FERC's 1999 Pipeline Policy Could Face Environmental Headwinds

Thomas N. Russo

The Federal Energy Regulatory Commission's review of its policy statement on natural gas pipelines is not unusual or surprising.[1]

What is surprising is that many in the industry are not taking it seriously. They take comfort in the Trump administration's pro-fossil-fuel-and-infrastructure agenda. I'm sure many coal companies and owners of coal-fired power plants thought the same thing when Energy Secretary Rick Perry proposed subsidizing coal and nuclear power plants to FERC. That attempt did not work out as planned. FERC asserted its independence and recognized the reality of electricity markets and the role that cleaner renewable and natural gas power plants are playing in the electricity sector.

I believe FERC will listen very carefully to environmental arguments, especially those made by states and landowners who are directly affected by pipeline construction and operation. While no one knows the outcome of such a review, I am certain some arguments will resonate with individual FERC commissioners. Even if FERC's pipeline policy is only tweaked, FERC may raise the ante and require the pipeline industry to do a better job in siting and constructing pipelines. In the absence of FERC and the pipeline industry rising to the challenge, the states, with the backing of environmental groups and landowners, will use their power under the Clean Water Act and Coastal Zone Management Act permits to stop construction altogether or impose very strenuous conditions in their respective permits. That's already happened in New York State with the Constitution and Northern Access natural gas pipelines.

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States, with the backing of environmental groups and landowners, will use their power under the Clean Water Act and Coastal Zone Management Act permits to stop construction.

These entities may impose penalties on pipeline companies for violations of water-quality standards and other state laws.

PRECEDENT AGREEMENTS

Open seasons are used by pipeline companies to determine the interest of shippers in using a new pipeline to transport additional gas capacity. If enough parties respond positively in an open season, then a precedent agreement is negotiated between the pipeline company and each shipper. Precedent agreements are routinely used by natural gas pipeline companies to demonstrate the need for a pipeline and economic benefits. Owners of liquid pipelines that transport crude oil and refined petroleum products also use precedent agreements to determine whether or not to build new pipelines and to attract investment capital. What FERC ultimately decides to do with precedent agreements could also affect how they are used to set rates on liquid pipelines as well.

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Opponents of natural gas pipelines decry the use of precedent agreements by FERC to demonstrate the need for a pipeline. The arguments surrounding need for a project made by environmental groups are almost as old as the National Environmental Policy Act (NEPA). These arguments are also frequently raised by opponents of all energy infrastructure projects, even solar and wind, to delay the siting process or to support no action. Nevertheless, FERC will certainly re-examine whether to rely exclusively on precedent agreements for natural gas pipelines or to include additional factors such as alternatives identified in an environmental impact statement (EIS) in their review.

FERC Commissioner Cheryl LaFleur's dissent on the Mountain Valley Pipeline Project/Equitrans Expansion Project (MVP) and the Atlantic Coast Pipeline Project (ACP) is often used as an example of FERC's narrow use of precedent agreements to determine need. In those cases, precedent agreements were used to approve these two projects, while FERC dismissed the two pipeline alternatives evaluated in the environmental impact statement.[2] To some, FERC's approval of the MVP and ACP projects was troubling. It is the perfect storm for those advocating using environmental considerations to look at need and to approve or disapprove proposed pipelines.

However, the geographical proximity of the MVP and ACP pipeline projects to each other and the common markets they will serve may just be coincidental. Even if they are not, I am not certain that these projects have to be mutually exclusive, as Commissioner LaFleur and others suggest. In reality, numerous natural gas pipelines have historically transported gas from the US Gulf to markets in the Northeast and Midwest. In those earlier decisions, FERC did not pit one pipeline proposal against another serving the same market or substitute its judgment on the need. FERC relied on precedent agreements and the willingness of shippers and pipelines to agree to use and build the new pipeline, respectively.

Had FERC denied both the proposed MVP and ACP pipeline projects and recommended that only one of the pipeline alternatives be constructed, it would have second-guessed the pipeline proponents, shippers, and investors, and in effect instituted federal planning into the pipeline certification process. If one does not want to rely on precedent agreements, then the central question is what to replace them with. Opponents would argue that FERC should consider a variety of factors, such as natural gas demand, the environmental effects of fracking, and the rising trend of renewables that they hope will one day replace gas used for power generation.

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Whether FERC would want to second-guess the gas markets and rely more on an analysis of trends and environmental factors instead of precedent agreements is an open question. Energy markets and trends are constantly changing. While I believe FERC could ascertain those factors, I don't believe FERC would want to second-guess the natural gas markets, which is composed of real sellers and buyers of natural gas.

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Given the success in the last 70-plus years in building out the interstate natural gas pipeline system, I am not certain that we will see the end of precedent agreements at FERC anytime soon, but I do believe they will be scrutinized more closely by FERC, especially concerning the affiliate relationships of some of the signatories.

IT'S HARD TO ARGUE WITH SUCCESS

FERC is known for many things.

However, FERC's deregulation of natural gas and building out the interstate natural gas pipeline system to its current 200,000 miles of pipelines are major accomplishments that have benefited the United States (**Exhibit 1**). Without the interstate natural gas pipeline system, it would not have been possible to reap the benefits of adequate supplies of natural gas or the national and global benefits of the shale gas revolution. Likewise, the environmental benefits of CO_2 reduction and greening of the US power sector from

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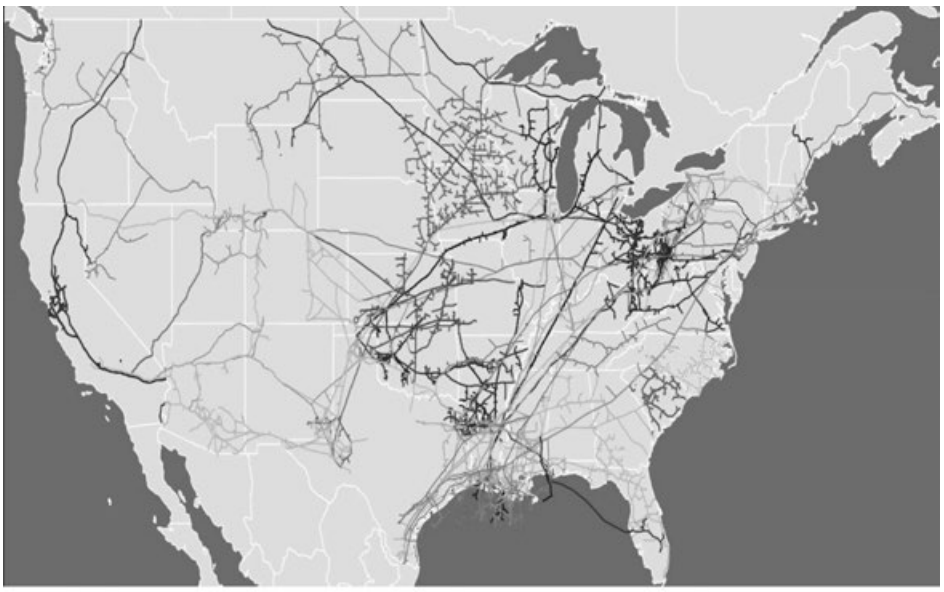
Exhibit 1. Interstate Natural Gas Pipeline System



Source: Interstate Natural Gas Association of America.

power-plant fuel-switching to natural gas would not have been attained.

Today's interstate crude oil and liquid pipeline system is much smaller than the natural gas pipeline system. FERC has no authority to site land to approve liquid pipelines. However, FERC does ensure that transportation rates are just and reasonable. Liquid pipeline companies do use open seasons and precedent agreements to determine interest in new transportation capacity.

In contrast, the growth of interstate electric power transmission has been left to the individual states.[3] Under their traditional jurisdiction over land use, the states permit and site interstate electric power facilities that traverse their boundaries. This jurisdiction has posed an obstacle to the development of new interstate transmission facilities for several decades and even recently. On February 4, 2018, for example, New Hampshire regulators vetoed the $1.6 billion Northern Pass Transmission (NPT) project that would bring 1,090 megawatts of Canadian hydropower 192 miles across the state of New Hampshire and connect to the New England electric grid in Massachusetts.

The New Hampshire Site Evaluation Committee, a state entity responsible for overseeing the planning, siting, construction, and operation of energy facilities, voted 7–0 against the NPT project, citing concerns about the project's impact on local business, tourism, and development in the region.

FERC 1999 PIPELINE POLICY STATEMENT

FERC's review of its 1999 pipeline policy statement is not unusual or surprising.[4] FERC looks at all of its policies periodically to see what improvements can be made. FERC is also currently looking at natural gas index liquidity and transparency[5] in the physical natural gas markets, to explore current trends in physical natural gas trading and price reporting and how the use of natural gas indices has evolved over time.[6]

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In its 1999 Pipeline Policy Statement,[7] FERC clarified its certification policy so it could better determine whether to issue a certificate for new interstate pipeline facilities and how best to create incentives. At the time, deregulation of upstream natural gas production and sales had recently taken place, as well as major restructuring of the indus-

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try to encourage competition to benefit consumers. FERC stated in the 1999 Pipeline Policy Statement its intention to do the following:

- Enhance market competition with respect to pipeline transportation
- Support market demand for natural gas
- Avoid the potential for overbuilding pipelines and the adverse impacts on landowners, communities, and the environment
- Conduct an independent NEPA review

WHAT'S CHANGED, WHAT HASN'T

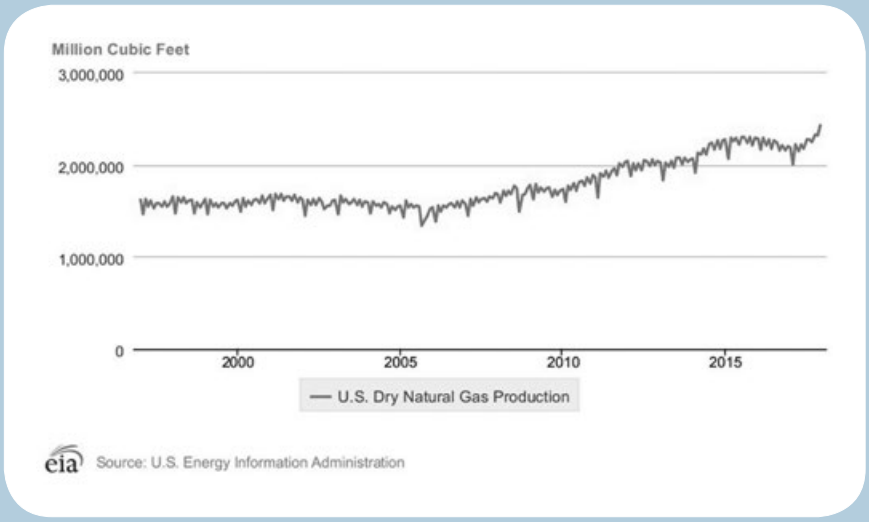
Since the 1999 Pipeline Policy Statement was issued, the use of horizontal/directional drilling and hydraulic fracking of inland shale basins have resulted in increased production of natural gas in the United States. These basins include the Marcellus/Utica shales in Pennsylvania, Ohio, and West Virginia, and other basins in Texas, Oklahoma, and the Rocky Mountains.

US natural gas production has grown from 18,832 billion cubic feet annually when the 1999 Pipeline Policy Statement was issued to 26,863 billion cubic feet in 2017, an increase of nearly 43 percent (**Exhibit 2**). Given the increase in production and demand for natural gas in the United States, Mexico, and abroad, it is not unusual that FERC has approved certificates for nearly 400 pipeline projects.[8] Opponents to the current pipeline policy cite this as a major reason why the policy requires revision. Opponents have also leveled similar criticism at FERC's hydroelectric program, where over 1,670 projects have been licensed and very few applications were denied.

Most environmentalists want FERC to broaden its NEPA review to include the upstream effects from hydraulic fracking and downstream effects from burning pipeline natural gas. Environmentalists also want FERC to consider the growth trend in renewable energy and electric storage technologies that may one day replace the need for gas-fired power generation and new natural gas pipelines. This may present a slippery slope for FERC because trends are subject to a variety of factors. Trends may not be a substitute for reliance on markets or on precedent agreements, which reflect a written negotiated commitment of shippers and a pipeline company to proceed with a new pipeline project.

On March 16, FERC issued two orders that will affect its review of the 1999 Pipeline Policy Statement with regard to attracting capital for future pipelines. The first will revise polices that will disallow income-tax-allowance cost recovery in master limited partnership pipeline rates on interstate natural gas pipelines.[9] The second order addresses changes in the income tax rates for natural gas and oil pipeline companies that FERC regulates, stemming from the landmark Tax Cuts and Jobs Act of 2017.[10] FERC has proposed a rulemaking to determine what changes, if any, have to be made in rates charged.

Exhibit 2. US Natural Gas Annual Production Increased by 43 Percent 1999–2017



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What has not changed is FERC's ability to mitigate the environmental impacts of a pipeline proposal by changing the proposed pipeline route and location of compression stations. FERC's regulations, and particularly its prefiling process, are specifically designed to facilitate such changes. The prefiling process relies heavily on local input from communities and landowners to identify the most preferable routes that will avoid adverse impacts altogether. The same emphasis applies with respect to mitigation and restoration of the affected land, once the pipeline is constructed.

FERC'S ACHILLES' HEEL AND NEPA DÉJÀ VU

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Dissents by current FERC Commissioners LaFleur and Richard Glick, both Democrats, on the March 14, 2018, Order on Remand Reinstating Certificate and Abandonment of the Southeast Market (SMP) Project are already drawing the lines regarding NEPA compliance and FERC review of the 1999 Pipeline Policy Statement. The majority of FERC commissioners don't believe that the construction of a new natural gas pipeline causes indirect downstream effects such as greenhouse gas (GHG) emissions from utility plants that burn natural gas. Commissioners LaFleur[11] and Glick[12] find this problematic. I do also, for a variety of reasons, specifically because I believe the new gas will have cumulative effects on GHG emissions from downstream gas-fired power plants burning the fuel.[13]

NEPA requires an agency to consider indirect and cumulative effects of a project in its decision-making. In the case of the SMP project, FERC has quantified the GHG effects from burning the natural gas by the receiving power plants in Florida. In essence, the effort and work have been done. In SMP's case, the net increase in GHG emissions was 3.6 percent. However, even if it was 36 percent of the total GHG emissions, FERC is only required to consider that information in its decision.[14] FERC's difficulty in determining the significance of an impact has no bearing on its requirement to consider the information in its decision-making. In the case of SMP, many would argue that the 3.6 percent increase in GHG caused by the project is grounds for not approving it.

The information has to be made public and be considered by the agency. NEPA is only a procedural statute and only requires an agency like FERC to make a knowing decision. If the majority of FERC commissioners openly state that they did the GHG analysis, but contend that this is not being considered in its review of the project, FERC may be vulnerable to a legal challenge.

In the mid-1980s, FERC faced a similar NEPA compliance challenge in its hydropower program—hence, the reference to déjà vu. At that time, many federal and state agencies, environmental groups, and the Council on Environmental Quality were petitioning FERC to consider cumulative effects associated with numerous hydropower projects being proposed in a river basin. FERC resisted the initial petitions vigorously, insisting that the other projects were not germane to its licensing decision.

The issuance of hydropower licenses slowed dramatically during this time. However, once FERC developed the methodologies to assess indirect and cumulative effects in its Environmental Assessments and Environmental Impact Statement, the hydropower program was restored. Yes, it took extra effort and time to do the analysis, and in most cases, the cumulative effects were not significant.

FOCUSING ON CONSTRUCTION AND MITIGATION

FERC relies on its prefiling process, NEPA, and public participation to delineate the best pipeline routes. Despite the uproar over the process, it does result in better routes, as evidenced by FERC draft EISs and at times supplements when a new route is identified later in the process. Unfortunately, the process is mired down with "out-of-scope" comments on the legitimacy of hydraulic fracking, use of eminent domain, renewable energy advocacy, and other arguments that have either been settled by Congress years ago or are just public opinion. Unfortunately, NIMBY is alive and well in pipeline proceedings.

Natural gas pipelines have always been controversial for landowners affected directly by the project and local communities along the route that don't directly receive project benefits. There is a great deal of knowledge on how to mitigate pipe-

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line route and compressor station impacts during construction and operation. The challenge is actual implementation on two levels: (a) moving from generic approaches or standard practices to detailed mitigation plans and (b) actually implementing them in an acceptable manner. Many state water-quality certification agencies and the Army Corps of Engineers are requiring detailed plans, and so should FERC if it doesn't wish to delegate such mitigation to the states.

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All of the promises by pipeline applicants to mitigate pipeline impacts, especially restoring a landowner's property, have to be implemented correctly and in a timely manner. Because FERC is approving the project, FERC has a special role to play in ensuring that mitigation and construction are done properly. For example, repeated occurrences of drilling mud spills into wetlands that occurred in Ohio on the Rover Pipeline were problematic not only for the company, but also for FERC's natural gas program and the natural gas pipeline industry in general. FERC needs to have a strong presence after approving the project during construction and initial operation to restore the public's confidence in the program.

In the cases of compliance, FERC should look to its Division of Hydropower Administration as an example. Also, just as FERC has done in the natural gas and electricity markets and hydropower program, it should increase its efforts to create a stronger compliance culture in the natural gas pipeline industry. FERC should use its Enforcement Hot Line, audit, and fines and penalty authority of $1-million-per-day-per-violation to ensure compliance with the conditions included in pipeline certificates and work closely with state water-quality and coastal zone management agencies as well.

NOTES

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2. LaFleur, C. (2017, October 13). Commissioner Cheryl A. LaFleur's Statement, October 13, 2017, about the Mountain Valley Pipeline Project/Equitrans Expansion Project and the Atlantic Coast Pipeline Project. Retrieved from https://www.ferc.gov/media/statements-speeches/lafleur/2017/10-13-17-lafleur.asp#.WqmXPZNzbOQ.
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6. Russo, T. (2017, August). Using natural gas price indices. *Natural Gas & Electricity, 34*(1), 1–7.
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9. FERC. (2018, March 15). FERC revises polices, will disallow income tax allowance cost recovery in MLP pipeline rates. Retrieved from https://ferc.gov/media/news-releases/2018/2018-1/03-15-18-G-2.asp#.Wq1CeZP4_OQ.
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11. LaFleur, C. (2018, March 14). Commissioner Cheryl A. LaFleur's statement on Southeast Market Project. Retrieved from https://www.ferc.gov/media/statements-speeches/lafleur/2018/03-14-18-lafleur.asp#.WqtIfpNzbOQ.
12. Glick, R. (2018, March 14). Commissioner Richard Glick's statement on Southeast Market Project. Retrieved from https://www.ferc.gov/media/statements-speeches/glick/2018/03-14-18-glick.asp#.WqtJRJNzbOQ.
13. The Council on Environmental Quality defines cumulative effects as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions (40 CFR ~ 1508.7).
14. In other cases, in which natural gas is replacing coal, there may be substantial reductions in GHG emissions.

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