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of the Committee on Energy and Commerce

A Legislative Hearing on the Proposed "Promoting Interagency Coordination for Review of Natural Gas Pipelines Act"

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Concise Statement

The proposed changes to 15 U.S.C. 717n are unnecessary and would upset the careful balance of cooperative federalism that exists under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. It would inappropriately expand FERC's Natural Gas Act authority and undermine states' rights and the important role that other federal and state agencies play in ensuring the protection of natural resources for the public.

Summary

Under the Natural Gas Act, FERC is responsible for administering applications for both Section 3 and Section 7 approvals. It does so on a case by case basis, subject to the statutory standards of the Natural Gas Act, operating under no larger federal energy program. When processing approval requests under Section 7 for certificates of public convenience and necessity, FERC may grant such approval only if it finds that the project is required by the public convenience and necessity. FERC has generated a series of Policy Orders, collectively known as FERC's Certificate Policy Statement,[1] to which it nominally adheres when evaluating these projects to determine compliance with that Natural Gas Act standard. FERC grants Section 3 approvals if it finds that the project is in the public interest, and FERC generally reviews LNG projects employing the same standards as Section 7 projects.[2] FERC approvals under Section 3 and Section 7 constitute major federal action for the purposes of the National Environmental Policy Act (NEPA), and as such, FERC

[1] Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC 61,227 (1999), clarified, 90 FERC 61,128, further clarified, 92 FERC ¶ 61,094 (2000).
[2] See 15 U.S.C. 717b.

is required to consider the environmental impacts of its potential project authorizations in strict accord with NEPA.

FERC currently employs an extraordinarily narrow interpretation of its regulatory role under NEPA. For example, FERC has expressed its view that it is not FERC's duty to assess project purpose and need beyond accepting the applicant's stated project goal. This approach has limited FERC's NEPA review to a mere recitation of legal requirements, devoid of the real analysis of alternatives to the proposed projects that forms the heart of NEPA. FERC will only consider alternatives to natural gas transmission pipelines that are other natural gas transmission pipelines. Moreover, FERC's assessment of environmental impacts routinely finds that a project's environmental impacts will not be significant so long as other federal agencies, or state agencies acting pursuant to federal law, separately assess the project's environmental harms under comprehensive statutes such as the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.[3]

Thus, the detailed and comprehensive environmental impacts analyses required to protect natural resources are consistently performed by other federal and state agencies under the more specific environmental standards contained in the above-listed substantive environmental laws -- not by FERC under NEPA. While FERC must additionally consult with other federal/state agencies, such as United States Fish and Wildlife Service, responsible for assessing Endangered Species Act effects, and state historic preservation authorities, in coordinating the Section 106 Process of the National Historic Preservation

[3]FERC has rarely, if ever, denied authorizations based on project-specific impacts identified during the NEPA review process. See Linda Luther & Paul W. Parfomak, Cong. Research Serv., R44140, Presidential Permit Review for Cross-Border Pipelines and Electric Transmission (2017).

Act, those important environmental reviews do not involve the same core authority delegated to the states under the CWA, CAA and CZMA.[4]

Although the proposed bill is entitled, "Promoting Interagency Coordination for Review of Natural Gas Pipelines Act," the essence of the Act's proposed changes to 15 U.S.C. § 717n would generate -- not resolve -- conflict between and among the federal and state agencies currently responsible for reviewing the actual environmental impacts of project proponents' applications to FERC for Section 3 or Section 7 Natural Gas Act approvals. In fact, the proposed statutory amendments threaten to abrogate state powers and duties under federal laws including the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.

Clean Water Act and the Coastal Zone Management Act: The Importance of the State's Role in the Cooperative Federalism.

The Clean Water Act explicitly recognized the critical role that the states play in protecting water quality. Clean Water Act section 401 plainly mandates that "any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State."[5] The statute further states, "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been

[4] For example, as part of accepting delegation of the 401 program, states retained the core authority to determine that a particular project proposal cannot proceed in accordance with state water quality standards, although FERC has determined that the project can satisfy Natural Gas Act standards under Section 3 and Section 7.

[5] 33 U.S.C. § 1341(a)(1).

denied by the State . . . "[6] This authority is squarely reserved by the states when charged with considering FERC project applicants' requests for 401 Water Quality Certificates. Any amendments to the Natural Gas Act, such as the ones proposed for altering 717n, would create overt clashes with the existing federal statutes and comprehensive plans designed to protect the nation's water and air quality. The proposed bill's attempt to allow FERC to define the scope of environmental review *for* the states or agencies acting pursuant to Clean Water Act authority would clearly run afoul of the Clean Water Act's goals and language.

A key legislative purpose of the Clean Water Act was to uphold "the primary responsibility for controlling water pollution [that] rests with the States."[7] From its inception, the 401 certification requirement was a mechanism to explicitly protect states' ability to regulate water quality standards and pollution control, ensuring states' abilities to enforce more stringent standards than federal ones. Senator Muskie, who introduced the 1970 bill that created water quality certification, stated "no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution."[8] He later expounded further on the aim of section 401, contemplating how the certificate program would prevent projects proposed for federal authorization such as Section 7 or Section 3 projects from circumventing the state's certification:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit

[6] Id.
[7] 115 Cong. Rec. 28,970 (1969) (statement of Sen. Cooper); see also 33 U.S.C. §1251(b).
[8] H.R. Rep. No. 91-127 (1969).

> without providing assurance that the facility will comply with water quality standards.[9]

Congress enacted the certification requirement as a mechanism to ensure that proposed projects would not move forward without first complying with state water pollution control standards. Congress recognized that occasional project delays could result from state certification requirements and decided that certification nonetheless was required before a federal permit could be issued, because it represented a critical safeguard. Congress purposely enacted the certification program to prevent "investments"[10] in projects until the state assured that such projects would abide by water quality standards, regardless of the attendant delays.[11] In fact, this has not borne out in practice. The complex interplay between these statutes has struck the appropriate balance between the respective federal and state agencies responsible for reviewing them under the various applicable statutes, and fulfilled Congressional intent to prevent the pursuit of any project activity unless the states certified that the project could proceed without harming water quality, as determined by the state 401 programs, which are confirmed by the USEPA.[12,13]

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[9] 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie).

[10] With the Clean Water Act section 401 process, Congress intended to prevent precisely the types of premature project investments that PennEast seeks to make in pre-construction activities prior to collecting all the relevant data regarding project impacts.

[11] Delays in FERC's certification processes typically do not stem from states' tardiness in issuing a section 401 certificate. Rather, applicants that postpone their section 401 applications and submit incomplete data to FERC in their CPCN applications create their own bottlenecks in the certification process. Furthermore, expediency is insufficient rationale for circumventing a carefully crafted statutory scheme. Applicants should anticipate and account for any delays that do result from the section 401 process. Despite the increase in applications, there is no indication that FERC's decision-making process has become overly burdened or delayed; recent congressional debates on this issue revealed that 92% of natural gas pipeline applications are decided within twelve months. Pete Kasperowicz, House Votes 252-165 to Speed up Natural Gas Pipeline Approvals, HILL (Nov. 21, 2013), 4 http://thehill.com/policy/energy-environment/191065-house-votes-to-speed-up-natural-gaspipeline-approvals.

[12] This right is independent of whether the particular state also has a federally delegated permitting program for Section 404 approvals, or for NPDES permits.

Congress explicitly provided that a federally licensed project could not proceed absent state certification under the Clean Water Act,[14] as evidenced by the plain language of the Clean Water Act statute and the foregoing legislative history. Congress enacted the Clean Water Act to establish a comprehensive statutory scheme in which states have final authority to set their own water quality standards and to impose conditions on federal licensing of projects or reject applications that do not meet water quality standards.[15] The Clean Water Act section 401 confers on the state the threshold determination of a project's viability for complying with water quality standards.[16] Those standards may regulate water quality more stringently than the baselines set out by EPA under the Clean Water Act. See 33 U.S.C. § 1370. A state's water quality standards are deemed to be the federal standards.[17]

The same is true for the state's role in the cooperative federalism established under the Coastal Zone Management Act.[18] States' exercise of this section 401 authority has been both expeditious and judicious, and overwhelmingly resulted in project approvals. Of the

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[13] City of Tacoma, 460 F.3d at 67 (explaining that the state's ability to block the project is the mechanism through which the state fulfills its primary responsibilities under the Clean Water Act); see also Keating, 927 F.2d at 622 (same); Gunpowder, 807 F.3d at 279 (same).

[14] The Keating court also stated that "an applicant for such a license must first obtain state approval of the proposed project" and "section 401 certification is a predicate to the issuance of any section 404 permit." Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991) (making the point that 401 governs 404 permits because the 404 permit is a federal license).

[15] Notably, the state's authority to establish such conditions is not restricted to those "specifically tied to a 'discharge'" under section 401, but rather applies to any activities which the state deems are necessary to ensure compliance with the Clean Water Act. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 701 (1994) (finding that Washington state's minimum stream flow requirements were within the state's statutory authority and were entitled to deference).

[16] 33 U.S.C. § 1341(a)(1) (2012).

[17] See 33 U.S.C. § 1313(c)(3).

[18] See Islander East Pipeline Co., LLC v. McCarthy, 525 F.3d 141 (2d Cir. 2008) ("Clean Water and Coastal Zone Management Acts are notable in effecting a federal-state partnership to ensure water quality and coastal management around the country, so that state standards approved by the federal government become the federal standard for that state.").

hundreds of energy infrastructure projects authorized by FERC, there have only been three -- a tiny percentage -- that states have determined cannot be constructed in accordance with applicable water quality standards. Industry cries of states "abusing" their reserved and primary powers to protect their water quality, therefore, must stem from their mistaken belief that any certification denial constitutes an abuse of authority.

Attempting to impose restricted schedules on state's review of Section 7 and Section 3 certificates in practice may prevent the state from fully protecting against any impacts from and undue investment in projects that may fail to comply with the CWA and other state water quality standards.[19] Congress need not disturb its determination that that ability is rooted in the prevention of "major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards."[20] The language of section 401 says any activity "which *may* result in discharge" -- as opposed to "usually" or "foreseeably" -- requires a state certificate.[21]

The impact of the proposed amendments to 717n on state authority under Section 401 of the Clean Water Act is particularly vague and ill-defined. As set out above, Section 401 requires that states certify that federally permitted activity is consistent with state water quality standards. The Clean Water Act is a model of cooperative federalism. Historically, water quality regulation was left to the states.[22] As water quality regulation

[19] FERC's consideration of authorizations on a case by case basis, subject to no federal energy program or regional planning, is a prime example of an authorization system that must be continue to be reviewed for ancillary Federal authorizations by agencies operating subject to comprehensive plans, charged with protecting our waters and air for future generations.
[20] 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie).
[21] 33 U.S.C. § 1341(a) (emphasis added).
[22] See Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (declaring a policy to "recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution"); Federal Water Pollution Control Amendments of 1956, ch. 518, 70 Stat. 498 (declaring that "[n]othing . . . shall

was gradually federalized, states retained authority to determine water quality standards applicable to their own waterways,[23] and in 1970, Congress created the water quality certification mechanism to assure that federally permitted activities would not violate state-set water quality standards.[24] In 1972, the Clean Water Act incorporated both these mechanisms into the new cooperative federalism framework: giving states authority to set water quality standards subject to minimum standards, and giving states the role of determining whether federally permitted activity would comply with those standards.[25]

Clean Air Act: The Importance of the State's Role in the Cooperative Federalism.

The same principles apply to states' certifications under the Clean Air Act.[26] Courts have made clear that states retain the right to deny an air quality permit pursuant to its State Implementation Plan (SIP).[27] Under the Clean Air Act, states retain the right to adopt their own plans for the "implementation, maintenance, and enforcement" of air quality standards issued by EPA.[28] States have significant authority and responsibility to develop SIPs, and may impose air quality or emission standards more stringent than EPA promulgated standards.[29] For projects proposed under Section 3 and Section 7 of the Natural Gas Act, emissions associated with LNG terminals and compressor stations often

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be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.").

[23] See Water Quality Act of 1965, Pub. L. No. 89-234, sec. 5, § 10.

[24] Water Quality Improvement Act of 1970, Pub. L. No. 91-224, sec. 102, § 21(b)(1).

[25] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 303, 401.

[26] See Chevron, 467 U.S. 837, 842–43 (1984).

[27] Myersville, 783 F.3d at 1320.

[28] Michigan v. EPA, 213 F.3d 663, 669 (D.C. Cir. 2000); see also 42 U.S.C. §7410.

[29] This is analogous to the states' rights and substantial freedom under the Clean Water Act to develop state water quality standards more stringent than federal ones, discussed above.

trigger state review for Clean Air Act compliance and permitting. The Clean Air Act provides its own complex system of cooperative federalism that precludes FERC from sidestepping or controlling the requisite environmental review process arising thereunder. As is true with FERC's limited water quality impacts analysis during its NEPA review, wherein FERC inevitably concludes there will be no significant adverse water quality impacts by anticipatorily relying on the relevant state's more detailed and substantive water quality certificate review, FERC's air quality impacts analysis routinely assumes an applicant independently will satisfy the relevant state's Clean Air Act permitting processes, when concluding that the Section 3 or Section 7 project will not have significant adverse air quality impacts.[30]

Proposed Changes to 15 U.S.C. § 717n(b)(2)(B), (C)

The proposed changes to 15 U.S.C. § 717n(b)(2)(B) and (C) sow seeds of confusion, as they lack definition and use similar nomenclature to refer to legally distinct concepts. It is entirely unclear from the language what the newly proposed "Identification" and "Invitation" processes encompass. Is it intended to allow FERC to identify and invite agencies to its own internal review process?

Or is it, as it appears to be written, to be inviting agencies to participate in their own review processes? Without clarification, it is difficult to comment substantively. To the extent that it suggests that FERC has the power to identify who the agency administering the ancillary Federal authorizations must consult with when conducting those independent

[30] Importantly, states are charged with implementing comprehensive air quality programs tailored to their geographical regions, while, as set out above, FERC solely evaluates one project application at a time, subject to no integrated regional plan.

reviews, it ignores the fact that FERC has neither the substantive expertise nor the authority under those environmental statutes to do so. Nor should it direct a deadline for responding to FERC once receiving this invitation to "cooperate or participate in the review process for the applicable Federal authorization." It would appear this newly proposed language contemplates a statutory scheme in which FERC is inviting federal and state permitting agencies to participate in the review process that they are responsible for conducting themselves.

Moreover, wholly inconsistent with Congress' approach to delegating authority to other agencies, it also appears to put FERC in charge of identifying which agencies need to participate in those independent review processes, in violation of both its sister federal agencies' autonomous implementation of their authorizing statutory schemes, as well as those agencies' primary rights to determine with whom they need to consult once they have received an application for a permit or authorization. Additionally, nothing in this section indicates what happens if the "invited" body does not respond to FERC, nor does it even contemplate that such "invited" body has any administratively complete application in front of it, to trigger its native review authority.

Proposed Changes to 15 U.S.C. § 717n(c)[31]

[31] 15 U.S.C. § 717r(d)(2) states, "The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3)." Paragraph (3) instructs that upon finding this statutorily defined inconsistency, "the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand." 15 U.S.C. § 717r(d)(3).

The existing statutory language of 717n(c)(1) currently presents problems in FERC's review process for Section 3 and Section 7 projects, because FERC routinely accepts applications that are missing basic information and analyses required under FERC's own environmental review regulations, at 18 C.F.R. pt. 380. FERC currently condones and excuses applicants' submissions of seriously deficient applications for Section 3 and Section 7 approvals. It repeatedly issues requests for data it identifies as critical, but then proceeds with its NEPA process for these empty applications, rather than rejecting them. The proposed (c)(1) compounds this problem, by providing the Commission authority to set a schedule for all Federal authorizations, without providing a required temporal trigger -- such as a completed application that contains the data FERC's regulation state are required for a complete submission, but which now allows to be submitted on a rolling basis -- for that schedule-setting endeavor. FERC's regulations implementing this statutory authorization, found at 18 C.F.R. § 157.22, currently use FERC's publication of an FEIS for the Section 3 or Section 7 project as its temporal trigger. The current regulation requires that "a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law."

This default timeline cannot prevent state agencies acting pursuant to or under delegated federal law from refusing to consider deficient applications for requisite Federal authorizations, such as state 401 Water Quality Certifications. The Natural Gas Act ("NGA") can only give FERC authority to coordinate the processing of "Federal authorizations," because the substantive review and decision making for those Federal authorizations are

controlled by other statutes, such as the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. Accordingly, the existing 717n provisions and any regulations implementing them can only establish a schedule if it does not conflict with one "otherwise established by Federal law."[32] When promulgating this default 90-day schedule via regulations, FERC reconciled the potential conflict with other critical environmental statutes by making clear that the ninety-day timeline does not apply where an authorization request (i.e., permit application) is incomplete:

> In the event of a disagreement regarding the adequacy of the contents of a request for a Federal authorization, the Commission may find reason to revise an agency's deadline for a final decision. However, although the Commission implores project sponsors and agencies to work cooperatively, it cannot compel them to do so. An agency retains the discretion to reject a request on the grounds that information necessary to reach a decision is lacking.[33]

Thus FERC's regulations propose a schedule but acknowledge that they cannot override environmental agencies' determinations of when those applications are lawful or sufficient.

The first proposed change sweeps the 90-day regulatory schedule into the statute, without explicitly incorporating a caveat providing that the schedule shall not come into effect if such timeline will interfere with the responsibilities of those federal agencies (or state agencies acting pursuant to federal law, or delegated federal authority) to comply with their own regulatory and statutory duties. This will impede other federal agencies from effectively carrying out their mandates under Federal environmental laws, and fails to explicitly recognize the primary importance of the states' review under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. Any amendments to the Natural Gas Act must not grant FERC authority that exceeds both its institutional expertise

[32] 18 C.F.R. § 157.22.
[33] 71 Fed. Reg. 62,912, 62,916 n.26 (Oct. 27, 2006) (emphasis added).

and its jurisdictional reach. Importantly, this newly proposed 717n(c)(2) fails to recognize that for many pipeline projects, the applicant may not submit its request for these ancillary Federal authorizations until after the FEIS is issued, and may well not be in a position to do so. A 90-day review deadline, as proposed, would interfere with the equal power of the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act to determine whether a Section 3 or Section 7 project may proceed without jeopardizing valid state requirements/standards.

The next proposed change to 717n(c) is the inclusion of a newly minted paragraph 3, entitled "Concurrent Reviews." This section again fails to explicitly recognize that Federal and state agencies responsible for Federal authorizations cannot review applications that are administratively incomplete, and any such review schedule must (1) require the applicant to submit complete applications to those agencies concurrently with their application for Section 3 or Section 7 authorizations, and (2) explicitly provide that ancillary agencies' determinations of application completeness begin any statutorily recommended review period -- or risk infringing those agencies' obligations under other applicable laws.

The proposed alterations do not appear to explicitly impose any burdens on the applicants to marshal the requisite environmental data essential for allowing Federal authorizations to commence. Moreover, FERC's review under NEPA arises under the backdrop of the Natural Gas Act, while the other Federal authorizations arise against the backdrop of environmental statutes with highly specific environmental data requirements, and entirely different statutory or regulatory schemes. As such, while it would be

expeditious for all necessary authorization processes to run simultaneously, the current landscape for such proposals routinely involves applications for projects that lack sufficient data for what FERC requires under its own regulations, much less what environmental agencies require under their authorizing statutes.

15 U.S.C. § 717n(c) paragraph 4, subsections (B) and (C), generate conflict and confusion, and appear to be crafted for the purpose of intruding upon other agencies' rights under separate statutes. These are rights that FERC has understood and respected.[34] 717n(c)(4)(B) authorizes FERC to forward any issue of concern identified by a Federal or state agency "to the heads of the relevant agencies (including, in the case of a failure by the State agency, the Federal agency overseeing the delegated authority) for resolution. The term "failure by the State agency" is left entirely undefined. What constitutes a "failure" by the State agency appears to be left to FERC's discretion. Rather than speculate about what a "failure by the State agency" connotes, a review of the other jeopardy posed by this provision follows.

As set out herein, under the carefully crafted cooperative federalism set in place by the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act, the states retain substantial freedom and authority under those laws as the primary guardians of state water and air quality, under comprehensive and well planned programs. This provision attempts to grant FERC what can only be described as a quasi-parental controlling authority to police the states' exercise of their primary responsibility to safeguard their water and air, and to "punish" them for undefined "failures" by reallocating

[34] "The Commission does not interfere with another agency's oversight of its own regulations." Order Issuing Certificate and Approving Abandonment, 149 FERC 61,258 at 28. (Dec. 18 2014).

their statutory authority to the "Federal agency overseeing the delegated authority." The Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act all have provisions specifying and delineating the state's (or U.S. Army Corps of Engineers) and EPA's respective roles.[35] The states have primary responsibility for determining whether applications for 401 Water Quality Certifications or Clean Air Act permits.[36] Importantly, as set out above, the states are entitled to implement more stringent environmental standards for these reviews than the federal standards established by the U.S.EPA; the federal standards provide the minimum standards to which the states must adhere.

Under the newly proposed 717n(c)(4)(B), this balance of power and carefully constructed cooperative federalism would become skewed towards the federal agency, according the federal agency ultimate authority to interpret and apply the states' own laws. Often states' Section 401 Water Quality Certification analyses involve coordination and application of myriad complex state laws. Requiring U.S.EPA to resolve issues of concern that may arise squarely under state law would abrogate those states' powers and generate countless litigation regarding the interplay between the Federal Environmental statutes and the Natural Gas Act.

Finally, the new 717n(c)(4)(C), titled, "Deference to Commission," proposes that FERC define the "appropriate" scope of environmental review for Federal authorizations.

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[35] See, e.g., 33 U.S.C. § 1313 (2012) (under the CWA, providing for state development and EPA review of water quality standards); 42 U.S.C. § 7409-10 (under the CAA, providing for EPA development of air quality standards, and for state development, enforcement, and revision of plans to achieve those standards); 16 U.S.C. § 1456 (under the CZMA, providing for consistency of federal activities with state coastal management plans).

[36] New Jersey additionally has primary responsibility for determining whether specific projects qualify for wetlands permits under its own statutory and regulatory standards for most state wetlands, under delegated Section 404 Clean Water Act authority. Michigan has this delegated Section 404 authority as well. New Jersey's implementation of its freshwater wetlands permitting program employs more stringent standards than the federal Clean Water Act's.

This cannot stand under existing federal environmental laws. The Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act do not accord FERC any role in their statutory or regulatory schemes. FERC has neither the statutory authority nor the substantive expertise to play any role in the implementation of these statutes. Thus, this provision, which attempts to accord deference to FERC's determination of what environmental agencies should consider in assessing applications for Federal authorizations, stands in conflict with both those statutory authorizations and with well-established judicial precedent. This provision's only possible purpose -- and the only possible purpose of so many of the Act's proposed changes -- is to abrogate states' rights and powers, and bestow those stolen powers upon FERC.

The language proposed for 15 U.S.C. 717n(c)(5) suffers from the same legal conflicts. It appears to mandate that any Federal or state agency that "does not complete a proceeding for an approval that is required for a Federal authorization in accordance" with FERC's established schedule shall become vulnerable to litigation brought by the applicant, as well as have its carefully reserved rights abrogated by the Federal agency responsible for administering the corresponding federal environmental statute. But it goes beyond this as well, and attempts to curtail states' provision of adjudicatory hearings on those federal authorizations. For example, in the case of a state agency exercising its rights to conduct a thorough Section 401 Water Quality Certification review, this proposed statutory amendment, through the use of totally undefined and new language referring to the state's failure to complete a "*proceeding* for an approval" (emphasis added), dictates that the U.S. EPA should then determine the timeline for that state's review proceedings.

Proposed 15 U.S.C. § 717n(d)

The proposed language contained in § 717n(d) directs a federal or state agency considering an ancillary environmental Federal authorization to consider remote or aerial survey data submitted by the project proponent, and purports to create a new type of permit under those environmental laws -- a conditional approval issued without on-site data -- providing a "subsequent onsite inspection" to verify the remote data. There are two major problems with this new provision. First, aerial data are notoriously insufficient to provide baseline conditions or to assess project impacts to endangered species, on-site water quality, and critical wetlands habitat delineation. For example, aerial data provides no useful information for over 99% of the endangered species in New Jersey.[37] The bill, therefore, allows for conditional approval based upon a survey technique that is unable to catalog much of the data required by the complex environmental statutes and regulations those environmental agencies considering authorizations are charged with implementing.

Second, echoing concerns set out above with respect to the other proposed amendments, this provision oversteps FERC's substantive expertise and interferes with the agencies possessing environmental expertise's determination of what kinds of data applications for Federal authorizations must contain -- determinations that are part of complex state and federal statutory and regulatory schemes, and their implementing protocols. Moreover, requiring state and Federal agencies to consider project proponents'

[37] See Testimony of Edward Lloyd on behalf of the New Jersey Conservation Foundation and the Stony Brook-Millstone Watershed Association, February 2, 2016 at Table 1, p. 12. The prior testimony also demonstrated that even extensive ground investigation is difficult to undertake and requires many person-hours. Id at p. 11-13. Moreover, aerial surveys are inadequate methods to identify wetlands along proposed pipelines. Id at 1, 15.

submissions of aerial surveys is a useless exercise and a waste of agency resources.[38] Since aerial surveys generate little, if any, legitimate scientific evidence upon which an agency may make an ultimate decision, there is no sound reason to create an alternative permitting regime in which an agency may simply guess as to the actual environmental impacts, and perform its analysis anew once onsite surveys and sampling occurs. Federal and state agencies should not be required to consider sub-par data and to make two separate determinations, one based on guesswork, and a subsequent one, based on actual verified on-site data. Doing so fails to promote interagency coordination -- it inappropriately places a non-environmental agency, FERC, that makes individual authorizations subject to no comprehensive energy policy or program, in the position of directing Federal authorizations under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.

Proposed 15 U.S.C. § 717n(e)

The newly proposed 717n(e), denoted "Application Processing," attempts to provide a statutory underpinning for outsourcing Federal and state environmental review to hired consultants paid by private industry applicants. This provision attempts to (1) put private corporations in the position of regulators, authorizing them to review applications for compliance with Federal and state environmental laws; and (2) allow the project proponent to fully fund this service. This provision pushes beyond the existing conflicts of

[38]In addition to its scientific inadequacies, aerial surveying also raises significant privacy and property rights concerns for homeowners along proposed pipeline routes. Id at 16-17. Aerial surveys—whether conducted with airplanes, helicopters, or drones—impose serious burdens on farming communities along proposed pipeline routes. Id.

interest that arise when FERC employs the same consultant to perform its "independent" NEPA review as the applicant pays to prepare its application to FERC for Section 3 and Section 7 approvals. And it goes beyond allowing third parties to collect data for such ancillary authorizations. The laws under which the Federal authorizations arise must be implemented by the impartial agencies that Congress designated as the guardians of our nation's water and air quality, and they alone must review the applications to determine consistency with applicable laws.

Proposed 15 U.S.C. § 717n(f)

The new provision for "Accountability, Transparency, Efficiency," encapsulated in the new 717n(f), appears to make information available to the public in a coherent and consolidated fashion. As such, it would be an improvement over the current chronological and mixed submission style docketing that FERC currently employs.

Proposed "Promoting Cross-Border Energy Infrastructure Act"

This proposed bill purports to "establish a more uniform, transparent, and modern process to authorize" international border crossing energy infrastructure projects. These projects often bear enormous environmental price tags, and, as such, the State Department has conducted increasingly robust NEPA reviews prior to issuing cross-border authorizations, with a national interest determination process informed by that NEPA review. For example, recent reviews have provided a much more thorough evaluation of climate impacts associated with new fossil fuel infrastructure projects, including the

carbon emissions coming from the addition production they would enable. The existing NEPA review process provides the State Department an opportunity to evaluate the need for the proposed project in a global economy increasingly in transition. Accordingly, it allows for a broad policy and planning determination regarding which new fossil fuel infrastructure projects are not feasible or economic against this global backdrop. Further, this proposal removes the ability of the Department of Defense, Homeland Security as well as the Department of State to provide valuable insights of national security which may influence the decision whether it issue a Presidential Permit or not. This paradigm has been in place since Executive Order 11423, which established a longstanding process that has been used by both Republican and Democratic administrations for decades to ensure that pipelines flowing into the U.S. are in the national interest, and was confirmed by Executive Order 13337.

The bill attempts to shift responsibility for proving that such cross-border energy projects are in the public interest from the project proponent onto the authorizing agency, where it instead becomes that agency's responsibility to prove that the project would not be in the public interest. The bill also removes the State Department's primary review responsibility, which it maintained under the Executive Branch's constitutional power to engage in foreign relations,[39] and purports to put FERC in charge of the NEPA process for the cross-border facilities involving oil infrastructure.[40]

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[39] This power has been exercised since Executive Order 10485 of Sept. 3, 1953 was signed by President Dwight D. Eisenhower. As the United States Supreme Court noted, it is a power exercised through "inherent constitutional authority to manage foreign affairs." Sisseton-Wahpeton Oyate v. U.S. Dept of State, 659 F. Supp. 2d. 1071 (D.S.D. 2009) (citing U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319-320 (1936))

[40] FERC has neither the authority nor the expertise to consider the breadth of global environmental issues and economics encompassed within the current State Department reviews.

Moreover, it appears to limit FERC's NEPA review of the impacts of such projects to just the cross-border facility itself, without requiring evaluation of the attendant suite of environmental impacts emanating from the oil pipelines to which these facilities attach. The essential creates a statutory carve-out to NEPA, by codifying segmentation of FERC's review of the bulk of these projects' environmental impacts. The bill thus effectively exempts cross-border projects from meaningful environmental review under NEPA by dramatically narrowing the focus of that review, because both the permit requirement and the NEPA review apply only to the cross-border segment of the project. Trans-boundary pipelines and transmission lines are multi-billion dollar infrastructure investments that stretch hundreds of miles, last for decades, and pose environmental risks well beyond the narrow border crossing segment. But the proposed bill precludes review of the full project's impacts, such as oil spills and the consequences for landowners, public safety, drinking water, climate change, and wildlife.

The proposed language also seeks to exempt "modifications" from needing any additional approvals. Yet the term modification is broadly defined to include new compressor stations, new diameter pipelines, additional pipelines for both oil and gas facilities, as well as changes to the flow direction and volume. These modifications can have significant environmental and economic impacts beyond those from the original construction. For example, reversing an oil pipeline from exporting into Canada to exporting tar sands oil into the United States could have significant air emission impacts. In doing so, it attempts to shield serious environmental impacts from federal review, leaving scant few projects that could not be cast as "modifications."

Thus it replaces the current requirement that proposed oil and natural gas pipelines and electric transmission lines that cross the U.S. border with Mexico or Canada obtain a presidential permit, after a robust environmental review and determination that the project is in the national interest, with a process that: (1) eliminates the national interest requirement, and shifts the burden of proof to the reviewing agency to prove that a narrow portion of the project would not be in the public interest, making it difficult to disapprove a project; (2) significantly narrows and limits environmental review to a small portion of the project; and (3) exempts many types of projects from any permit requirement.

Finally, as these projects currently require a Presidential Permit, the bill's new allocation of powers would usurp the Constitutional authority granted to the Executive Branch, Office of the President, by removing the requirement for a Presidential Permit ignoring the separation of powers set out in the United States Constitution, Article II, which vests the authority to engage in foreign relations in the Executive Branch.

Conclusion

In conclusion, I thank the Committee for giving me the opportunity to submit this testimony and to appear before it. I also thank Susan Kraham, Esq. and Edward Lloyd, Esq. of the Columbia Environmental Law Clinic, Channing Jones, a legal intern at the Columbia Environmental Law Clinic, Anthony Swift, of Natural Resources Defense Council, Michael Pisauro, Esq. of the Stony Brook-Millstone Watershed Association, and Tom Gilbert of the New Jersey Conservation Foundation, for their contributions to the preparation of this testimony. I nonetheless take full responsibility for the contents of this testimony.