

# FERC Now To Consider Climate Change and Environmental Justice When Approving Natural Gas Facilities

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The Federal Energy Regulatory Commission (FERC) has changed the standards it applies when approving a natural gas project. Going forward, FERC's approval framework will consider downstream environmental effects from *the use* of transported natural gas—including putative impacts on climate change and environmental justice communities. There are, however, legal questions regarding FERC's expanded view of its authority.

On February 18, 2022, FERC issued an Updated Policy Statement on Certification of New Interstate Natural Gas Facilities ("Updated Policy Statement"), concurrently with an interim policy statement on the Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews ("Greenhouse Gas Interim Policy Statement"). Under the Updated Policy Statement, FERC will weigh the adverse impacts on four key interests in determining whether the proposed project is in the public interest. For this first time, the public convenience and need analysis will include consideration of potential climate change impacts and impacts on environmental justice communities. Adopted on a 3–2 party-line vote, the Updated Policy Statement has received criticism. The minority commissioners issued separate dissents concluding that FERC's Updated Policy Statement exceeds its statutory authority.

## **An Overview of the Updated Policy Statement**

Under section 7 of the Natural Gas Act (NGA), FERC is charged with determining whether a proposed interstate natural gas facility "is or will be required by the present or future public convenience and necessity."<sup>1</sup> FERC's historic approach was established in the 1999 Policy Statement<sup>2</sup> on the certification of new interstate natural gas facilities. After requesting comments on whether and, if so, how it should revise the 1999 Policy Statement in April 2018 and February 2021,<sup>3</sup> FERC issued the Updated Policy Statement. The Updated Policy Statement seeks to provide a more comprehensive analytical framework for how FERC decides whether a new interstate natural gas transportation project is required by the public convenience and necessity. The Updated Policy Statement clarifies that precedent agreements alone may not be sufficient to establish public convenience and necessity. Instead, applicants are encouraged to provide specific project detail to show why there is a need.

The Updated Policy Statement states FERC will evaluate *all relevant factors* bearing on the public interest—including a balance of environmental and economic interests. In balancing any adverse effects against the anticipated project benefits, FERC will now consider the potentially adverse impact of the proposed project on four major interests:

(1) the interests of the applicant's existing customers; (2) the interests of existing pipelines and their captive customers; (3) environmental interests; and (4) the interests of landowners and surrounding communities, including environmental justice communities. Where a project will lead to adverse impacts, a greater showing of public benefit is required to obtain a certificate.<sup>[4]</sup> The Updated Policy Statement expands on each of the four key interests to be considered:

- First, FERC will consider whether the proposed project increases rates or causes a degradation in service for existing customers. Cost impacts on existing customers will no longer be a threshold question as they were under the 1999 Policy Statement.<sup>5</sup> FERC will continue with its existing policy that an applicant cannot rely on subsidization by existing customers for financial support of the project. FERC explains that the goal is to prevent existing customers from paying for a project that does not serve them.
- Second, FERC emphasizes that it must consider harm to captive customers, whether or not FERC identifies evidence of unfair competition. FERC notes that one consideration here is preventing overbuilding (i.e., approval of projects designed to serve demand already being met).
- Third, FERC will consider environmental impacts, including potential downstream impacts from the *use* of transported gas on climate change, as well as an applicant's proposed mitigation of such impacts. FERC reasons that the National Environmental Policy Act (NEPA) and court precedents in past certificate proceedings, combined with executive orders issued by the Obama and Biden administrations, obligate it to weigh greenhouse gas impacts upstream and downstream from the actual project as part of its decision whether to issue a certificate of public convenience and necessity. This environmental assessment is now to occur concurrently with review of economic impacts. Under the 1999 Policy Statement, FERC later considered environmental impacts if a proposed project passed the economic test established by the 1999 Policy Statement. FERC states that it expects applicants to avoid or minimize adverse environmental impacts. FERC did not explain what certificate conditions it might consider to mitigate the impacts, short of certificate denial.
- In connection with the issuance of the Updated Policy Statement, FERC issued the Greenhouse Gas Interim Policy Statement.<sup>6</sup> This interim policy statement explains how FERC will assess the impacts of natural gas infrastructure projects on climate change in its reviews under the NEPA and in public-interest determinations under section 3 and section 7 of the NGA. While this is an interim statement and FERC is seeking comment on it, the Greenhouse Gas Interim Policy Statement will be implemented immediately, including for evaluation of pending applications.
- Last, FERC will look at the impacts of surrounding communities. Beyond the economic impacts associated with a permanent right of way on a landowner's property, which were the historic area of focus, FERC explains that this factor will be broader going forward. Specifically, FERC will now assess the impacts of a proposed project on environmental justice communities. As with environmental impacts, FERC will look to applicants to present tailored measures that eliminate or mitigate the adverse impact on environmental justice communities. This stress on environmental justice is the latest in federal agencies' emphasizing environmental justice considerations in the wake of President Biden's January 2021 executive orders on advancing racial equity and tackling climate change.<sup>7</sup>

FERC can deny an application based on any of these types of adverse impacts.<sup>8</sup>

## Reactions to the Updated Policy Statement

Some, including minority commissioners Danly and Christie, have criticized the Updated Policy Statement. The dissenters highlight that although FERC has a procedural NEPA obligation to consider the environmental consequences of its decisions, FERC has no substantive authority to regulate greenhouse gas emissions, whether directly by interstate pipelines or indirectly by upstream producers or downstream consumers.

Commissioner Danly stated in a dissent that the Updated Policy Statement "contravenes the purpose of the NGA which, as the Supreme Court has held, is to 'encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.'"<sup>[9]</sup> Danly argues that the Updated Policy Statement exceeds FERC's authority under the NGA to consider whether a project is or will be required by public convenience and necessity. As Danly notes, the term "public convenience and necessity" is not defined in the NGA. Danly opined this instruction must be read within the context of and take meaning from the narrower purpose of the NGA—the plentiful supply of natural gas at

reasonable prices. Danly also took issue with the majority's position that FERC should weigh end-use environmental impacts in its determination of public convenience and necessity.<sup>[10]</sup> Lastly, Danly questioned the procedural vehicle the Commission claimed to use. Danly noted that although the majority asserts the Updated Policy Statement is not a binding agency action, "it may have been more appropriate for [FERC] to have proceeded through rulemaking instead of through a policy statement."<sup>[11]</sup>

Commissioner Christie also dissented. In his dissent, Christie calls the Updated Policy Statement a "radical departure from decades of Commission practice and precedent implementing the NGA."<sup>[12]</sup> Commissioner Christie asserts that these changes implicate the "major questions doctrine." The major-questions doctrine is based on Supreme Court precedent reflecting that Congress will be presumed to reserve for itself matters of vast economic and political significance unless Congress has clearly granted such authority to an agency in a statute. Christie insists Congress has not done so here. On February 28, 2022, the Supreme Court heard argument about the major-questions doctrine in *West Virginia v. Environmental Protection Agency*. The Supreme Court is considering whether the Environmental Protection Agency had authority under the Clean Air Act to establish an interstate cap-and-trade scheme for greenhouse gas emissions from electric generating units.

## Key Takeaways

- Under FERC's Updated Policy Statement, environmental impacts, including climate change impacts and impacts on environmental justice communities, will be weighed concurrently with economic impacts in determining whether a project will be approved for public necessity and convenience.
- FERC will begin applying the Updated Policy Statement, along with the GHG Interim Policy Statement, immediately. Applicants with pending applications will be given the opportunity to supplement their filings accordingly.
- Legal questions remain about whether the Updated Policy Statement goes beyond FERC's statutory authority.

For further information or questions about the Updated Policy Statement and its impact on your business, please contact Jonathan D. Brightbill (partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Ray Wuslich (of counsel, Energy), Madalyn Brown (associate, Environmental), or your Winston relationship attorney.

*Please note that government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.*

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<sup>[1]</sup> 15 U.S.C. § 717f(e).

<sup>[2]</sup> 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) (1999 Policy Statement).

<sup>[3]</sup> Certification of New Interstate Natural Gas Facilities, 83 FR 18020 (Apr. 25, 2018), 163 FERC ¶ 61,042 (2018); Certification of New Interstate Natural Gas Facilities, 86 FR 11268 (Feb. 24, 2021), 174 FERC ¶ 61,125 (2021).

<sup>[4]</sup> Updated Policy Statement, 178 FERC ¶ 61,107, at 65.

<sup>[5]</sup> 1999 Policy Statement, 88 FERC at 61,746–47, clarified, 90 FERC at 61,391–96.

<sup>[6]</sup> Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022).

<sup>[7]</sup> E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009, 7010–11; E.O. 14008, Tackling the Climate Crisis at Home and Abroad, 86 FR 7619, 7629; *see also* The White House, Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (2021).

<sup>[8]</sup> Updated Policy Statement, 178 FERC ¶ 61,107, at 51.

<sup>[9]</sup> Danly Dissent at 2 (citations omitted).

<sup>109</sup> *Id.* at 16.

<sup>111</sup> *Id.* at 23.

<sup>112</sup> Christie Dissent at 2.

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## Authors

[Jonathan D. Brightbill](#)

[Madalyn Brown Feiger](#)

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[Jonathan D. Brightbill](#)



Madalyn Brown Feiger

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