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Client Update: Consideration by the Federal Energy Regulatory Commission of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews

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How does a federal regulatory agency advance an Administration's goals—in this case, reducing carbon emissions to reduce climate change risk? To what extent can the agency accommodate political and practical considerations? These questions have converged in the context of a Draft Policy Statement issued by the Federal Energy Regulatory Commission (FERC or the Commission).

On February 18, 2022, FERC issued an Interim Policy Statement proposing sweeping changes to the Commission's procedures for evaluating climate impacts of natural gas infrastructure projects pursuant to FERC's authority under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). Although FERC set the Interim Policy Statement for a public comment period and further administrative proceedings, FERC also took the unusual step of applying the new interim policies to natural gas projects *already pending* before the Commission. The negative industry reaction to making the new policies apply to existing applications was swift and clear. On March 24, 2022, FERC issued a subsequent Order that reversed the retroactivity of its new greenhouse gas policies to existing natural gas projects and downgraded the Interim Policy Statement to a Draft Policy Statement. FERC is now moving ahead with consideration of the Draft Policy Statement and may implement final binding guidance in the coming months.

The Draft Policy Statement represents a significant shift in the FERC natural gas project approval process and will require additional reporting and compliance for prospective applicants. The Commission seeks comments on all aspects of the Draft Policy Statement, including a particular focus on the proposed approach for assessing the significance of proposed projects' contributions to climate change. **Comments on the Draft Policy Statement must be submitted to FERC by April 25.** Even if your company does not submit comments, interested stakeholders will want to monitor how FERC considers the various industry positions and finalizes its Policy Statement. In addition, how FERC considers impacts on climate change of various actions it takes in the gas area may portend similar potential action in the electric and oil pipeline areas within its authority.

Policy Statement Summary

The Draft Policy Statement purports to (1) describe FERC's procedures for evaluating climate impacts of natural gas infrastructure projects under NEPA, and (2) describe how the Commission will integrate climate considerations into its public interest determinations under the NGA. In doing so, the Commission established a new emissions benchmark of 100,000 metric tons per year of carbon dioxide equivalent (CO₂e) that, if likely to be exceeded by a proposed project, will presumptively trigger Commission staff to prepare an Environmental Impact Statement (EIS) as contemplated by NEPA. The Commission also plans to make public interest determinations in part by considering proposed projects' impacts on climate change, as well as by considering proposals by the project sponsor to mitigate all or a portion of the project's climate impacts.

FERC explained that the Draft Policy Statement was issued because the Commission's most recent Certificate Policy Statement, which guides FERC's approach to the certification of new interstate natural gas transportation facilities, was issued in 1999 and has not incorporated the developments in climate policy over the past two decades.

The Draft Policy Statement does not establish binding rules for applicants and may be subject to further revision. As noted above, the Commission initially sought to apply the new greenhouse gas (GHG) emission guidelines immediately, including to project applications *already pending* before the Commission under sections 3 and 7 of the NGA. However, FERC reversed course on the Statement's retroactivity on March 24th. Moving forward, the Policy Statement will not apply retroactively to pending project applications or filed applications. Instead, the Policy Statement will not go into effect until the Commission issues final guidance.

NEPA Review Thresholds

Under NEPA and its implementing regulations, federal agencies must take a "hard look" at potential environmental consequences before taking any major federal action that may significantly affect the quality of the environment. Agencies such as FERC typically prepare an Environmental Impact Statement (EIS) when significant environmental effects are predicted to result from a major action. FERC's Draft Policy Statement creates greenhouse gas emissions thresholds for new and pending natural gas projects that, if exceeded, presumptively trigger preparation of an EIS.

The Commission's Draft Policy Statement establishes a significance threshold of 100,000 metric tons or more per year of CO₂e. FERC staff will create an estimate of a proposed project's GHG emissions based on all relevant evidence submitted in the record. If the Commission's emissions estimate exceeds 100,000 metric tons of CO₂e per year, the project will be *presumed* to have a significant environmental impact warranting preparation of an EIS. The Commission's annual emissions calculation will use the 100% utilization or "full burn" rate for natural gas supplies delivered by the proposed project.

Importantly, the Commission emphasizes that projects exceeding the emission significance threshold will not inherently be required to reduce emissions to receive approval. Instead, the threshold merely indicates potential environmental significance and triggers preparation of an EIS under NEPA. NEPA is a reporting statute that does not impose substantive obligations on involved parties or dictate any particular result even if the proposed action is found to have a significant environmental impact.

NEPA Emissions Quantification

Pursuant to NEPA, the Commission will continue to quantify a proposed project's GHG emissions that are reasonably foreseeable. For NGA section 7 applications, this now includes case-by-case consideration

of upstream emissions resulting from construction and operation of the project, as well as downstream emissions resulting from the combustion of transported gas. The Commission continues to not consider downstream GHG emissions under NEPA for section 3 projects because the Department of Energy has sole authority to license and consider the environmental impacts of natural gas exports.

The Draft Policy Statement also changes the method for calculating the likely impact of a project's GHG emissions on climate change. While the Commission will use the project's full burn rate for determining the appropriate level of NEPA review, it will instead consider a projected utilization rate when quantifying likely GHG emissions. This change is intended to reflect the reality that most natural gas projects do not operate at 100% utilization at all times.

The Commission encourages project sponsors to file a projected utilization rate, as well as its justification for the rate and supporting evidence, in its applications under NGA section 3 or 7. The Commission did not provide concrete guidelines for utilization rate calculations, but suggested the use of measures including expected utilization data from project shippers, historical usage data, demand projections, and an estimate of how much capacity will be used on an interruptible basis. Applicants also may submit additional evidence that impacts the quantification of a project's reasonably foreseeable emissions, such as evidence of verifiable downstream mitigation efforts or evidence that the project will displace the use of a higher emitting alternative fuel.

Emission Mitigation Evidence

The Draft Policy Statement also encourages the Commission to issue certificates for natural gas projects that are conditioned on achieving a specified level of mitigation of projected GHG emissions. The Commission reserves the right to require a project sponsor to mitigate all, or a portion of, the impacts related to a proposed project's GHG emissions. This includes direct emissions, but may also require the sponsor to mitigate upstream and/or downstream emissions as well.

The Commission also will consider any mitigation measures proposed by a project sponsor on a case-by-case basis when making public interest determinations. These mitigation conditions may be applied to section 3 and section 7 applicants. An applicant's proposed mitigation measures, if sufficiently quantifiable, may also help avoid the preparation of an EIS where one would otherwise be required under the new emissions threshold.

The Commission is not mandating any particular form of mitigation. Project applicants can propose any mechanism to mitigate GHG emissions, as long as those mechanisms are (a) both real and additional, (b) quantifiable, (c) unencumbered, and (d) trackable for compliance purposes. Some example mitigation mechanisms provided by the Commission include:

- Market-based mitigation via renewable energy credits, mandatory compliance market participation, or voluntary carbon market participation; or
- Physical mitigation, such as carbon capture or reducing GHG emissions from the applicant's existing facilities, including those with no direct connection to the proposed project.

Project sponsors proposing GHG mitigation measures may also propose to recover the costs of these measures through their proposed rates. The recovery of costs for mitigation measures will continue to be reviewed for justness and reasonableness of rates under NGA section 7 and section 4.

Policy Statement Analysis

The Commission's Draft Policy Statement will require natural gas project sponsors to alter the way they seek certification from the Commission. The Draft Policy Statement is not a final rule and may change its terms after the public commenting period, but it nevertheless reflects the Commission's heightened concern regarding GHG effects of new projects. Once the Commission issues final guidance on the Policy Statement, subsequent project applicants should conduct a careful analysis of the Commission's new GHG policies to inform both project viability and the required analyses to be submitted for review.

Additional Application Information

Assuming the Draft Policy Statement remains in effect following the commenting period, natural gas project applicants are encouraged to submit further GHG-related information in their section 3 and 7 applications. The Commission recommends that new applicants submit:

- The project's projected utilization rate and supporting information;
- An estimate of reasonably foreseeable project GHG emissions;
- If not quantified, evidence supporting why upstream and downstream emissions are not reasonably foreseeable;
- Evidence, if any, that impacts the quantification of the project's reasonably foreseeable GHG emissions;
- A description of the applicant's proposed GHG mitigation measures, including quantified percentages of the project's direct and indirect GHG emissions that will be mitigated; and
- A detailed cost-estimate of proposed GHG mitigation strategies and a proposal for recovering those costs if the project is approved.

While the Draft Policy Statement's requirements are not yet binding on project applicants, it may be prudent for applicants to submit the recommended environmental materials out of an abundance of caution.

Financial Considerations

Moving forward, natural gas project sponsors should account for the likelihood of additional time and monetary investment required to receive Commission approval. Especially for new projects likely to exceed the GHG significance threshold, project sponsors should assume their applications will trigger the preparation of an EIS pursuant to NEPA. EISs are by no means a trivial regulatory step. Per Department of Energy analysis, the average EIS in 2015 took 4.1 years to complete and carried an average cost of \$4.2 million.¹ While project sponsors may be able to avoid an EIS by providing evidence of a compelling GHG mitigation process, the case-by-case nature of the Commission's mitigation determinations coupled with the lack of current precedent under the Draft Policy Statement makes it difficult to predict whether the presumption of significant environmental impacts can be rebutted, as well as which types of mitigation proposals will be viewed most favorably.

We continue to monitor opportunities to engage with the Commission on matters affecting client's interests. We are actively following this proceeding and other areas within the Commission's jurisdiction that may be impacted by the direction revealed by the Draft Policy Statement.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Washington, D.C. energy regulatory lawyers who practice within the Firm's Energy Infrastructure and Transition Practice Group:

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¹ Department of Energy, *Lessons Learned Quarterly Report*, Mar. 2016, available at <http://energy.gov/nepa/downloads/lessonslearned-quarterly-report-march-2016>.

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