

*Report of May 9 meeting of community and environmental groups with
John Wellinghoff, FERC Chair*

Representing the document at the meeting were:

Ted Glick, National Campaign Coordinator, Chesapeake Climate Action Network
Thomas Salamone, Stop the Minisink Compressor
Maya K. van Rossum, the Delaware Riverkeeper, Delaware Riverkeeper Network
Craig Segall, Staff Attorney, Sierra Club
Arsha Canalos, We The People Matter
Aaron Stemplewicz, Staff Attorney, Delaware Riverkeeper Network.

Present from FERC were:

1st mtg:

Chairman John Wellinghoff
Len Tao, Office of External Affairs (I think)
Sara McKinley, Office of External Affairs
Niles Nichols, Legal Department

2nd mtg with staff:

John Katz, General Counsel's office
Ann Miles, Office of Energy Projects
Lauren O'Donnell, Office of Energy Projects

Organizations Represented in this Effort:

Berks Gas Truth, Pa.
Catskill Citizens for Safe Energy, NY
Center for Sustainable Rural Communities, Richmondville, NY
Chesapeake Climate Action Network
Citizens Energy and Economics Council, Meredith, NY
Citizens for Clean Water, Susquehanna County, Pa.
Citizen Shale, Md.
Coalition Against the Rockaway Pipeline, NY
Delaware Riverkeeper Network
Food and Water Watch
Meyersville Citizens for a Rural Community, Md.
NJ Sierra Club
NJ Highlands Coalition
North Jersey Pipeline Walkers
The Responsible Drilling Alliance, Williamsport, Pa.
Sane Energy Project
Shale Justice Coalition, Bloomsburg, Pa.
Stop the [Constitution] Pipeline, East Meredith, NY
We the People Matter/Stop the Minisink Compressor
350NJ

On May 9, 2013, in a meeting with Chairman Wellinghoff of the Federal Energy Regulatory Commission the following policy and programmatic changes/efforts were requested.

FERC Should Prepare a Programmatic Environmental Impact Statement That Comprehensively Analyzes All Liquid Natural Gas Export Proposals

Numerous liquid natural gas (“LNG”) export applications are pending before the U.S. Department of Energy, Office of Fossil Energy (“DOE/FE”), and FERC. Under the National Environmental Policy Act (“NEPA”), FERC is required to analyze the impacts of each application together with those of other past, present, and reasonably foreseeable future projects, even when the projects are geographically distinct and operated by different entities. Because each approval granted for LNG export will alter the price and production effects of exports generally, and the cumulative effects of the proposed projects are significant, FERC should not examine each application in isolation but rather should prepare a programmatic environmental impact statement (“EIS”) to provide a comprehensive analysis of all cumulative impacts.

The Council on Environmental Quality (“CEQ”) NEPA regulations define programmatic agency action as “systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.” 40 C.F.R. § 1508.18(b)(3). These regulations recommend the use of programmatic EIS to “eliminate repetitive discussions of the same issues.” 40 C.F.R. § 1500.4(i). After completing a programmatic EIS, an agency may then “tier” to that EIS in conducting NEPA analyses for subsequent site-specific reviews, enabling the agency to avoid redundancy and focus attention on the issues germane to that site. 40 C.F.R. § 1502.20.

Two federal agencies have already acknowledged the cumulative effects of multiple LNG export applications. In recognition of those effects, DOE/FE has commissioned two macroeconomic studies of LNG exports – one by the Energy Information Administration and one by NERA Economic Consulting – which examine a range of potential export volumes, although none at the scale contemplated by the current applications. With respect to cumulative environmental effects, EPA has repeatedly requested that FERC consider pending export proposals together.

FERC can best analyze those proposals’ cumulative impacts by preparing a programmatic EIS. A programmatic EIS is appropriate because, in acting on the many pending LNG export terminal applications under the Natural Gas Act, 15 U.S.C. § 717b(e), FERC is implementing its specific and exclusive statutory authority to approve or deny such applications. Moreover, FERC and DOE/FE are making what is functionally a programmatic decision radically to alter the U.S. natural gas market by allowing large-scale LNG export.

A programmatic EIS would advance governmental and public understanding of the relationships between the various proposed export projects and their cumulative environmental and economic impacts, thus improving the agencies' ability to make informed decisions on pending and future applications. Only a programmatic EIS will be adequate to inform this programmatic decision; piecemeal, application-by-application analysis will obscure the full impact of the inextricably linked export projects. This analysis must include the effects of the pipelines serving LNG facilities, and associated drilling and downstream infrastructure, on the development of renewable energy sources and energy efficiency strategies, as well as a comprehensive discussion of the greenhouse gas and climate change implications of this massive energy extraction and infrastructure buildout effort.

FERC Should Prepare a Programmatic Area-Wide EIS That Comprehensively Analyzes All Infrastructure Overlying in the Marcellus and Utica Shale Formations or Serving Gas Development in those Regions

Massive FERC-jurisdictional infrastructure expansion is proceeding in the regions overlying and adjacent to the Marcellus and Utica Shale formations to transport, store, and utilize gas extracted from these formations. Applications pending for new construction in New York, New Jersey, Pennsylvania, Ohio, West Virginia, Maryland and Virginia include both greenfield construction of and upgrades to major transmission lines and compressor stations, natural gas storage facilities, and all of the equipment associated with them. FERC not only has been conducting piecemeal environmental reviews of the separate applications but also has been allowing project sponsors to divide large development plans into individually insignificant segments for cursory analysis in a series of cookie-cutter environmental assessments.

FERC's piecemeal approval process cannot adequately account for the cumulative effects of this infrastructure expansion and its associated gas development. Many of the most serious environmental impacts of the infrastructure cannot be evaluated appropriately without examining impacts across the landscape. For example, impacts on water quality and aquatic ecosystems must be examined holistically across large watersheds. Air pollution affects both human health and vegetation across a wide region. Habitat fragmentation caused by clear-cutting through interior forest cannot be understood by focusing narrowly on a single pipeline right-of-way.

Before an entire region is degraded by unplanned and uncoordinated over-building of gas infrastructure, FERC should prepare a programmatic EIS. As with the programmatic EIS for LNG exports, a programmatic area-wide EIS must consider the implications of this massive build-out of infrastructure for the development of renewable energy sources and energy efficiency strategies as well as for greenhouse gases and climate change.

A programmatic EIS evaluating the cumulative impacts of infrastructure projects that will transport, store, or utilize natural gas extracted from the Marcellus and Utica Shale regions is the most appropriate vehicle for analyzing impacts of this scope occurring from projects that share common timing and geography. This analysis should include projects located elsewhere designed to utilize gas extracted from these shales, such as the Cove Point LNG export terminal proposed for Lusby, Maryland, as well as compressor stations and pipelines in Maryland and Virginia designed to service such terminals, or pipelines and related transmission infrastructure in New Jersey, New York, and beyond.

This analysis would enable FERC and other federal, state, and local agencies to understand the region-wide impacts of their decisions and avoid unnecessary harm to and depletion of critical habitat and natural resources. It would enable cooperating agencies on multiple levels to target development in areas of least impact and to ensure that adverse effects occur only where they are truly unavoidable. By avoiding haphazard development and by proceeding with the full disclosure and public participation required under NEPA, FERC also might build trust in the agency and the regulated community that is sorely lacking now.

Until such time as FERC completes the requested programmatic EISs, it should include in individual project NEPA documents a much more robust consideration of alternatives; thorough assessment of the environmental, community, and economic impacts resulting from the drilling that will be supported or induced by the project; and a much more thorough assessment of the environmental, community, and economic impacts resulting from the end use of the gas delivered by the project, including implications of its export from the country. FERC should also include a much more robust discussion of the safety implications and the risks of accidents, including the potential magnitude of such accidents. FERC must also take strong action to prevent segmentation of projects by natural gas transmission infrastructure companies, which have systematically pursued a strategy of dividing long-term and lengthy construction projects into segments that escape review in an EIS.

FERC Must Improve Outreach to the Public and More Comprehensively Involve Communities in the Decision-Making Process

A. FERC Should Support of the Creation of Two Key New Roles and Facilitate and Integrate These Roles Into the Current FERC Process

1. It is critical that FERC designate personnel and staff responsible for regional infrastructure oversight and the accompanying public relations role for that regional location. We understand that for logistical reasons, the five FERC Commissioners cannot meet with every affected community in the country. However, community representatives and public interest groups must have access to meeting

directly with FERC representatives local to their region when they require information and resources.

2. It is additionally imperative that FERC assist with the legislative initiation of a separate governmentally-acknowledged public advocacy bureau or department, distinct from FERC but working alongside it, to represent the interests of communities targeted for energy infrastructure build-out. Beginning in the pre-filing stage of each project, every community targeted for such infrastructure must have access to at least one ombudsman, or public advocate, per project, in a direct community position as a public representative. This advocate will additionally serve as a moderator between energy industry representatives and local communities, facilitating the dialogue, and thus the information presented, between potentially impacted communities and industry. This individual or individuals will be sworn to present the technical facts of a project with truth and clarity.

B. FERC Should Revise the Project Approval Process To Provide For More Comprehensive Public Involvement

1. An educational campaign of no less than 2 months should occur before a call for public comment is issued on a project. All residents and businesses (not just affected landowners) within a one-mile radius of the project should be notified by mail with details of the project, including: the name of the applicant, a timeline and summary of both the project and the FERC review process, and instructions on how to intervene and comment. These affected parties should receive notification by mail of any and all scoping meetings, public hearings, and comment deadlines. The advocate(s) should stage several public meetings and information sessions for the public to learn about a proposed project. The advocate(s) would also serve to moderate discussions between community members, elected officials, and energy industry representatives. As with any public official, the individual(s) would also be available to comment on proceedings to members of press.

2. A comment period should follow the educational campaign of each and every project. The current official comment period of 30 days is an inadequate allotment of time for members of a community to digest fully what is often voluminous and technically complex information and deduce from it a well-reasoned conclusion then articulate their concerns to this agency. The brief comment period is even more inadequate when this window of time falls on or includes a holiday, as it often does. Moreover, information relevant to a project takes far longer to saturate urban, densely populated areas. For this reason, we suggest designating “zones” according to population density and allowing comment periods of corresponding rates of no less than 2 months for small rural communities and up to six months for highly-populated urban communities not including observed holidays.

3. **At the conclusion of the comment period, the advocate(s) should prepare a report for Commissioners and FERC staff on the proceedings and the nature of the relationship between the companies and the communities affected.** This will be in addition to the comments provided by a more educated and informed public. **FERC should post all of these documents to each project's docket.**

C. **FERC Should Revise its Website to Make it Far More User-Friendly and Accessible to the Public**

This revision should include, at a minimum:

1. A glossary of industry terms for public reference;
2. A directory of regional FERC contacts, and links to resources available to communities;
3. Earlier notification of upcoming projects by the FERC Office of External Affairs via a dedicated web page, listing projects by region before they are given a pre-filing number; and
4. Interactive maps, by region, of existing and planned projects under FERC's oversight

FERC Must Not Allow Any Land Disturbance Activities to Proceed Before All Permits Required under Federal, State, and Local Law Have Been Approved

FERC should fully honor the requirement in its Certificates of Public Convenience and Necessity ("Certificate") that, prior to receiving FERC authorization to construct a project, a company must first have secured all authorizations or permits required pursuant to federal, state, or local law. FERC should (a) define construction as any land disturbance, tree cutting, installation of infrastructure associated with the project and (b) withhold approval to begin construction of any portion of a project (including tree cutting, land disturbance, infrastructure installation) until such time as all required approvals and permits have been received and submitted to FERC.

In its certificates issued to natural gas infrastructure companies, FERC routinely includes the provision:

Prior to receiving written authorization from the Director of OEP [Office of Energy Projects] to commence construction of any project facilities, [pipeline company] shall file with the Secretary documentation that it has received all applicable authorizations required under federal

law or evidence of waiver thereof.¹

FERC staff has identified this provision as a critical tool to ensure that a project is fully compliant with all applicable laws and has been fully reviewed and approved by all applicable local, state, and federal agencies before the project is allowed to move to construction.

While the provision gives the impression that a project will not commence until such time as it has fully secured agency review and approvals, has complied with all applicable laws, and has received all necessary permits, that is not in fact the case. Projects are routinely allowed to commence, with significant environmental impacts, prior to receiving all necessary approvals.

For example, the Tennessee Gas Pipeline Northeast Upgrade Project, which cuts through significant areas of mature forest and forested wetlands on both public and private lands, was allowed to initiate tree felling prior to receiving Clean Water Act permits from the U.S. Army Corps of Engineers. The tree cutting is among the major causes of environmental harm and community impact. If the wetlands permit had ultimately been denied, a major portion of the harm would already have been inflicted. Of further concern, FERC's permission to proceed with tree felling enabled the pipeline company to argue that, because it had already made major investments in the actual construction of the project, the Army Corps was compelled to issue the wetlands permit regardless of potential agency concerns.

The ability for this project to proceed in such a major way was driven by FERC's compliance with the language in its Certificate but not the spirit, intent, or the perception of protection it leads the public to believe exists. Because FERC is using the common mean of "construction" in its implementation of this limitation, and the term "construction" does not generally include equipment staging, tree felling, or other activities that alter or disturb land, FERC routinely allows projects to begin in ways with significant and permanent impacts on natural resources well before all required permits are obtained.

Therefore, we ask that FERC honor the spirit of the promise it is making to the public in including the limitation in its certificates by:

- 1) explicitly defining "construction" to include all preparatory phases including equipment staging, tree felling, and any other activities that alter or disturb land; and

¹ 139 FERC ¶ 61,161, Tennessee Gas Pipeline Company, L.L.C., Docket No. CP11-161, Order Issuing Certificate and Approving Abandonment, May 29, 2012, Appendix B, Environmental Conditions, ¶ 8 (emphasis in original).

- 2) refraining from issuing notices to proceed with construction until applicants have actually received all necessary permits and approvals from local, state, and federal agencies.

FERC Must Respond Timely to Rehearing Requests Rather than Rely on Tolling Orders

The Natural Gas Act, 15 U.S.C. § 717r(a), permits “any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for rehearing within thirty days after the issuance of such order. . . . Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.” The NGA makes a rehearing request a condition precedent for filing suit in federal court for review of a Commission order. Moreover, the aggrieved party may not file suit in federal court until the Commission renders its final decision on the merits of the rehearing request.

FERC’s common practice is to comply with the NGA 30-day mandate by issuing a tolling order within thirty days of a rehearing request. The tolling order grants the request for rehearing only insofar as to take the matter under consideration and allow FERC extra time to make a decision. While federal courts have upheld this practice as consistent with the NGA in the context of challenges to FERC decisions concerning rates and fees, the effect of using this practice for final decisionmaking on pipeline project approvals is to deny intervenors a timely response and the ability to challenge a project in a timely fashion.

FERC compounds this inequity by then waiting to issue final decisions on rehearing requests until just before or even after a project is granted authority to proceed with construction the rehearing requester has had to go to the time and expense of compelling the FERC decision by filing of a court action.

FERC’s practice of tolling the time to respond to rehearing requests and then failing to issue timely final orders cannot be justified. This practice effectively denies rehearing requesters’ due process rights to a timely decision by FERC and judicial review thereof, before construction starts, causing irreparable injury to communities striving to protect their health, safety, and environmental interests. The harms inflicted during the period that a rehearing requester follows the legal path to secure a decision so it can proceed with a legal challenge prior to initiation of the project cannot be undone or fully remedied later. In addition, this practice creates unnecessary litigation burdens for the affected parties and FERC itself. Parties requesting rehearing are forced to seek emergency relief from the federal courts under the All Writs Act to obtain a final reviewable order from FERC that can then allow judicial review to proceed, and it forces the community to file for an injunction to stop the project in order to allow the community time to pursue its legal challenges. Not only is this an avoidable waste of

time and resources for rehearing requesters, it is also an avoidable waste of time and resources for FERC and the federal courts.

Simply by issuing more timely final orders on rehearing requests, as contemplated by the NGA's provisions on administrative remedies and judicial review, FERC would not only fulfill its due process obligations to rehearing requesters but also avoid time-consuming and unnecessary litigation that wastes both the agency's and the courts' resources. In many, if not most, instances it would provide an opportunity for affected parties to secure legal review of a project well before the project actually begins, negating the need for requests for injunction and fully honoring affected parties' rights to have their grievances heard and addressed by a court before it is harmed by a project approved by FERC.

If FERC does not change this practice, then at a minimum it should take the policy position that it will not challenge requests for injunction, demonstrating its commitment to honor Congress' establishment of affected parties' right to legal review prior to suffering environmental and community harm.