notice and opportunity for comments before acting; explaining the reasons for the Commission's decision; and authorizing only those projects that are determined to be in the public interest. Under current authorities, the Commission is able to determine which pipeline projects must employ Pre-filing Review and which do not need this phase. Through early collaboration and by tailoring the process to address project-specific circumstances, the Commission since EAct 2005, has been able to act on 92% of natural gas project applications in less than one year after the application is filed.



## II. Specific Comments on the Discussion Draft

The discussion draft addressing FERC Process Coordination under the Natural Gas Act has the commendable goals of improving transparency and predictability for federal and state permitting agency actions by adding more coordination, reporting, issue resolution, and accountability to section 15 of the NGA. Commission staff is committed to the timely review of proposed interstate natural gas facilities. The Commission's current review process is thorough, efficient, and has resulted in substantial additions to the nation's natural gas infrastructure. These results have been facilitated by a thorough environmental analysis under NEPA, which I believe has been improved through the Commission's Pre-filing Review process.

The proposed legislation would alter the NGA to include several existing practices the Commission has used to successfully review projects: outreach to permitting agencies to ensure participation in the development of the NEPA document; early identification and resolution of issues; the use of third-party contractors in assisting Commission staff with application review; and disclosure of the status of any pending permits. The proposed changes to the NGA would formalize the informal process that Commission staff has found to be effective. However, the proposed changes would move some activities to later in the process than is the case under current Commission practice, thus lessening efficiency. This would limit the Commission's flexibility to adapt its process to the unique circumstances of each project. In addition, the proposed NGA

modifications would alter the Commission's role from one of collaboration with its sister agencies to an enforcement role overseeing and monitoring other agency execution of their Congressionally-mandated duties. I am concerned that this will require the use of Commission resources that could better be spent analyzing proposed projects and could lead to unproductive tension between the agencies involved in the review process. I will now offer comments on the specific sections of the discussion draft.

A. Section 15(b)

The proposed changes to NGA section 15(b) would require the Commission to identify all agencies and Indian tribes with federal authorization responsibilities after the federal authorizations were requested by the project sponsor. After receipt of an application, the Commission would be responsible for establishing a specific deadline by which all permitting agencies would agree to participate in the NEPA review process.

Currently, the Commission's regulations require that each project applicant perform outreach to relevant agencies during the Project Preparation phase and well before any application is made. This outreach ensures that agencies with responsibility for permits, opinions, or other approvals required under federal law are aware of the proposed project at the earliest possible time, while also requiring the project sponsor to account for the various application processes in developing the project schedule. Once the Commission initiates Pre-filing Review, staff begins more formal coordination with

such agencies and invites them to participate in the NEPA review process. This allows those agencies to have input into the development of the project and identification of potential project issues when their advice is most valuable. Accordingly, I recommend that any statutory revision concerning the engagement of cooperating agencies require that engagement begin before the filing of applications for federal authorizations.

B. Section 15(c)

The proposed changes to NGA section 15(c)(2) would not alter the current authorities and responsibilities of the Commission as the lead federal agency for coordinating all applicable federal authorizations and for the purpose of NEPA compliance. Staff's experience has shown that agencies can have different timing requirements for the information needed for their decisions, which results in differing review periods. Information that an agency considers vital to its determination may not be available until after the FERC environmental review is complete and the Commission has issued an order. Providing agencies with timely and complete information necessary to perform Congressionally-mandated project reviews is the single most crucial step in ensuring process accountability and efficiency. This is the responsibility of the project sponsor and is often outside of the control of permitting agencies. I recommend that any statutory revision setting a deadline for the issuance of federal permits include as a predicate the timely provision of all necessary information by the project sponsor.

The proposed text of NGA section 15(c)(3) and (4) would require permitting agencies to coordinate their review with the FERC's NEPA review and to give deference to the Commission's opinion on what matters need to be addressed for that agency's permit review. Coordination for NEPA review already occurs during the Commission's Pre-filing Review, where staff engages other permitting agencies before an application has been filed to discuss what issues need to be included in the Commission's environmental review. Our process provides this mechanism for early and effective coordination among Commission staff and agencies with jurisdiction or special expertise. We invite these agencies to formally cooperate with us in the preparation of the NEPA document, building on the relationships and groundwork established during Pre-filing Review. To the extent possible, staff constructs the NEPA document so that it can be adopted by all cooperating agencies. During this coordination, Commission staff gives deference to these agencies' opinion of the scope of environmental review needed to satisfy their NEPA obligations, as they are best equipped to determine what information satisfies their statutory mandates. I am not certain that the proposed statutory language is needed to improve current practice.

The proposed text of NGA section 15 (c)(4) and (6) would require agencies to formulate and implement administrative, policy, and procedural mechanisms to enable agencies to complete permit processing within 90 days after issuance of the Commission's final environmental document. In addition, if the agency is unable to meet the schedule, it must report to Congress and set forth an implementation plan to ensure

completion. Having to report to Congress on an agency's failure to meet the schedule and provide an implementation plan would provide some accountability; however it could also have the unintended consequence of agencies providing stricter permitting conditions than would have been the case had they had more time. Further, it is not clear what value would be gained by also requiring that this information be provided to the Commission, as the Commission will not be in a position to review or alter the agency plans.

The proposed text of NGA section 15(c)(5) would establish a process for the early identification and resolution of issues associated with an agency's permit review. However, this proposal places this step during Application Review, after an application has been filed with the Commission and all other relevant agencies. The Commission's current approach encourages involvement by all federal or state agencies, local governments, or Indian tribes much earlier, as the project is being developed and throughout Pre-filing Review. This is the period in which agencies can provide the greatest assistance to the project sponsor in designing a successful project and in addressing issues that may delay or prevent federal authorization. If Congress chooses to codify Commission practice, I recommend requiring coordination during the Pre-filing Review phase as is current Commission practice for large, complex projects.

Proposed NGA section 15(c)(5) would also establish a formal process with timelines for the resolution of disputes between the permitting agencies and the project

sponsor. As I understand the bill, this process could only be used during Application Review, once applications had been filed with the Commission and all other relevant agencies. Again, the Commission's current approach already provides for cooperative resolution of issues through engagement by all parties during the earlier Project Preparation and Pre-filing Review phases. In the initial stages of project development, well before applications are made, both the project sponsor and permitting agencies discuss any issues that would result in delay or denial of federal authorization. Once the Pre-filing Review process begins, Commission staff facilitates these discussions and involves agency regional or headquarter senior staff as necessary to find solutions. However, the proposed changes would alter the voluntary, collaborative process by imposing a structure and timetable that would likely make the process adversarial. As with the coordination step, I recommend that any statutory revision governing an issue resolution meeting begin during the pre-application phase, in order to promote timely processing of applications.

### C. Section 15(d)

Revised NGA section 15(d) would allow an applicant to fund third-party contractors or Commission staff to assist the Commission in reviewing the application. This practice is already a feature of Pre-filing and Application Review. For projects wishing to use a third-party contractor, Commission regulations require project sponsors to provide at least three third-party contractors from which Commission staff may make a

selection. Commission staff has complete authority over the scope and level of involvement of the third-party contractor, which works solely under the direction of Commission staff. There is no need to provide for the funding of Commission staff, given that the Commission is already required by law to recover all of its costs through fees assessed to regulated entities. Thus, I do not find the proposed revision necessary for the Commission's review process.

#### D. Section 15(e)

As revised, NGA section 15(e) would require, in instances where there are multiple federal authorizations needed, the Commission make available on its website the schedule established by the Commission and the status of the federal authorizations. As previously discussed, the Commission already notifies federal, and state agencies acting pursuant to delegated federal authority, of the date their action is due in its public Notice of Schedule. Similarly, the project sponsor is already required to disclose the status of any needed federal permits. Specifically, the Commission's regulations require all applications to include: each federal authorization the project will require; the agency responsible for that authorization; and the requested issuance date of that authorization. In addition, the Commission's regulations require the project sponsor to indicate the date it submitted the federal authorization request. In cases where the permit request has not been made, the project sponsor must provide an explanation for the delay and provide a date by which it intends to make the required submission. If a project is approved, the

applicant must again provide updates to the Commission on the status of both applications for and receipt of federal authorizations. Because this information is scattered now, I see value in having the Commission create a website that would have the information in one location; however, it will require time to create and maintain, which may divert resources away from application processing.

### III. Conclusion

The current siting process for natural gas facilities has resulted in a significant increase in the natural gas infrastructure in the United States, meeting the Nation's energy needs and answering the concerns of all stakeholders with decisions that are fair, thorough, and legally defensible. In addition, the current review process for natural gas facilities includes public engagement, consultation and cooperation with affected federal and state agencies, Indian tribes, and other stakeholders and a thorough environmental analysis based on information developed during the Pre-filing and Application Review phases. The proposed text would codify existing, successful practices but, in doing so, would move some processes later in the application review, which could have the unintended consequences of lengthening the processing time for natural gas facilities. I am concerned that codifying the Commission's practices too rigidly might have the unintended consequence of limiting the Commission's ability to respond to the circumstances of specific cases, to changes in the natural gas industry, or to the Nation's energy needs.



Commission staff would be happy to provide technical assistance and to work with other stakeholders to help refine both the hydropower and natural gas discussion drafts.

This concludes my remarks. I would be pleased to answer any questions you may have.