



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

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July 25, 2018

Federal Energy Regulatory Commission
Secretary of the Commission
888 First Street NE
Washington, DC 20426
Docket No. PL18-1-000

Dear Secretary of the Commission,

The Association of State Wetland Managers (ASWM) provides the following **comments in response to FERC’s Notice of Inquiry** (Federal Register Docket No. PL18-1-000) **for help exploring whether, and if so how, it should revise its approach under its currently effective policy statement on the certification of new natural gas transportation facilities** to determine whether a proposed natural gas project is or will be required by the present or future public convenience and necessity, as established in section 7 of the Natural Gas Act (NGA).

Protection of the nation’s waters is of paramount concern not only to federal agencies, but states and tribes, as well as local governmental organizations and the public. The important and unique role of states in the management of water resources and the water quality certification associated with FERC projects is clearly recognized in the Clean Water Act (CWA). The states have a long history of successful cooperative federalism in carrying out dredge and fill point source permitting programs. We appreciate the opportunity to advise FERC regarding important state contributions, and to provide recommendations. ASWM is pleased to see FERC’s request for input and stakeholder perspectives, showing continued commitment to partnering with states and tribes.

In response to FERC’s request, this letter provides comments on FERC’s methodology for consistent evaluation of the environmental impact of a proposed project and input on whether there are specific changes the Commission could consider implementing to improve the efficiency and effectiveness of its certificate processes including pre-filing, post-filing, and post-order issuance.

Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the Right of way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is considered? (B5)

In response to request for input Section III B5, ASWM also encourages FERC to better define/and establish when a CPCN certificate cannot be issued because there is insufficient information about land and waters being impacted in the proposed pipeline path. There will inevitably be some portion of property in the proposed pipeline development plan that does not allow for access until eminent domain takes effect. However, it is critical for state agencies to have adequate information to evaluate impacts to aquatic resources. States have expressed concern that there should be some threshold criteria beyond which the issuance of CPCN certificates by FERC is delayed if a reasonable amount of information on the affected property is not provided. A small percentage of a proposed project may be acceptable as desktop analysis only, but the majority of aquatic crossings and critical habitat impacted by the proposed pipeline route should be accurately identified and assessed prior to issuance of a certificate.

Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? (A9) and Are there any environmental impacts that the Commission does not currently consider in its cumulative impact analysis that could be captured with a broader regional analysis? If so, how broadly should the regions be defined? (C2)

In response to requests for input A9 and C2, ASWM recommends that the Commission strengthen consideration of cumulative impacts, especially cumulative adverse effects (CAE), when assessing need under circumstances where multiple pipeline applications to construct or develop in the same geographic area are pending before the Commission. Cumulative adverse effects are the accumulation of adverse effects across space and time. There is a need to include consideration of effects that arise from project development that crosses multiple watersheds and multiple wetlands and of watershed and wetlands that are crossed by multiple pipelines. Wetlands and waters should be considered on a regional scale and cumulative impacts assessed should include the entire length of the project and all phases.

ASWM recommends that efforts to review cumulative adverse effects during a cumulative impacts analysis focus on a review of past and current impacts, as well as those already planned for creation in the reasonably foreseeable future. ASWM agrees with the stance that it is not possible to project into the future about projects that have not yet had a route identified (planned, but not sited gathering and distribution lines). FERC should not require nor review “speculative analyses.” Speculative analysis relies on information that is too incomplete to provide a meaningful basis for deciding between proposed options¹.

CEQ defines cumulative impacts as “the impact on the environment that results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions².” The requirement that an impact must be reasonably foreseeable to be considered in a NEPA analysis applies to both indirect and cumulative impacts. In *EarthReports, Inc. v. FERC*³ (2016), courts found

¹ *N. Plains Res. Council v. Surf. Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011).

² 40 C.F.R. §1508.7 (2017)

³ *EarthReports, Inc. v. FERC*, 828 F. 3d. 949, 955 (DC Cir. 2016)

that an impact is reasonable foreseeable only if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”

ASWM understands these as the parameters used to include/exclude information used in permit review decision making and encourages FERC to focus on additional consideration of past impacts when reviewing applications. By reviewing the past impacts in conjunction with the current and those with committed routes for development in the foreseeable future, it is possible to enter this information into a framework for evaluating cumulative adverse effects.

A recent white paper⁴, produced by ASWM with a national workgroup and authored by cumulative impacts specialist Wing Goodale of the Biodiversity Research Institute, shares a common framework for looking at these effects, which is relevant to ASWM’s recommendation. This work developed a framework for considering CAE in pipeline permit application development and review. The framework incorporated key temporal considerations, including the number of pipelines operating within the watershed defined in the spatial scope of the analysis (i.e. those already developed *in the past*), along with the number of pipelines *currently* being permitted within the watershed, and the number of those pipelines formally planned within the watershed in the *foreseeable future*.

ASWM is also finalizing a model (developed by Goodale) that can be adapted for use by applicants and reviewers alike. This model captures how the proposed pipeline *incrementally contributes* to the adverse effects from past, present and foreseeable future developments. ASWM and its partners encourage FERC to provide additional guidance, based on this or other models, on how to frame, assess, evaluate and manage CAE from pipeline development using this scientifically- and legally-based consideration of temporal boundaries.

Consequently, ASWM encourages FERC to require the submission of information about not only the current pipeline, but also past, current and foreseeable future development within the watershed for a complete analysis of cumulative effects. If the information is not formally requested by FERC, it is not available for analysis.

Should the Commission consider changing how it weighs a proposed project’s adverse environmental impacts against favorable economic impacts to determine whether the proposed project is required by the public convenience and necessity and still provide regulatory certainty to stakeholders? (C6)

In response to request for input C6, ASWM emphasizes the critical importance of avoidance and minimization as part of the planning process and regulatory requirements. Section §404 regulations in the Clean Water Act and other regulations provide specific guidance around alternatives analysis, including how resources are affected, site selection, methods or operating equipment. States, local governments and utilities companies often have details about practices which are appropriate to their region for avoiding and reducing adverse effects. Cumulative adverse impacts (see CEQ definition above on Page 2 of the letter) need to be considered as part of the alternatives analysis. This analysis should include what the adverse impacts are, how they occur and how they can be avoided or minimized.

⁴ Goodale, W. (2018). The Cumulative Adverse Effects of Natural Gas Pipeline Development on Wetlands. Association of State Wetland Managers. (In Draft)

However, where the alternatives analysis has identified unavoidable impacts and minimization has occurred to the extent practicable (which includes proper selection of techniques, especially for managing soils and vegetation to minimize impacts), ASWM encourages FERC to continue relying on the mitigation process provided in the 2008 Federal Mitigation Rule to economically address adverse environmental effects. The current mitigation process is well-structured, accepted nationally and provides predictability and transparency for pipeline developers. In keeping with the increasing emphasis on cooperative federalism, states are able to implement the national framework while adopting their own evaluation and implementation approaches. State implementation decisions are largely dictated by access and information on resources that will be impacted and their state regulations on the protection of aquatic resources and benefit from this state-level discretion. Many states are currently working to refine and improve their mitigation practices and procedures. States and tribes are able to work within the national mitigation framework to focus on issues that are specifically important to their wetland and aquatic resources management. For example, West Virginia is working to develop a new system to determine the quality of wetlands for their mitigation review process and the Fond du Lac Tribe requires higher mitigation rates based on wetland conversion.

In keeping with the 2008 Federal Mitigation Rule, the hierarchy of avoidance, minimization and lastly mitigation should continue to be the focus of federal, state and tribal requirements. In the case where unavoidable impacts lead to *conversion* (a change to another wetland type or a non-wetland), ASWM encourages the requirement of additional mitigation for conversion of wetlands. Even if proposed as a temporary impact in a permit application, any conversion should be considered a permanent impact and require mitigation, with freedom for states and tribes to carry out implementation in the manner best suited to them.

General Input on Certificate Process Improvements (D1-4)

In response to request for input D1-4, ASWM makes the following recommendations to the Commission for consideration to improve the efficiency and effectiveness of its certificate processes including pre-filing, post-filing, and post-order issuance.

Increasing evidence indicates that the best way for pipeline permitting processes to become more efficient is to engage all relevant parties in an active and engaged pre-application/pre-filing process. This coordinated work prior to the submission of a formal application, allow all parties to work together in the pre-application process to identify and come to agreement on necessary changes. In order for this to occur, applicants and FERC should focus on encouraging efforts to engage states and tribes in the scoping phase of projects. Early engagement will allow for critical resources and §401 certification considerations to be incorporated into planning and adverse impacts to these resources can be avoided through advance planning. By addressing the issues prior to the application process, states and tribes will be less likely to require additional information, clarifications and changes once the NEPA process is completed and the §401 certification process begins. The joint consideration of §404 review with the NEPA review process (e.g. purpose and need, alternatives retained) can be a more efficient means of reviewing a project.

In terms of cooperative federalism, states want to retain their full §401 certification review opportunities. The §401 certification process is a well-established and accepted tool for states to engage in review of water quality impacts that are critical to state interests. The §401 certification is an important regulatory tool for many states across the United States for dredge and fill and other

discharges into state waters. Improving the quality of applications and plans to achieve compliance with water quality standards before §401 certification requests are submitted, however, often reduces the amount of time for issuance and likelihood of delays.

Additionally, ASWM recommends that FERC continue to provide and encourage state/tribal participation in the review process as cooperating agencies and intervenors. These partnership roles allow states and tribes to participate fully and receive all communications, as well as be at the table for critical discussions that can avoid future delays or confusion during the review process.

Improving Permitting Process Efficiency, Predictability and Transparency

ASWM makes the following suggestions based on recent discussions with states, tribes and federal agencies to improve transparency, timing, and predictability in review of pipeline permits by states and tribes. The suggestions shared are specific to the Commission's certification process and in support of the goals of Executive Order 13807 (which encourages agencies to make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years).

- While best practices are intensely context dependent, those entities being regulated and the regulating agencies will benefit from taking the time to jointly come to agreement prior to project and during the pre-application process on best practices for pipeline construction in the project area, and which practices will be practicable for the project. Consequently, FERC's continued promotion of participation in the pre-application process is critical to increasing the efficiency, timing and predictability of FERC permitting processes.
- FERC should work to ensure prior to the formal application process that all relevant state agencies and tribes receive the Notice of Intent to prepare a NEPA document. This involves investing time in updating and checking FERC mailing lists. It is hard for the responding agencies to be efficient in reviewing and responding to information that they have not received.
- Some tribes are recognized by states but are not recognized by the federal government. While these federally-unrecognized tribes may not be on the radar of FERC and other federal agencies, in some states these same tribes are required to sign off on §401 Certification and other state permitting requirements at the state level. ASWM recommends that FERC work with states and tribes to better understand the role of these tribes and increase opportunities to bring them into the scoping and pre-application phases of project planning.

Opportunities for Ongoing Input from States and Tribes

ASWM recommends that FERC continue providing opportunities for states and tribes to participate in decision making about changes to the process. In addition to the formal Federal Register-based requests for stakeholder input, ASWM encourages a more rigorous stakeholder engagement process, including listening sessions with states and tribes (online or via conference calls) and other in-person stakeholder meetings. An example of this approach would be the recent efforts to engage various stakeholder groups by the Environmental Protection Agency around the development of a new Waters of the United States Rule.

Additionally, in response to request for input B5, several states and tribes have requested the opportunity to receive (and opt-out of) review of variances. Once FERC issues its certificate for the pipeline, most changes to plans require the submission of a variance by the pipeline developer (e.g. changing from plans to do HDD to an open trench, changes in hours of operation and others). Some of these changes can have significant impacts on aquatic (and other resources). States would like FERC to provide the *option* for states and tribes to review variances that may affect wetlands and waterbodies. ASWM supports states having the option to review variances.

In Closing

Given the potential effect of a revised approach that may be developed by FERC, we hope that FERC will consider our above recommendations and we encourage FERC to hold discussions with impacted states and tribes and other stakeholders to provide supplemental information as any changes are proposed.

As always, ASWM appreciates the opportunity to review and provide input. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,

A handwritten signature in black ink that reads "Jeanne Christie". The signature is written in a cursive, flowing style.

Jeanne Christie, Executive Director
Association of State Wetland Managers

cc: ASWM Board of Directors

