

WHITE PAPER / **STREAMLINING PIPELINE PERMITTING**

OVERCOMING COMMON CHALLENGES WITH THE FERC PERMITTING PROCESS

BY David Thomas

Navigating the Federal Energy Regulatory Commission's (FERC) permitting process for new natural gas pipeline construction projects is complicated. With awareness of common application pitfalls and an understanding of how to prepare for them, it is possible to streamline the permitting process.



Under Section 7 of the Natural Gas Act of 1938, companies wishing to construct interstate natural gas pipelines in the U.S. must obtain a Certificate of Public Convenience and Necessity (certificate) from the Federal Energy Regulatory Commission (FERC).

The Section 7 process is challenging, requiring numerous decisions on the appropriate approval process for each project. A large-scale project generally consists of application pre-filing activities, preparation of a certificate application, reviews, authorization(s) and post-certificate proceedings, some aspects of which have come under increasing scrutiny by policymakers, Congress and federal courts.

Companies seeking a FERC certificate can expect to be challenged on the environmental impacts of and demonstrated need for their proposed projects, as well as eminent domain, landowner interests, project alternatives and other issues. While these issues are addressed in a company's application — and while the application may meet FERC's minimum filing requirements — it is likely that FERC will request additional information that could result in unplanned delays.

To minimize these costly delays, it is important to anticipate the questions FERC is likely to ask and address them proactively in the original application. A useful strategy is to review environmental comments and questions FERC has posed on similar, recent projects and to include such information in the application. Companies should consider the following key issues:

CONSULT EARLY AND COMMUNICATE REGULARLY

The process for obtaining FERC approval can take up to two years, depending on the size and scope of the project. The chances of streamlining this process improve if it can be demonstrated to a FERC project manager that regulators have been engaged from the start. That usually involves determining each regulatory agency's expectations as well as outlining the applicant and the project's expectations of each agency.

Identify and contact agencies as soon as there is a clear need for a project. In addition to FERC, those agencies could include the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Bureau of Land Management, state historic preservation agencies, state environmental agencies and other groups, depending on the project location. Outline a plan to file for a certificate and provide a general timeline for construction to each group.

Ongoing communication with FERC is valuable, particularly during the pre-filing phase of a project. During this period, FERC staff can provide feedback on draft plans, including informal advice on additional data that may be needed. Staff may also share comments from landowners or agencies about draft plans and suggest how they be addressed in the final application. A FERC project manager is often an effective source of guidance for moving the project along. After the application is filed, contact with FERC personnel becomes more formal due to the commission's ex parte rules.

DESCRIBE PROJECTS COMPLETELY AND ACCURATELY

With a FERC application, there is no such thing as providing too much information. To establish a compelling case, it is important to write a project description that not only details the size and scope of individual project elements, but also ties them directly to the project's purpose. The narrative should also include descriptions of any ancillary facilities not under FERC's jurisdiction, including justification for why these facilities do not fall under FERC's purview.

FERC prefers applications that document potential impacts on landowners and other stakeholders, as well as the environment. For example, if a pipeline requires a 135-foot construction right-of-way rather than the standard 100-foot width allowed in the guidance manual, include reasoning in the application. Similarly, if a route must veer from an existing utility route to reach a required delivery point, provide documentation to support the detour. Projects authorized by FERC under Section 7 include the right of eminent domain, and landowners have a right to know why a project is necessary and why their property is needed for its construction.

PROVIDE A DEFENSIBLE PURPOSE AND NEED STATEMENT

Applications require a clear, defensible statement that explains the project’s purpose and need. This purpose and need statement can justify projects on one or more different grounds: from demand needs, including firm commitment for the new capacity, to service reliability issues and human health exposure.

FERC will likely refer to this purpose and need statement throughout its environmental review. The commission will rely on it to justify the necessity of a project and the impacts its construction will have on the public. Be sure to develop and craft the statement carefully.

PERFORM A CONSTRUCTABILITY REVIEW

FERC created its Upland Erosion Control and Revegetation Plan and its Wetland and Waterbody Construction and Mitigation Procedures (FERC’s Plan and Procedures) to serve as a baseline for erosion control and revegetation, and as a starting point for the development of project-specific Plan and Procedures documents. It can then be determined if a project can be constructed using the Plan and Procedures as is, or if modifications or supplements are needed to reflect terrain, seasonal constraints or other factors specific to the project.

Because any modifications to FERC’s Plan and Procedures require FERC approval, pipeline sponsors are sometimes reluctant to suggest alternative measures. Some seek to meet only the minimum standards and will go beyond them only when compelled to do so by FERC. This approach is inadvisable because it often results in unnecessary project delays.

Keep in mind that FERC views its Plan and Procedures as the minimum standards and as a template that can and should be modified to meet the specific needs of each project. FERC welcomes requests for alternative construction, erosion control and revegetation methods —

presuming the methods meet its minimum environmental standards and provide an equivalent or better outcome than the original Plan and Procedures. In fact, the use of boilerplate language in a FERC application can be a red flag, suggesting that the applicant has failed to seriously consider the standard Plan and Procedures and how these measures would enhance or limit successful outcomes during construction. Requesting variances to the Plan and Procedures, either following issuance of the Draft Environmental Impact Statement or later during construction, could incur delays and additional cost.

PROVIDE A COMPREHENSIVE ALTERNATIVES ANALYSIS

FERC requires project applicants to demonstrate thoughtful consideration of alternative routes and construction methods, consistent with the purpose and need statement and the project’s specific environmental resource conflicts. FERC officials rely on this information to address stakeholder inquiries regarding a project’s chosen location.

When considering possible alternatives, review recent filings on similar projects in the area to learn how other applicants addressed comparable impacts and how regulators responded. Then use this information when developing a strategy that addresses the project’s particular needs.



For example, the Army Corps of Engineers may have previously rejected projects that significantly impact wetlands. If the originally proposed route involves major or multiple wetland crossings, include an alternative route (or construction technique) that would reduce or avoid those impacts. The same approach may be taken to address stream crossings, forested areas, endangered species habitats and other sensitive resource impacts. The mitigation or avoidance of resource impacts should drive the alternatives analysis.

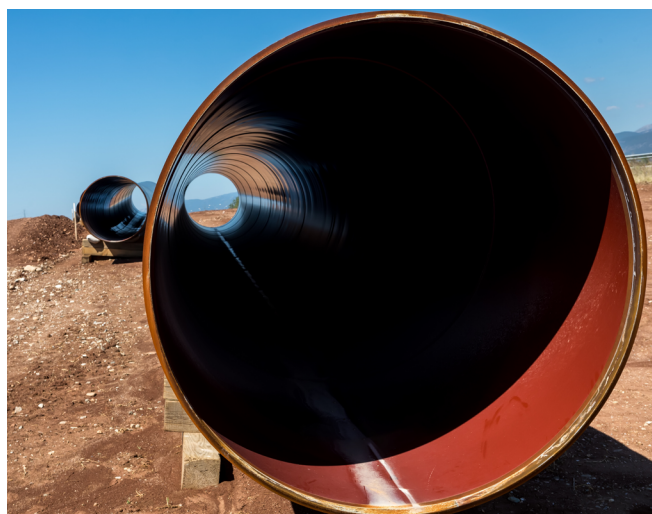
In each case, directly compare the resources disturbed by the originally proposed route with that of constructing the pipeline on one or more alternative routes. The potential schedule delays created by protracted FERC negotiations are also worthy of consideration. Often, a longer route may be faster and cheaper to construct, with the additional pipe and right-of-way expenses being more than offset by environmental mitigation required by FERC or other regulatory agencies and lost production costs.

Ultimately, the best alternatives reflect a project's purpose and need, meet FERC standards and are acceptable to both regulatory agencies and the general public.

PROVIDE A COMPREHENSIVE CUMULATIVE IMPACTS ANALYSIS

A good project description includes an assessment of a project's impact on area resources from past and present projects, as well as any projects planned for the foreseeable future. This analysis is often deficient in FERC filings and is a common reason why FERC staff request additional information. Again, review recent FERC environmental impact statements to get a sense of FERC's current approach and ways to minimize information requests.

Before completing the cumulative impact analysis, begin with a review of recent filings on similar projects in the area. There may be multiple wetland permits already on file, for example. If that is the case, provide an assessment of not only the project's impact on the region's water and wildlife, but also the cumulative impact of all the



projects having a temporal and geographic impact on area resources. This information will be needed when developing a strategy to address project needs.

INCLUDE UP-TO-DATE AERIAL PHOTOGRAPHY

Technology continues to evolve, and an application should reasonably reflect the current state-of-the-art. Printed paper maps with pasted arrows depicting topography and pipe routes will no longer pass muster. When possible, use drones to obtain high resolution aerial photography that can be annotated with software and maintained in online databases. This will provide the ability to make multiple changes easily and quickly as the project evolves from a planned route to a proposed route and into construction.

IDENTIFY FOCUS AREAS FOR REVIEWERS

Because FERC-approved projects must include a National Environmental Policy Act (NEPA) review, FERC asks for an assessment of the project's environmental impacts in the form of 12 environmental resource reports (ERRs). These ERRs include everything from land, air and water impacts, to sacred tribal grounds and cultural resource impacts. The project's purpose and need should be woven into each of the 12 ERRs. The FERC Guidance Manual for Environmental Report Preparation provides further details.

For each ERR, for example, FERC has established minimum filing requirements. An application should outline each report's requirements and then thoroughly and completely address each one. If the requirements call to address water crossings and the project involves no water crossings, don't simply omit this item. Explain that it is not applicable and always err on the side of providing more detail.

FERC reviewers should never have to guess. Filings should be thorough, paying particular attention to accuracy and consistency. A common problem is that resource impacts (numbers, acres, etc.) don't match from one ERR to the next.

PLAN AHEAD FOR FIELD SURVEYS

Once a route is established, FERC requires an environmental and cultural resource survey along the project path. Because field surveys tend to be the most expensive component of the FERC permitting process, start by contacting regulatory agencies to discuss field methodologies befitting the species and resources in the region. Other local project filings can help identify flowering periods, migration patterns and other habitat information need to understand how to address the area's animal and plant species. If a species is only present in the spring, complete the survey then, rather than delaying the project a year to await its return. If a yearlong wait isn't an option, a good strategy is to assume that the species will be found once the survey is conducted. Develop and propose specific measures to mitigate or limit impact on the species.

Carefully consider the width of the survey corridor. A wider survey corridor may prevent the need to conduct supplemental surveys (and their associated cost and time delays) as the route evolves during the FERC environmental review.

ENGAGE STAKEHOLDERS AND ADDRESS CONCERNS

FERC-approved projects must meet NEPA standards, which are designed to be inclusive and accept comments from both regulatory agencies and the general public. As a project sponsor, get ahead of the NEPA process and win the confidence of key stakeholders

by communicating with them candidly and proactively. Thoroughly explain the project, its impacts and benefits. Detail how the project will benefit the local community and how landowners would be compensated if the pipeline passes through their property, along with their rights should an easement be needed.

THE BOTTOM LINE

Time is money, especially on major pipeline projects. The sooner a project receives a FERC certificate, the sooner construction can be completed, gas gets flowing and contractual obligations are met. The value of retaining an experienced partner in this process becomes clearest when deficits in the initial application lead to protracted review periods, court battles and schedule delays. Investments made to streamline the FERC permitting process often pay for itself.

BIOGRAPHY

DAVE THOMAS has been an environmental consultant to the pipeline industry for most of his professional consulting career, which spans more than 25 years. Dave has experience at all levels of consulting, from field identification of wildlife habitat and wetland delineation to preparation of NEPA documents, with a focus on the FERC application process. He recently supported the Section 7(c) filing for the Fairburn Expansion Project in Georgia and served as project manager for the Section 3 filings for the Elba Liquefaction Project in Savannah, Georgia, and the Gulf LNG Liquefaction Project in Pascagoula, Mississippi.

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