FERC’s Role in Interstate Natural Gas Pipeline Development

National Regulatory Conference
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What is FERC?

- The Federal Energy Regulatory Commission ("FERC") is an independent regulatory agency of the U.S. government
  - 5 Commissioners, appointed by POTUS, no more than 3 can be from the same political party
- FERC regulates certain aspects of the following industries:
  - Interstate natural gas companies (pipelines, storage, LNG) and gas companies that operate import and export facilities
  - Electric utilities, hydroelectric power, and other power producers
  - Oil and certain other liquids pipelines
FERC Commissioners

Norman Bay, Chairman (D)  
Term expires: June 2018

Cheryl LaFleur, Commr (D)  
Term expires: June 2019

Tony Clark, Commr (R)  
Term expires: June 2016

Colette Honorable, Commr (D)  
Term expires: June 2017
Office of Energy Projects

- Sites, certificates, oversees construction of natural gas pipelines, LNG facilities, gas storage (also licenses hydroelectric facilities)
  - DOT PHMSA handles pipeline safety
  - FERC’s Office of Energy Market Regulation reviews new pipeline tariffs and rates
- OEP Staff includes regulatory policy, environmental, and engineering experts (archeologists, geologists, industry experts, etc.)
What parts of the gas transportation business does FERC certificate & regulate?
FERC’s Statutory Gas Pipeline Siting Authority

**Natural Gas Act (NGA), 15 U.S.C. § 717**
- FERC regulates the facilities, rates, and services of gas pipeline facilities that transport gas in “interstate commerce”
- New pipeline facilities and service must serve the present or future public convenience and necessity (“PC&N”)
- **Pipeline rates and service must be just and reasonable, not unduly discriminatory or preferential**

**National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, et seq.**
- As a federal agency, FERC must take a “hard look” at the environmental impacts of any proposed pipeline construction certificate
- **NGA designates FERC as the “lead agency” for the NEPA review purposes**
- **FERC Staff prepares either an Environmental Assessment or an Environmental Impact Statement**
NGA Section 7(c)

- FERC’s 1999 Certificate Policy Statement*
  - Is the pipeline prepared to financially support the project without subsidy from existing customers?
  - Has the pipeline eliminated or minimized any adverse (economic) effects on existing customers, existing pipelines in the marketplace and their customers, or landowners/communities affected by the route?
  - If any adverse effects can’t be eliminated, they are balanced against the public benefits from the project.
- With a FERC certificate – federal eminent domain authority.

FERC Preemption

- **Not preempted:** Other FEDERAL Statutes
  - Clean Air Act, Clean Water Act, Coastal Zone Management Act, Endangered Species Act, National Historic Preservation Act, etc.

- **Preempted:**
  - State and local laws that would conflict with the FERC certificate or unduly delay a certificated project

- **Areas of uncertainty:**
  - State or local standards referenced in federal statutory implementation such as an EPA-approved State Implementation Plan under CAA
  - State or local standards acknowledged by FERC to apply and/or incorporated into federal certificate conditions
  - State or local laws that do not interfere with FERC's jurisdiction
The FERC Certificate Process

- The Pre-Filing Process
- The Certificate Process
- The Post-Certificate Process
The FERC “Pre-Filing” Process

- An informal process to allow early engagement with stakeholders, early identification of environmental or other route issues that will need to be examined/addressed
- Optional for pipeline projects (mandatory for LNG projects) – but widely used
- Typically lasts 6 months to a year or longer before the certificate application is filed
- Notifications to stakeholders; engagement with other reviewing agencies; submission of route and environmental information
- Public comment opportunities but no formal parties
The FERC Pre-filing Process
(source: http://www.ferc.gov/resources/processes/flow/lnng/-1.asp)

PRE-FILING ENVIRONMENTAL REVIEW PROCESS

**Applicant Process**
- Assesses market need and considers project feasibility
- Studies potential site locations
- Identifies Stakeholders
- Requests use of FERC’s Pre-Filing Process
- Holds open house to discuss project

**FERC Process**
- Receives Applicant’s request to conduct its review of the project within FERC’s NEPA Pre-Filing Process
- Formally approves Pre-Filing Process, issues PP Docket No. to Applicant, and begins project review
- Participates in Applicant’s open house
- Issues Notice of Intent for Preparation of an EIS/ES. Opens NEPA scoping period to seek public comments on the project.
- Holds NEPA scoping meeting(s) and site visit in the project area. Consults with interested agencies.

**Public Input Opportunities**
The FERC Certificate Proceeding

- Governing regulations codified at 18 C.F.R. Part 157 (NGA) and Part 380 (NEPA)
- Massive submission of information for a proposed new pipeline (11-13 environmental reports; proposed new tariff; rate derivation; commercial support)
- Much is submitted publicly but some is confidential – critical energy infrastructure info, commercially or environmentally sensitive data (customer agreements, landowner lists, cultural resources info) – may be obtained by parties signing a non-disclosure agreement
- Interested parties may submit comments and/or become an intervenor in the case
- In advance of certificate decision, FERC issues the NEPA document (EA or EIS)
- Processing timing ranges from 6 months to multiple years
The Post-Certificate Phase

- With the certificate in hand, the pipeline can condemn property within its certificated footprint, as necessary
- It may NOT start construction until getting further authority from FERC Staff (“Notice to Proceed”)
- Often the certificate contains many conditions that must be met and procedures followed
- The certificate may be conditional on other agency authorizations being received
- FERC requires multiple layers of environmental and other monitoring of project construction and site restoration
Challenges to FERC Orders – NGA Section 19 (15 U.S.C. § 717r)

- Request for Rehearing - parties unhappy with the FERC order must exhaust administrative remedies before going to court
  - The project’s ability to proceed is generally NOT stayed while rehearing is pending
- Court Review - Upon FERC’s denial of rehearing, those parties that sought rehearing may seek court review in the appropriate U.S. Court of Appeals
  - Again, stays of construction pending court review are not typically granted
- For other required federal/state agency actions – the NGA specifies various “expedited” appellate paths
  - If failure to act – CT of Appeals for the DC Circuit
  - If challenges to approval or denial – federal circuit court where the project is located
• Questions?

• Thank you!

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Mitigation for Large Infrastructure Projects
1.5 hour panel at National Regulatory Conference
Williamsburg, VA
May 19, 2016

Outline of Nikki Rovner’s presentation

I. Mitigation is the lens through which TNC views projects like interstate natural gas pipelines.

A. We recognize that not everyone is using this lens, but we think it’s a useful one and would like to see its use expanded.
B. One consideration that mitigation does not address the question of whether a project is needed.
C. In a recently released paper, TNC outlined “10 Principles for Applying the Mitigation Hierarchy.” We can use the Mountain Valley and Atlantic Coast Pipelines to illustrate a number of these principles.

II. The Mitigation Hierarchy

A. Mitigation is often confused with compensation, but compensation is the third and last step. When utilized fully, mitigation results in improved siting, early in the process of project proposal and consideration.
   Principle 1. The mitigation hierarchy should be applied in a landscape context. Principle 2. Mitigation policy goals should support conservation objectives and drive accountability in applying the mitigation hierarchy. Principle 3. The mitigation hierarchy should be followed sequentially - avoid, minimize, and then offset impacts. Principle 4. There are limits to what can be offset.
B. Virginia pipeline examples.
   1. TNC shared GIS maps of critical habitats with the pipeline developers.
   2. USFS highlighted avoid areas in its comments on the ACP and FERC supported.
   3. Recent realignment of ACP to avoid Cheat and Shenandoah Mountains.
   4. Might FERC offer siting guidelines that could be used at pre-filing stage?

III. The FERC Process

A. The FERC process provides opportunities for federal and state agencies and stakeholders to weigh in. Are improvements to this process needed?
Principle 5. Mitigation should support long-term, durable outcomes.
B. Virginia pipeline examples
   1. Requests for FERC to prepare a Programmatic Environmental Impact Statement
   2. NEPA
   3. Migratory Bird Treaty Act

IV. Compensation for Impacts

A. Compensation for unavoidable impacts offers an opportunity to replace impacted resources.
   Principle 7. Offsets should provide a new contribution to conservation, additional to what would have occurred without the offset.
   Principle 8. Offsets should provide ecologically equivalent values as those lost to project impacts.
   Principle 9. Offset benefits should accrue in the project-affected landscape.
   Principle 10. Offsets should protect against temporal losses.
B. Virginia’s pipelines have not yet reached the compensation stage, but we can talk generally about what this might look like.

V. This approach to mitigation can also apply to other types of energy infrastructure such as wind energy and extraction of shale gas and coal, all of which are expected to continue in the Central Appalachians.
Elected officials are constitutionally charged with protecting the “health, safety, and welfare” of their constituents. Nowhere else does the “rubber meet the road” more clearly than on the local governmental level with elected officials—boards of supervisors, city councils, soil and water conservation board members—and with appointed boards—service authorities, planning commissions, and metropolitan planning area boards.

Ironically, in the planning and decision making process for an INTERSTATE natural gas pipeline, the ability to carry out those “charges” listed above is severely compromised. On the surface, local leaders appear powerless to be a part of the decision making process. In fact, corporations building those pipelines would lead one to believe that there is NOTHING that can be done by any elected officials on the federal, state, and especially the local level. In a Dillon Rule state like Virginia, state officials will tell local officials they don’t have the authority to do anything because they haven’t been granted that authority. Then in the next breath they will say that they can’t do anything either, because this is an interstate pipeline and so it is a federal issue. On the federal level elected officials say they can’t do anything because FERC is an independent agency not answerable to Congress and they are bound by the Natural Gas Act.

And then there is FERC – The Federal Energy Regulatory Commission, an independent federal agency that regulates the interstate transmission of natural gas, oil, and electricity. FERC also regulates natural gas and hydropower projects.

Although FERC abides by the NEPA process, from some perspectives it appears to be a matter of “lip service” in weighing social, economic, and environmental impacts against the perceived public good and need. To some, the commissioners appear to see their job as expediting energy projects, in our case natural gas pipelines. And, public good appears to mean signed customer contracts for corporate profit.

In Virginia, the lines blur between what is a profit-making corporation and what is a public utility. The Virginia General Assembly has had no small part in helping erase those lines with legislation such as the 2004 Wagner Act that allows natural gas companies to survey private lands without permission for a proposed pipeline project.
FINDING POWER: A CASE STUDY IN AUGUSTA COUNTY

Description of the project: nearly 60 miles of proposed pipeline, through landfill, near schools, farms, neighborhoods, public water recharge areas, across sinkholes...

Potential positive and negative impacts and actions by officials

A. Water & Karst
   --AC & ACSA hydrological studies, meetings, FERC filings
   --Source water protection areas: local ordinances in place

B. Economic impacts
   --Projections of tax revenue from SCC & Va. Dept. Taxation
   --County faces significant negative impacts
   --Potential jobs?
   --Industrial development potential?
   --Agricultural issues

C. FERC process
   --Scoping meetings/distain for county
   --Meeting transcripts
   --Becoming an intervener
   --Keeping communication open

D. Other actions
   --Providing opportunity for local input
   --Resolutions
   --“Rezoning” hearing
   --Flood plain ordinances

E. Comprehensive Plan
   --Virginia Outdoors Foundation
   --Potential karst ordinances and comprehensive plan language
   --Future land use map & language

F. Teaming up with others
   --Programmatic EIS
   --USFS – Augusta Co. is 38% public land
   --DEQ issues

G. On the ground
Finding Ways to Make LOCAL Voices Heard in the FERC Process

BY NANCY SORRELLS, CO-CHAIR AUGUSTA COUNTY ALLIANCE
WWW.AUGUSTACOUNTYALLIANCE.ORG
Augusta County & the ACP
Almost 60 miles through Augusta County
Va. Code Section 56-49.01

Going north to go east?

“…[The Code] provides for the right of natural gas companies to enter private property for the purpose of surveying for its proposed route as may be necessary to satisfy any regulatory requirements and for the selection of the most advantageous location or route for the pipeline. We believe that the Code section places an affirmative obligation on the part of the Atlantic Coast Pipeline to find the most advantageous route. We are concerned that the most recent alternative route is not the most advantageous route.”
Karst & Water: EIS process
Scoping meetings

What FERC’s transcription says:

“Our scoping notice requests that our comments be specific, but we ought to love the wonderful reports that the Supervisors and Service Authority put together, to give you all the specifics about a ride in our cars.”

What was actually said:

“Our scoping notice requests that our comments be specific – “the more specific, the more useful.” Then you ought to love the wonderful reports that the Supervisors and Service Authority have put together giving you all the specifics about our water and our karst.”
Augusta County and the Atlantic Coast Pipeline: Summary of Economic Effects

Augusta County’s Economy: What’s at Risk

Augusta County has a robust and growing economy thanks in part to its clean and healthy environment and high quality of life. The Atlantic Coast Pipeline, which would run 46.8 miles in Augusta, has triggered widespread concern over what the pipeline would do to the local community, land, and economy. This report describes the assets and trends that may be at risk if the Atlantic Coast Pipeline is built and summarizes research on the potential economic impacts on land value, natural benefits, and key economic sectors in Augusta County.

Key Log Economics for Augusta County Alliance
February 2016

“...I am here to tell you what the Atlantic Coast Pipeline can ruin. It can ruin our million dollar view... our water quality... our property value... our family business... it can ruin our way of life, our American dream.”
— Virginia Davis, Owner, Staunton Draft Farm Market

Who will pay for Dominion’s pipeline?

Everyone.

A new economic study shows the true costs of Dominion’s Atlantic Coast Pipeline (ACP) to Augusta County families and communities:

- Total Property Value lost up to $44.5 million
- Annual property tax revenue lost up to $240,000
- Annual loss of personal income up to $8.1 million
- People in Pipeline Evacuation zone* 10,779
- Homes in Pipeline Evacuation zone 3,019

What will go DOWN if the ACP is built?
- Property values
- Sense of security
- Quality of life
- Agricultural production
- Tourism revenue
- Economic development opportunity

What will go UP if the ACP is built?
- Your taxes
- Risks to drinking water
- Natural gas exports

To read more about the economic impacts of the ACP go to www.AugustaCountyAlliance.org

* These numbers will be higher with the new pipeline miles proposed through Overland Valley.

Stay informed! Stay Involved!
Augusta County is a special place, let’s keep it that way.

WWW.AUGUSTACOUNTYALLIANCE.ORG
Economic need

“There’s a widespread assumption that such pipelines would only be proposed if they were necessary. This assumption is not supported by the facts. We found that the dynamics of the pipeline business tend toward overbuilding—toward building excess pipeline capacity.”

Floodplains: Local Control


We are considered an area vulnerable to major flooding and accompanying erosion and mudslides.
Augusta County Comprehensive Plan
Programmatic Environmental Impact Statement

EPA Comments to FERC
The U.S. Environmental Protection Agency recently called for the current federal review of the [ACP] project's environmental impact to consider the cumulative effects of other "proposed and reasonably foreseeable projects" …as the energy industry pushes to move low-priced natural gas from the West Virginia shale fields to big users or to market.
Illegal Regulatory Shortcuts