



The INGAA Foundation, Inc.

# **Expedited Federal Authorization of Interstate Natural Gas Pipelines: Are Agencies Complying with EPOA 2005?**

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**Prepared for The INGAA Foundation, Inc.**

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**December 21, 2012**

**INGAA Foundation Final  
Report No. 2012.05**

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# **Expedited Federal Authorization of Interstate Natural Gas Pipelines: Are Agencies Complying with EAct 2005?**

## **Executive Summary**

This report presents a study showing that the time to obtain required federal authorizations from agencies other than the Federal Energy Regulatory Commission (FERC or Commission) for interstate natural gas pipeline projects has actually increased since the passage of the Energy Policy Act of 2005 (EAct 2005), a law with the stated intent to streamline and expedite federal authorizations for such projects.

The only provision in EAct 2005 Section 313 that provides an applicant with recourse in the face of agency delay—a petition to the U.S. Court of Appeals for the D.C. Circuit—has rarely been used, allowing agencies to miss the required federal authorization deadline without consequence.

The undesirable effects of permitting delays range from increased project costs to missed in-service dates, along with a variety of associated adverse business, environmental, and other consequences. Using survey and interview data from the majority of large pipeline projects over the past 13 years, this report analyzes permitting timeframes and identifies possible improvements.

It should be noted that no causal link was identified between the passage of EAct 2005 and the increase in time required to obtain all required federal authorizations for interstate pipeline projects. Rather, the causes for delay that were identified included agency inexperience and inadequate agency staff, interagency conflicts, applicant changes to the project requiring additional or revised environmental review, and site-access problems. Improving the Act may help to alleviate the delays that appear to have increased in recent years.

In order to streamline and expedite the federal authorizations required for interstate natural gas pipeline projects, EAct 2005 authorized FERC to establish a schedule for such authorizations.<sup>1</sup> To accomplish this, FERC implemented a 90-day deadline for other agencies to issue the federal authorizations required for a pipeline project after the issuance of FERC's environmental analysis under the National Environmental Policy Act.

Five years after implementation of the Act, The INGAA Foundation, Inc. commissioned Holland & Hart LLP to conduct a study to determine whether the law had reduced the time to obtain federal authorizations for interstate natural gas pipeline projects as intended and, depending on the results of the study, to develop strategies for streamlining the issuance of such authorizations. The study focused on the EAct 2005 provision regarding the federal

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<sup>1</sup> Federal authorizations include both authorizations issued by federal agencies and authorizations issued by state agencies acting under federal delegation.

authorization deadline, which applies to non-FERC authorizations. The study does not cover FERC processes or certification except in relation to the other federal authorizations.

To collect data for the study, Holland & Hart conducted a survey, with respondents representing 51 interstate natural gas pipeline projects from both before and after the effective date of EAct 2005.

For post-EAct 2005 projects, the survey data showed:

1. an increase from 7.69% to 28.05% of federal authorizations that were delayed (see Table 2);
2. an increase from 3.42% to 19.51% of federal authorizations that were delayed 90 days or longer beyond the FERC deadline (see Table 3); and
3. an increase in the time federal agencies took to deem an application for a federal authorization “complete.”

In response to open-ended questions administered to the survey-respondents, the most common cause cited for federal authorization delays was conflict between two agencies. Other causes included inadequate or under-trained agency staff, applicant changes to the project requiring additional or revised environmental review, site-access problems, third-party protests, and agency review and determination of requirements to mitigate for environmental impacts.

Suggestions to reduce future delays included:

1. providing consequences when agencies fail to meet the FERC deadline;
2. planning for the project early and thoroughly; and
3. establishing better applicant-agency relationships and lines of communication.

The survey was designed to quantify delays experienced in receiving federal authorizations and gather information on the causes of such delays. Based on the survey outcomes, Holland & Hart conducted qualitative interviews with representatives from four post-EAct 2005 projects that experienced significant delays to explore further some of the causes for such delays.<sup>2</sup>

The interviewees expressed a strong desire for the Commission to have the authority to impose consequences or take unilateral action when agencies failed to abide by the federal authorization deadline set by FERC. The interviews also revealed a general desire for more

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<sup>2</sup> Further research would be needed to determine all of the reasons that the frequency and duration of delay increased after the Act.

FERC involvement in the federal authorization process, especially to provide more education and training to the other federal agencies involved in the process.

A majority of the interviewees also indicated that state agencies with delegated federal permitting authority were a common source of delays, even though such delegated authorizations are subject to the EAct 2005 provision establishing a federal timeline. Several of the interviewees offered that the time it took to satisfy U.S. Fish and Wildlife Service requirements under the Migratory Bird Treaty Act and to obtain permits from the Army Corps of Engineers under Section 404 of the Clean Water Act contributed to major delays for their projects. The interviewees also indicated that under-staffed agencies and increased public concern over natural gas production issues like hydraulic fracturing were sources of pipeline project delay. Finally, the interviewees noted that duplicative agency processes, FERC's inability to enforce the federal-authorization deadline, and project changes by the applicant also contributed to delays.

Overall, the survey and interviews revealed increased permitting delays since the enactment of EAct 2005 for the federal authorizations required to develop interstate natural gas pipeline projects. Thus, it appears that federal agencies have not complied with EAct 2005's requirements for streamlining and expediting federal authorizations.

In order to achieve the Act's stated goal of streamlined permitting, there must be consequences for agencies that fail to meet deadlines. Additional process improvements, regulatory revisions, and/or legislative actions likely are needed. Based on analysis of the study data, potential options include:

1. Amending the Natural Gas Act to provide effective tools to enforce the federal-authorization deadline, such as granting automatic approval if an agency does not respond by the deadline or allowing FERC to grant approval in the agency's stead.
2. Greater FERC involvement in permitting processes to educate and train other federal agencies, facilitate communications with those agencies, and move the permitting processes forward.
3. Encouragement of other federal agencies to recruit staff with specific experience permitting linear projects.
4. Revision of FERC's policy that encourages cooperation with state and local agencies to recognize more definitively that state or local law that overlaps or conflicts with FERC's authority over pipeline facilities is preempted by the Natural Gas Act.
5. Recognition by federal agencies that, as the lead agency, FERC's completion of National Historic Preservation Act Section 106 consultation and Endangered Species Act Section 7 consultation is sufficient for other federal authorizations that require such consultation for interstate natural gas pipeline projects.

6. Explicit direction by the Council on Environmental Quality to require expedited review for pipeline projects under the National Environmental Policy Act.
7. Statutory amendments to authorize interstate natural gas pipeline companies access to private property for required non-invasive project surveys and to authorize FERC to apply authorization deadlines to non-federal authorizations required from state and local agencies.
8. Congressional or federal court action to address issues and associated delays resulting from the U.S. Fish and Wildlife Service requirements under the Migratory Bird Treaty Act, which currently prohibits the take of migratory birds that occurs incidental to otherwise lawful activities, such as interstate natural gas pipeline development.

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Appendix I Computer-Based Survey Questionnaire

## **Acronyms and Abbreviations**

ACHP	Advisory Council on Historic Preservation
BiOp	biological opinion
BLM	Bureau of Land Management
Corps	Army Corps of Engineers
CP	Certificate Proceeding
CZMA	Coastal Zone Management Act
EA	environmental assessment
EIS	environmental impact statement
EPAct 2005	Energy Policy Act of 2005
ESA	Endangered Species Act
FERC or Commission	Federal Energy Regulatory Commission
IA	interagency agreement
MBTA	Migratory Bird Treaty Act
MOU	memorandum of understanding
NEPA	National Environmental Policy Act
NPDES	National Pollutant Discharge Elimination System
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
OEP	FERC's Office of Energy Projects
SHPO	State Historic Preservation Officer
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service



## I. Introduction

In 2001, President George W. Bush issued Executive Order 13212 regarding Actions to Expedite Energy-Related Projects.<sup>3</sup> In that Executive Order, the President acknowledged that the “increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies . . . shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.”<sup>4</sup> To that end, he mandated that, “[f]or energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections.”<sup>5</sup>

Four years later, Congress similarly recognized the need for expedited permitting for energy-related projects in the Energy Policy Act of 2005 (EPAc 2005 or Act),<sup>6</sup> when it designated the Federal Energy Regulatory Commission (Commission or FERC) as the lead federal agency for review of interstate natural gas pipeline projects under the National Environmental Policy Act (NEPA).<sup>7</sup> It also gave FERC the authority to establish a schedule for federal authorizations and state authorizations required under federal law for interstate natural gas pipeline projects (collectively, federal authorizations).<sup>8</sup>

By regulation, the Commission has indicated that agencies must make a final decision on federal authorizations no later than 90 days after FERC issues its final environmental document under NEPA, unless a schedule is otherwise established by federal law.<sup>9</sup> However, EPAc 2005 does not give FERC any means to enforce the 90-day deadline or impose consequences on the agencies for failure to comply. EPAc 2005 only provides that an applicant may pursue remedies in federal court against agencies that delay issuance of federal authorizations.<sup>10</sup>

## II. Study Purpose and Need

In the years since Congress enacted EPAc 2005, the Commission has approved over 100 interstate natural gas pipeline projects. However, the issuance of federal authorizations has not necessarily proceeded in the manner anticipated by the Act. Despite the efforts by the executive and legislative branches to expedite and streamline the permitting process and encourage timely issuance of federal authorizations for interstate natural gas pipeline facilities,

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<sup>3</sup> 66 Fed. Reg. 28,357 (May 22, 2001).

<sup>4</sup> *Id.* § 1.

<sup>5</sup> *Id.* § 2.

<sup>6</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005) (hereinafter EPAc 2005).

<sup>7</sup> EPAc 2005 § 313(a)(3), codified at 15 U.S.C. §§ 717n(b)(1).

<sup>8</sup> EPAc 2005 § 313(a)(3), codified at 15 U.S.C. §§ 717n(c)(1).

<sup>9</sup> 18 C.F.R. § 157.22.

<sup>10</sup> EPAc 2005 § 313(a)(3), (b), codified at 15 U.S.C. §§ 717n(c)(2); 717r(d)(2).

anecdotal evidence has suggested that the time required to secure regulatory approvals for such projects is increasing rather than decreasing. Many believe that FERC's lack of authority to compel other agencies to meet a schedule has allowed agencies to ignore the federal-authorization deadline. There is also general concern that some agencies are using their discretion to determine when an application is "complete" (under regulatory schemes that do not sufficiently define application requirements) to place undue burdens on applicants and to delay the commencement of a decisional timeline prescribed by statute or regulation. The undesirable effects of these delays range from increased project costs to missed in-service dates, along with a variety of associated adverse business, environmental, and other consequences.

As a result, The INGAA Foundation, Inc. commissioned this study, with the objective to determine whether the EAct 2005 provision contemplating the timely issuance of all federal authorizations is being met or whether additional improvements are necessary. In July 2011, The INGAA Foundation engaged Holland & Hart LLP to study and report on the effectiveness of the federal-authorization deadline provision of EAct 2005.

### **III. Study Scope**

The purpose of this study was to examine the implementation of the federal-authorization deadline provision introduced by EAct 2005 (1) to determine whether the provision has been effective in decreasing the time required to secure federal authorizations; (2) to identify strengths and weaknesses of the federal authorization process; and (3) to develop potential policy, regulatory, and legislative options to strengthen or alter the process and address burdens and obstacles that may be identified. Areas of inquiry included sources of delay in the permitting process, agency-coordination issues, satisfaction of application requirements, and the impact of delay on interstate natural gas pipeline projects.

To determine the actual results of applying the fixed-timeline provision of EAct 2005, a confidential quantitative computer-based survey questionnaire using both open-ended questions (i.e., those requesting comments) and closed-ended questions (i.e., selection of responses from a predefined list) was developed in conjunction with The INGAA Foundation for the proponents of interstate natural gas pipeline projects authorized both before and after EAct 2005. All natural gas pipeline projects that required a FERC certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act (NGA) between 1999 and 2011 were identified. However, this pool of 410 projects was reduced to include only those projects involving 30 miles or more of pipeline. This threshold was used to focus on pipeline projects that were likely to require a number of federal authorizations in addition to a FERC certificate and were likely to face the permit challenges that the fixed-timeline provision was designed to address. After applying this threshold, the project proponents for 87 projects were asked to complete the computer-based survey, and 51 project proponents did so.

Holland & Hart analyzed the responses from the computer-based survey to identify strengths and weaknesses in the permitting process and to determine whether the goals of the fixed-timeline provision in EAct 2005 are being achieved. Drawing from survey data, individual

interviews were designed with INGAA Foundation input for a targeted sample of survey participants to solicit in-depth information on individual experiences with the permitting process. Four projects that experienced substantial delay in the permitting process were targeted for the individual interviews to help hone in on and provide additional insight into causes of delay.

The interview results were then analyzed to identify common themes, anomalies, and important insights. Key principles were identified that define the industry experience with fixed timelines for interstate natural gas pipeline projects through common responses and issues raised in the survey and interviews. Finally, this report was prepared to articulate difficulties generally experienced by the interstate natural gas pipeline industry during the permitting process and to identify process improvement, regulatory, and legislative options to address these difficulties. It should be noted that the survey results and interviews did not indicate that the passage of EAct 2005 itself resulted in the increases in permitting time; rather, this report concludes that the provisions of EAct 2005 designed to streamline the permitting process are not being adhered to by federal agencies.

#### **IV. Natural Gas Act Section 7(c) Certificate Process**

##### **A. Certificate and Environmental Review**

FERC has the authority under the NGA to approve the original construction or expansion of interstate natural gas pipelines through the issuance of a certificate of public convenience and necessity (certificate).<sup>11</sup> The NGA also requires Commission approval and issuance of a certificate prior to abandonment of any interstate natural gas pipeline facility or services.<sup>12</sup>

In order for an interstate natural gas pipeline company to obtain a certificate of public convenience and necessity, it must file a detailed application with FERC.<sup>13</sup> Among other things, this application must include maps showing the preliminary pipeline route, a description of the proposed pipeline facilities, and up to 13 specific environmental resource reports.<sup>14</sup> These resource reports, which are referred to collectively as the Environmental Report, cover the topics of project description and land requirements, water use and quality, vegetation and wildlife, cultural resources, socio-economics, geological resources, soils, land use, air and noise quality, project alternatives, safety and reliability, and, for projects involving older pipe or facilities, polychlorinated biphenyls.<sup>15</sup>

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<sup>11</sup> 15 U.S.C. § 717f(c). Blanket certificates cover a range of projects approved by FERC that satisfy cost limitations identified in the Commission's regulations. The FERC blanket-certificate process is not within the scope of this report. The NGA also gives FERC the authority to set "just and reasonable rates" for natural gas transportation or sale in interstate commerce. *Id.* § 717c(a).

<sup>12</sup> 15 U.S.C. § 717f(b).

<sup>13</sup> *See generally* 18 C.F.R. part 157, subpart A. Note that blanket certificates are subject to a streamlined application process. 18 C.F.R. part 157, subpart F.

<sup>14</sup> 18 C.F.R. §§ 157.6, 157.14.

<sup>15</sup> *Id.* § 380.12.

Before the Commission will authorize construction, however, it must review the proposed project to determine if it is in the public interest.<sup>16</sup> This review includes an evaluation of the costs of transporting natural gas by the pipeline and need for the project. The Commission also conducts an environmental review through the preparation of an environmental assessment (EA) or an environmental impact statement (EIS) under NEPA to evaluate the project's anticipated impact on the public and the environment.<sup>17</sup> While FERC has exclusive authority under the NGA to authorize construction of interstate natural gas pipelines, such projects are also subject to authorization requirements from a variety of other federal agencies. A pipeline must obtain all required authorizations before commencing construction.

## **B. Traditional and Pre-Filing Processes**

FERC currently employs two environmental review processes, which both include consulting with stakeholders, identifying environmental issues through scoping, and preparing environmental review documents, such as EAs or EISs. These two review processes are known as the "traditional filing process" and the "pre-filing process."<sup>18</sup> These two processes are specific to FERC's approach to evaluation of a certificate application and do not affect the fixed-timeline provision except to the extent that (1) the use of one process versus the other may affect the timing of issuance of the final NEPA analysis to which the 90-day deadline (discussed further below) is attached, and (2) FERC's coordination with other agencies occurs sooner under the pre-filing process than under the traditional filing process, which could potentially have some impact on the timing of those other agencies' authorizations.

**Traditional Filing Process.** In the traditional filing process, the applicant prepares the Environmental Report generally without FERC involvement during the applicant's planning phase, which is the first of the three commonly recognized phases in this process.<sup>19</sup> Following the applicant's planning phase is the traditional FERC scoping and environmental review phase, followed by the construction phase.<sup>20</sup>

The applicant may choose to use "team permitting," which gathers early input from other regulatory agencies and stakeholders.<sup>21</sup> This latter involvement can range widely, from none to extensive, depending on the project and company philosophy and issues of confidentiality.<sup>22</sup> FERC usually opts not to participate in the applicant's planning phase before

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<sup>16</sup> 15 U.S.C. § 717f(e).

<sup>17</sup> See 42 U.S.C. §§ 4321 – 4347; 18 C.F.R. part 380.

<sup>18</sup> See generally INGAA Foundation, Inc., "Review and Analysis of the Federal Energy Regulatory Commission Pre-Filing and Traditional Filing Processes for Natural Gas Act Section 7 Applications" (Oct. 2007), available at <http://www.ingaa.org/INGAAFoundation/Studies/FoundationReports/5684.aspx>.

<sup>19</sup> See *id.* at 1-4; see also FERC, "Processes for Natural Gas Certificates," available at <http://www.ferc.gov/help/processes/flow/gas-2.asp>.

<sup>20</sup> See FERC, "Processes for Natural Gas Certificates," available at <http://www.ferc.gov/help/processes/flow/gas-2.asp>.

<sup>21</sup> See INGAA Foundation, Inc., *supra* n.18 at 1-4.

<sup>22</sup> *Id.*

filing.<sup>23</sup> However, it has provided guidance to some applicants prior to filing an application. Although FERC often knows (at least informally) that a project is in the planning stages, it usually is not aware of any project details until the formal filing by the applicant.<sup>24</sup>

Under the traditional filing process, FERC involvement usually begins when it accepts the application and issues a Certificate Proceeding (CP) number for the project.<sup>25</sup> FERC's issuance of a CP number begins the second phase of the traditional filing process, FERC's certificate and environmental review.<sup>26</sup>

**Pre-filing Process.** In 2002, FERC's Office of Energy Projects (OEP) established the pre-filing process to allow FERC to be involved in the earliest stages of the project, several months (sometimes up to a year) before the application is filed.<sup>27</sup> The pre-filing process also allows applicants and FERC to engage stakeholders including state, local, and other federal agencies prior to filing an application for a certificate.<sup>28</sup> There was a demand for this process due in part to the increasing complexity of the NEPA review process and the need to streamline and expedite the overall permitting process.<sup>29</sup> The goal of the pre-filing process is to encourage early identification and resolution of issues, in order to expedite the permitting process for energy projects.<sup>30</sup>

The pre-filing process differs from the traditional filing process in that the applicant's planning phase overlaps and is combined with the FERC scoping and environmental review phase.<sup>31</sup> The construction phase follows and is similar for both filing processes.<sup>32</sup>

## **V. Pre-EPAAct 2005 Interagency Agreements and MOUs**

Prior to EPAAct 2005, FERC recognized the importance of encouraging cooperation among federal agencies in permitting pipeline projects and attempted to achieve coordination

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

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1-5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> This goal is consistent with the direction provided in Executive Order 13212, Actions to Expedite Energy-Related Projects (May 18, 2001) and its amendment by Executive Order 13302 (May 20, 2003).

<sup>31</sup> See FERC, "Pre-Filing Environmental Review Process," available at <http://www.ferc.gov/help/processes/flow/lng-1.asp>.

<sup>32</sup> *Id.* In October 2007, The INGAA Foundation issued a report on "Review and Analysis of the Federal Energy Regulatory Commission Pre-Filing and Traditional Filing Processes for Natural Gas Act Section 7 Applications." See *supra* n.18. That report concluded that the timeframe for the overall filing process is not significantly less for pre-filed projects compared to traditionally filed projects. Because this study focuses on the impact of the fixed-timeline provision of EPAAct 2005, which is directed at other federal authorizations and did not change the FERC filing processes, the effect of the filing option on the length of the permitting process was not further analyzed for this report.

through a series of agreements called variously interagency agreements (IAs) and memoranda of understanding (MOUs).

With assistance from the White House Task Force on Energy Project Streamlining, FERC entered into an IA in May 2002 to coordinate projects with the Bureau of Land Management (BLM), the National Park Service, the Minerals Management Service, the Bureau of Reclamation, the Bureau of Indian Affairs, the U.S. Forest Service (USFS), the Army Corps of Engineers (Corps), the Department of Transportation, the Environmental Protection Agency, the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service,<sup>33</sup> the Advisory Council on Historic Preservation (ACHP), and the Department of Energy.<sup>34</sup> The purpose of the IA was to establish a framework for early cooperation and participation among the participating agencies that would enhance coordination of the processes through which their environmental and historic preservation review responsibilities under NEPA and other related statutes are met in connection with the authorizations that are required to construct and operate interstate natural gas pipeline projects certificated by FERC.<sup>35</sup>

To streamline the regulatory processes, the IA focused on early coordination between the participating agencies to identify areas of potential concern, establish a schedule, identify agency responsibilities, and share information.<sup>36</sup> Participating agencies were encouraged to communicate informally with the lead agency (generally, but not necessarily, FERC) and resolve disputes with other participating agencies.<sup>37</sup> The IA, however, was intended only to improve the working relationships of the participating agencies in connection with expediting decisions for interstate natural gas pipeline project authorizations and was not made enforceable against the participating agencies.<sup>38</sup>

FERC and the Corps later signed an MOU to streamline their respective regulatory processes further through early coordination and early identification of project purposes, need, and alternatives that can be used by each agency in carrying out its respective legal responsibilities.<sup>39</sup> The MOU acknowledged that FERC is the lead agency for purposes of complying with NEPA, and FERC is responsible for authorizing the construction and operation of

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<sup>33</sup> The National Marine Fisheries Service is now known as NOAA Fisheries.

<sup>34</sup> FERC, "Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Regulatory Commission" (May 2002), available at <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 4-6.

<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> *Id.* at 7-8.

<sup>39</sup> FERC, "Memorandum of Understanding between United States Army Corps of Engineers and the Federal Energy Regulatory Commission Supplementing the Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Regulatory Commission" at 1 (June 2005), available at <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>.

interstate natural gas pipelines.<sup>40</sup> The MOU states that “the Corps will give deference, to the maximum extent allowed by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project.”<sup>41</sup> The MOU also provided that the agencies would coordinate with each other early, resolve disputes at the lowest level possible, and that the Corps would be responsive to FERC timelines.<sup>42</sup> Like the IA, the MOU states that it does not confer any right or benefit enforceable against the agencies.<sup>43</sup>

Notably, under the permitting process prior to EAct 2005, even though the Commission usually did act as the lead agency, it was not required to do so. FERC also lacked authority to set a schedule for state and other federal agencies to ensure expeditious decision-making with respect to necessary federal authorizations.

## VI. EAct 2005 Amendments to the NGA

**Statutory Provisions.** As previously noted, EAct 2005 amended the NGA to make FERC the lead agency for coordinating federal authorizations and the NEPA process for applications to construct or expand interstate natural gas pipelines pursuant to Section 7 of the NGA.<sup>44</sup> The EAct 2005 amendments further mandate that each federal and state agency considering an aspect of an application for a federal authorization “shall cooperate with the Commission and comply with the deadlines established by the Commission.”<sup>45</sup>

The Act gives the Commission authority to set a schedule for all federal authorizations in compliance with all applicable schedules established by federal law and must “ensure expeditious completion of all such proceedings.”<sup>46</sup> However, if a federal or state agency does not comply with the FERC schedule for federal authorizations, EAct 2005 only provides an enforcement option for the applicant, not FERC. The applicant may file a petition with the United States Court of Appeals for the District of Columbia Circuit, which is given original and exclusive jurisdiction over any civil action for review of an alleged failure of an agency to issue, condition, or deny any permit required under federal law.<sup>47</sup> The D.C. Circuit is authorized to

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<sup>40</sup> *Id.* at 1-2.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 2-3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> EAct 2005 § 313(a)(3), codified at 15 U.S.C. § 717n(b)(1). The lead agency is “the agency or agencies preparing or having taken primary responsibility for preparing the environment impact statement.” 40 C.F.R. § 1508.16. “Federal authorization” is defined as “any authorization required under Federal law” including “permits, special use authorizations, certifications, opinions, or other approvals with respect to an application for authorization” under NGA Section 3 to export or import natural gas or for a certificate under Section 7. 15 U.S.C. § 717n(a).

<sup>45</sup> EAct 2005 § 313(a)(3), codified at 15 U.S.C. § 717n(b)(2).

<sup>46</sup> EAct 2005 § 313(a)(3), codified at 15 U.S.C. §§ 717n(c)(1).

<sup>47</sup> EAct 2005 § 313(a)(3), (b), codified at 15 U.S.C. §§ 717n(c)(2), 717r(d)(2).

remand the case to the agency to take appropriate action and must “set a reasonable schedule and deadline for the agency to act on remand.”<sup>48</sup>

The EPAAct 2005 amendments also require the Commission, with the cooperation of federal and state administrative agencies and officials, to maintain a complete consolidated record of all decisions made or actions taken by the Commission or a federal administrative agency or officer or state administrative agency or officer acting under delegated federal authority with respect to any federal authorization.<sup>49</sup> Such record shall be the record used for judicial review of “decisions made or actions taken of Federal and State administrative agencies and officials.”<sup>50</sup>

**FERC’s Regulations.** In 2006, FERC promulgated regulations to implement Section 313 of EPAAct 2005.<sup>51</sup> With respect to the federal-authorization deadline provision, FERC’s regulations provide that, for certificate applications requiring an EA or an EIS, “notice of a schedule for the environmental review will be issued within 90 days of the notice of the application, and subsequently will be published in the Federal Register.”<sup>52</sup> The regulations also require a final decision on a request for a federal authorization no later than 90 days after FERC issues its final environmental document, unless a schedule is otherwise established by federal law.<sup>53</sup>

Related to this federal-authorization deadline, FERC’s regulations impose an obligation on the applicant to provide an exhibit with its application that includes the following information:

[a] statement identifying each Federal authorization that the proposal will require; the Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, that will issue each required authorization; the date each request for authorization was submitted; why any request was not submitted and the date submission is expected; and the date by

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<sup>48</sup> EPAAct 2005 § 313(b), codified at 15 U.S.C. § 717r(d)(3). This provision does not apply to actions taken under the Coastal Zone Management Act, but EPAAct 2005 included other provisions in Section 381 designed to expedite decisions under that statute.

<sup>49</sup> EPAAct 2005 § 313(a)(3), codified at 15 U.S.C. § 717n(d).

<sup>50</sup> *Id.*

<sup>51</sup> FERC, Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record, 71 Fed. Reg. 62,912 (Oct. 27, 2009), amending portions of and adding provisions to 18 C.F.R. parts 157, 375, and 385.

<sup>52</sup> 18 C.F.R. § 157.9(b).

<sup>53</sup> *Id.* § 157.22. Interestingly, the regulations also delegate to the Director of the OEP the authority to establish a schedule for federal authorizations required for Section 7 natural gas projects. *Id.* § 375.308(bb). This provision, which pre-dated EPAAct 2005, appears to have been superseded by the 90-day schedule set by regulation.



which final action on each Federal authorization has been requested or is expected.<sup>54</sup>

Although it does not appear to be followed in practice, FERC also issued a regulation requiring federal agencies and state agencies acting pursuant to federal law to provide notice to FERC when they receive an application for a federal authorization.<sup>55</sup> The notice is supposed to indicate (1) whether the application is ready for processing, and if not, what additional information or materials will be necessary to assess the merits of the request; (2) the time the agency will allot to the applicant to provide the necessary information or materials; (3) what studies, if any, will be necessary in order to evaluate the request; (4) the anticipated effective date of the agency's decision; and (5) if applicable, the schedule set by federal law for the agency or official to act.<sup>56</sup>

## VII. Evaluation of the Effectiveness of the EPOA 2005 Fixed-Timeline Provision

### A. Survey

In order to evaluate whether EPOA 2005 has accomplished its goal of expediting the federal permitting process for interstate natural gas pipelines, Holland & Hart, in coordination with The INGAA Foundation, designed and administered a survey intended to provide concrete data regarding the experience of interstate natural gas pipeline companies with the federal permitting process before and after EPOA 2005 went into effect.

**Focus of the Survey.** The survey was designed to identify (1) whether interstate natural gas pipeline projects have experienced delays in the permitting process; (2) if so, the frequency, magnitude, and causes of such delays; and (3) whether EPOA 2005 has helped reduce those delays. The survey questions were based around seven of the most common federal authorizations required by pipeline companies, aside from the FERC certificate.

1. BLM Right-of-Way Grant: Authorization to use a specific portion of BLM-managed federal land, usually for the life of the project.<sup>57</sup>
2. Army Corps of Engineers Clean Water Act Section 404 Permit: Authorization for the discharge of dredged and fill material into waters of the United States, including wetlands.<sup>58</sup>

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<sup>54</sup> 18 C.F.R. § 157.14(a)(12).

<sup>55</sup> *Id.* § 385.2013.

<sup>56</sup> *Id.*

<sup>57</sup> Rights-of-way across federal lands for natural gas pipelines are issued under the Mineral Leasing Act, 30 U.S.C. § 185(a). When the pipeline crosses lands under the jurisdiction of two or more federal agencies, BLM issues the right-of-way grant. 43 C.F.R. § 2881.11. If the pipeline crosses federal lands under the jurisdiction of only one agency other than the BLM, that agency issues the requisite authorization. *Id.* § 2884.19(b).

<sup>58</sup> 33 U.S.C. § 1344(a).

3. Army Corps of Engineers Rivers and Harbors Act Section 10 Permit: Authorization required to construct any structure in or over any navigable waters of the United States or to excavate, dredge, or deposit material in these waters or make any obstruction or alteration in any navigable water.<sup>59</sup>
4. Endangered Species Act (ESA) Section 7 Consultation: Consultation with USFWS and/or NOAA Fisheries to ensure that the proposed federal action is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.<sup>60</sup>
5. National Historic Preservation Act (NHPA) Section 106 Consultation: Consultation with the State Historic Preservation Officer (SHPO) regarding the effects of the project on historic properties, including providing the ACHP an opportunity to comment on the project.<sup>61</sup> While some officials within FERC and the ACHP have questioned whether the Section 106 consultation process is a federal authorization subject to the EAct 2005 amendments, the preamble to FERC's regulations treat NHPA compliance as such.<sup>62</sup> Regardless of the interpretation, the survey results indicate when the Section 106 consultation process extended 90 days or more beyond FERC's issuance of its NEPA analysis.
6. U.S. Forest Service Special Use Permit: Authorization for the use of National Forest System land.<sup>63</sup>
7. Coastal Zone Management Act (CZMA) Consistency Determination: Determination from the applicable state that the proposed activities within or affecting the coastal zone are consistent with the state's Coastal Zone Management Plan.<sup>64</sup> Note that the CZMA consistency determination also has its own regulatory timelines, so the 90-day

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<sup>59</sup> *Id.* § 401.

<sup>60</sup> 16 U.S.C. § 1536(a)(2). It should be noted that USFWS and NOAA Fisheries joint regulations impose a 135-day timeframe for the formal Section 7 consultation process (90 days for formal consultation and 45 days for USFWS to issue the biological opinion). 50 C.F.R. § 402.14(e). If the agencies agree, this timeframe can be extended for up to 60 days without the applicant's consent or longer if the applicant consents. *Id.* Thus, formal consultation arguably is not subject to the 90-day federal-authorization deadline established by FERC regulation, though FERC appears to have taken a contrary position in the preamble to its EAct 2005 implementing regulations. See Federal Energy Regulatory Commission, Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record, 71 Fed. Reg. 62,912, 62,912 n.6 (Oct. 27, 2006). In any event, informal consultation has no regulatory timeframe, so it should be subject to FERC's 90-day deadline. The survey results for the ESA consultation process provide data on the length of the process and whether it extends beyond 90 days after FERC issues its NEPA analysis.

<sup>61</sup> 16 U.S.C. § 470f.

<sup>62</sup> 71 Fed. Reg. at 62,913 n.10.

<sup>63</sup> 30 U.S.C. § 185(a); 36 C.F.R. part 251.

<sup>64</sup> 16 U.S.C. § 1456(c).

deadline does not apply to this determination.<sup>65</sup> The survey elicited information regarding this authorization to determine whether it was a source of delay that potentially would benefit from being made subject to FERC's deadline.

Of course, not every project required every authorization. Instead, the 51 respondents completed questions only about the authorizations that were required for their projects, the processes that they participated in to obtain those authorizations, and the length of time it took to obtain the authorizations. In addition, the survey included open-ended questions to identify other permits that may have been required for specific projects and to elicit both specific problem areas with and suggestions for improving the process. The most common additional permits required by responding projects were (1) the Clean Water Act Section 401 water quality certification, (2) a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit, and (3) a Clean Air Act permit.

**Survey Recipients.** To determine whether the EAct 2005 fixed-timeline provision has been effective, the survey elicited information from interstate natural gas pipeline companies regarding projects authorized both before and after the implementation of EAct 2005. The pre-EAct 2005 projects provide a baseline, and the projects authorized after EAct 2005 are measured against this baseline.<sup>66</sup> A comprehensive list of pipeline projects of 30 miles or more that completed the permitting process between 1999 and 2011 was compiled from the FERC docket. The project proponents for these 87 projects were asked to complete the survey based on their actual permitting experiences.<sup>67</sup> Of the 87 projects targeted for the survey, 60 were pre-EAct projects and 27 were post-EAct projects.<sup>68</sup>

## **B. Survey Results**

### **1. Survey Response Rate**

Holland & Hart received survey responses for 51 of the 87 pipeline projects. Of the 51 responses, 29 were pre-EAct 2005 projects (out of 60 possible) and 22 were post-EAct 2005 projects (out of 27 possible). The response rate for pre-EAct 2005 projects is 48.33%; the response rate for post-EAct 2005 projects is 81.48%. Departure of project personnel and the difficulty of accessing older documentation likely account, at least in part, for the lower pre-

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<sup>65</sup> 71 Fed. Reg. at 62,915 n.18, n.24.

<sup>66</sup> FERC began utilizing the fixed timelines provision in December 2006, after it promulgated regulations implementing the EAct 2005 amendments. Aside from FERC's implementation of its pre-filing process and EAct 2005's 90-day authorization deadline, the process for obtaining a FERC certificate has not changed significantly since 1999.

<sup>67</sup> Originally, 95 projects were identified for the 1999-2011 time period, but eight were eliminated because the appropriate survey respondent could not be identified or was no longer with the company. Survey respondents were emailed a link to the survey and could complete the survey at their convenience online. The survey questions are included in Appendix I.

<sup>68</sup> Holland & Hart contacted respondents whose projects fell within a year of the implementation date to determine whether EAct 2005 applied to their projects.

EPAct 2005 response rate. The survey results and percentages in this report are calculated based on the projects for which a response was provided.

## 2. Federal Authorizations Required

As noted above, the survey requested information about seven of the most common federal authorizations required for interstate natural gas pipeline projects. Table 1 below shows the number of pipeline projects that required each of the seven specific federal authorizations in the survey, listed in order from the most post-EPAct 2005 projects to the least. A Corps 404 permit, ESA Section 7 consultation, and NHPA Section 106 consultation were required for nearly all projects, both before and after EPAct 2005. A BLM right-of-way grant was the next most common before the Act, but was required for a much smaller percentage of projects after the Act.<sup>69</sup> A Corps Section 10 Rivers and Harbors permit was required of just over one-third of projects after the Act and just under one-third before.

**Table 1 – Federal Authorizations Required for Surveyed Pipelines**

Permit Type	Number of Pre-EPAct Projects (29)	% of Total Pre-EPAct Projects	Number of Post-EPAct Projects (22)	% of Total Post-EPAct Projects
<b>NHPA Sec. 106</b>	27	93.10%	21	95.45%
<b>Corps 404 Permit</b>	28	96.55%	20	90.91%
<b>ESA Sec. 7</b>	27	93.10%	20	90.91%
<b>Corps Rivers &amp; Harbors Permit</b>	9	31.03%	8	36.36%
<b>CZMA Consistency Determination</b>	8	27.59%	6	27.27%
<b>BLM Right-of-Way Grant</b>	12	41.38%	5	22.73%
<b>USFS Special Use Permit</b>	6	20.69%	2	9.09%

## 3. Overall Delay

Overall, the survey showed a general increase since EPAct 2005 in the number of authorizations delayed beyond 90 days after issuance of the FERC NEPA document. The delays for federal authorizations for pre-EPAct 2005 and post-EPAct 2005 projects are summarized below by authorization type in Table 2, listed from greatest percentage delayed post-EPAct 2005 to least. Each of the different authorization types experienced more delay post-EPAct 2005, with BLM rights-of-way, Corps Rivers and Harbors permits, and Coastal Zone Management Act consistency determinations showing the largest increases. Although the number of surveyed projects that required these three authorizations is fairly low, the number

<sup>69</sup> This report does not explore the differences between the number and type of authorizations required before and after EPAct 2005.

of projects requiring these authorizations relative to the total number of projects surveyed is fairly consistent from pre- to post-EPAAct projects.

Two of the most common authorizations, the Corps 404 permit and NHPA Section 106 consultation, also experienced large increases in the percentage of projects delayed, though these authorizations caused delay in fewer than half of the post-EPAAct projects surveyed (10 of 23). For the Corps 404 permits, the percentage of surveyed projects experiencing delay more than tripled after EPAAct 2005 (10.7% to 35%). NHPA consultation delay also more than tripled (3.7% to 14.2%), although the overall percentage experiencing delay remains below 15 percent. Because many projects require these authorizations, the increase in delay for these two authorizations post-EPAAct 2005 affected a considerable number of projects.

**Table 2 – Delay in Federal Authorizations**

Authorization	Total Authorizations Required		Authorizations Not Received Within 90 Days <sup>70</sup>		% Delayed	
	Pre-EPAAct 2005	Post-EPAAct 2005	Pre-EPAAct 2005	Post-EPAAct 2005	Pre-EPAAct 2005	Post-EPAAct 2005
<b>BLM Right-of-Way Grant</b>	12	5	1	3	8.33%	60.00%
<b>Corps Rivers &amp; Harbors Permit</b>	9	8	2	4	22.22%	50.00%
<b>CZMA Consistency Determination</b>	8	6	0	3	0.00%	50.00%
<b>USFS Special Use Permit</b>	6	2	0	1	0.00%	50.00%
<b>Corps 404 Permit</b>	28	20	3	7	10.71%	35.00%
<b>NHPA Sec. 106</b>	27	21	1	3	3.70%	14.29%
<b>ESA Sec. 7</b>	27	20	2	2	7.41%	10.00%
<b>Total</b>	117	82	9	23	7.69%	28.05%

<sup>70</sup> We use 90 days from the date FERC issues its NEPA document (either an EIS or EA) as the general measure of delay. Although there was no statutory deadline pre-EPAAct 2005, the post-EPAAct 2005 90-day deadline provides a reasonable comparison point for the timeliness of pre- and post-EPAAct authorizations.

Not only are more authorizations delayed since EAct 2005, the delays are longer. The survey showed more than a three-fold increase in the percentage of federal authorizations delayed more than 90 days beyond the standard FERC authorization deadline. Table 3 below shows the extended delays by agency for pre- and post-EAct projects, arranged from the highest percentage of post-EAct 2005 extended delay to lowest.

**Table 3 – Delays More than 90 Days Beyond 90-Day Deadline for Post-EAct 2005 Projects**

Authorization	Total Authorizations required from the Agency		Permits received 90 days or more beyond 90-day deadline after FERC EA/EIS		Extended delays as percentage for the Agency	
	Pre-EAct 2005	Post-EAct 2005	Pre-EAct 2005	Post-EAct 2005	Pre-EAct 2005	Post-EAct 2005
<b>Corps Rivers &amp; Harbors Permit</b>	9	8	1	4	11.11%	50.00%
<b>CZMA Consistency Determination</b>	8	6	0	2	0.00%	33.33%
<b>Corps 404 Permit</b>	28	20	2	6	7.14%	30.00%
<b>BLM Right-of-Way Grant</b>	12	5	0	1	0.00%	20.00%
<b>ESA Sec. 7</b>	27	20	1	2	3.70%	10.00%
<b>NHPA Sec. 106</b>	27	21	0	1	0.00%	4.76%
<b>USFS Special Use Permit</b>	6	2	0	0	0.00%	0.00%
<b>Total</b>	<b>117</b>	<b>82</b>	<b>4</b>	<b>16</b>	<b>3.42%</b>	<b>19.51%</b>

As shown in Table 4, when grouped by project, before EAct 2005, 27.59% of the projects reported no delay in obtaining any of the listed federal authorizations. After EAct 2005, only 18.18% of the projects reported no delay in obtaining any of the authorizations included in the survey.

**Table 4 – Delay by Project**

<b>Projects Experiencing No Delay</b>		<b>Projects Experiencing Delay for One or More Authorizations</b>	
<b>Pre-EAct 2005</b>	<b>Post-EAct 2005</b>	<b>Pre-EAct 2005</b>	<b>Post-EAct 2005</b>
<b>8 (27.59%)</b>	<b>4 (18.18%)</b>	<b>21 (72.41%)</b>	<b>18 (81.82%)</b>

Another question asked respondents to characterize (subjectively) the length of each authorization’s delay as “no delay,” “little delay,” “moderate delay,” and “large delay.” As can be seen in Table 5 below, the largest increases were in the percentage of small delays, with large delays increasing only slightly as a percentage.

**Table 5 – Amount of Delay by Number of Projects and Percentage of Total<sup>71</sup>**

Authorization	No Delay		Little Delay		Moderate Delay		Large Delay	
	Pre-EPAct 2005	Post-EPAct 2005	Pre-EPAct 2005	Post-EPAct 2005	Pre-EPAct 2005	Post-EPAct 2005	Pre-EPAct 2005	Post-EPAct 2005
BLM Right-of-Way Grant	5	2	2	3	2	1	2	0
	45.45%	33.33%	18.18%	50.00%	18.18%	16.67%	18.18%	0.00%
Corps 404 Permit	15	10	2	2	3	3	3	5
	65.22%	50.00%	18.18%	10.00%	13.04%	15.00%	13.04%	25.00%
Corps Rivers & Harbors Permit	6	2	1	3	0	1	1	3
	75.00%	22.22%	12.50%	33.33%	0.00%	11.11%	12.50%	33.33%
ESA Sec. 7	14	15	3	2	1	0	4	2
	63.64%	78.95%	13.64%	10.53%	4.55%	0.00%	18.18%	10.53%
NHPA Sec. 106	14	13	2	5	1	1	3	1
	70.00%	65.00%	10.00%	25.00%	5.00%	5.00%	15.00%	5.00%
USFS Special Use Permit	2	2	1	0	0	0	3	1
	33.33%	66.67%	16.67%	0.00%	0.00%	0.00%	50.00%	33.33%
CZMA Consistency Determination	4	3	1	1	0	0	0	3
	80.00%	42.86%	20.00%	14.29%	0.00%	0.00%	0.00%	42.86%
Total	60	47	12	16	7	6	16	15
	63.16%	55.95%	12.63%	19.05%	7.37%	7.14%	16.84%	17.86%

<sup>71</sup> Some respondents did not respond to every question, so the numbers in this table do not always match the total number of authorizations obtained for the various projects represented in the survey.



#### 4. Incomplete Applications

There was only a small difference between the percentage of federal authorization applications deemed complete upon submission before and after EPOA 2005, with 62.26% of those reporting deemed complete before EPOA 2005 and 61.45% deemed complete after. See Table 6 below. However, for post-EPOA 2005 projects, it took longer to get a completeness determination for those applications initially deemed incomplete. Since EPOA 2005, a greater percentage of applications required 90 days or longer to achieve completeness (26.39% for pre-EPOA compared to 37.50% for post-EPOA).

Of the seven federal agency authorizations specifically included in the survey, the BLM right-of-way grant and the Corps 404 permit have the highest rates of incomplete applications and the longest delays in deeming applications complete since EPOA 2005. BLM right-of-way grants were required for 22.72% of the post-EPOA 2005 projects surveyed (5 of 22). For these projects, 80% of the BLM right-of-way applications (4 of 5) were deemed incomplete upon submission. Of the BLM right-of-way applications deemed incomplete, 40% (2 of 5) took 121 days or more after the initial submission to be deemed complete. BLM also had the highest rate of secondary requests for additional information, with 75% of post-EPOA 2005 projects (3 of 4) that required a BLM right-of-way grant having to respond at least twice to requests for additional information before the application was deemed complete.

After EPOA 2005, 44.44% of the respondents (8 of 18) reported that their Corps 404 application was deemed incomplete upon submission (up from 28% pre-EPOA 2005 (7 of 25)). Of those applications deemed incomplete, 40% took 121 days or more to be deemed complete. Corps 404 permits were second only to BLM right-of-way grants in secondary requests for additional information: 50% of the incomplete Corps 404 applications received at least two information requests from the Corps before their applications were deemed complete after EPOA 2005 compared with 30.77% before EPOA 2005.

NHPA Section 106 consultation and USFS permits were the only authorizations to show improvement in the number of filings deemed complete upon initial submission. The percentage of incomplete NHPA submissions decreased from 45.45% before EPOA 2005 to only 26.32% after EPOA 2005. However, although the percentage of incomplete NHPA submissions decreased, there was still a higher percentage of NHPA authorizations with extended delays (90 days or more beyond the deadline) after EPOA 2005 (with 3.70% experiencing extended delays pre-EPOA and 14.29% experiencing extended delays post-EPOA). The data for USFS special use permits are less conclusive because only two post-EPOA 2005 projects required such a permit; one was deemed complete and the other was not.

**Table 6: Pre- vs. Post-EPAAct 2005 – Was filing deemed complete upon initial submission?**

Authorization	Total Deemed Complete		Total Deemed Incomplete		% Deemed Incomplete	
	Pre-EPAAct 2005	Post-EPAAct 2005	Pre-EPAAct 2005	Post-EPAAct 2005	Pre-EPAAct 2005	Post-EPAAct 2005
<b>BLM Right-of-Way Grant</b>	6	1	7	4	53.85%	80.00%
<b>Corps 404 Permit</b>	18	10	7	8	28.00%	44.44%
<b>Corps Rivers &amp; Harbors Permit</b>	6	4	3	4	33.33%	50.00%
<b>ESA Sec. 7</b>	17	12	8	6	32.00%	33.33%
<b>NHPA Sec. 106</b>	12	14	10	5	45.45%	26.32%
<b>USFS Special Use Permit</b>	1	1	5	1	83.33%	50.00%
<b>CZMA Consistency Determination</b>	6	5	0	1	0.00%	16.67%
<b>Total</b>	66	47	40	29	37.74%	38.16%

## **5. Legal Remedies**

Of all the projects surveyed, only two out of 51 pursued legal remedies to address agency authorization delays. Both of these projects were authorized before EPAAct 2005 was passed. Both filed for declaratory orders—one against a state agency administering a federal permitting program and the other relating to the CZMA consistency determination and Clean Water Act Section 401 water quality certification. The fact that none of the survey respondents for the post-EPAAct 2005 projects petitioned for review, even though these projects experienced increased delay, is a strong indicator that the judicial remedy provided by EPAAct 2005 is not an effective method to combat delay. Despite the increase in number and length of delays, pipeline companies are very reluctant to use legal remedies to address agency delay in the permitting process. This issue is discussed further below in the interview section.

## 6. Mileage

The project sponsors that responded to the survey represented a broad range of project lengths as shown in Table 7 below. No significant correlation was found between pipeline length and delay. The correlation between mileage and delayed authorizations was -0.087, which was not statistically significant.<sup>72</sup>

**Table 7: Project Mileage**

Mileage Range	# of Pre-EPAct Projects	# of Pre-EPAct with Delay	% of Pre-EPAct Projects with Delay	# of Post-EPAct Projects	# of Post-EPAct with Delay	% of Post-EPAct Projects with Delay	Total # of Projects
30-59	10	8	80.00%	5	5	100.00%	15
60-100	5	4	80.00%	3	3	100.00%	8
100-199	7	5	71.43%	9	6	66.67%	16
200-299	3	2	66.67%	0	0	0.00%	3
300-399	2	1	50.00%	1	0	0.00%	3
400+	2	1	50.00%	4	4	100.00%	6
<b>Total</b>	<b>29</b>	<b>21</b>	<b>72.41%</b>	<b>22</b>	<b>18</b>	<b>85.71%</b>	<b>51</b>

## 7. Survey Respondent Extended Answers on Causes of and Remedies for Delay

The survey included five open-ended questions about specific causes of delay and solicited suggestions for both agencies and project proponents to avoid delay for future projects.

**Causes of Delay:** Survey respondents provided substantive responses about the causes of delay with respect to 16 projects (seven pre-EPAct 2005 and nine post-EPAct 2005). Several of the respondents cited multiple causes of delay. The most common causes cited for long authorization delays were disagreements, conflicts, or other issues between two federal agencies—either two of the agencies charged with issuing federal authorizations or one of these agencies and FERC. Problems included one agency duplicating the efforts of another, one agency discounting results from another agency’s process (related to NHPA Section 106 determinations), or both agencies waiting for each other to complete a review before agreeing

<sup>72</sup> 0.544 2-tailed significance; correlation of 0.36 needed for statistical significance at p<.05.

to proceed. Respondents for eight projects (four pre- and four post-EPA 2005) indicated these interagency issues were at least one cause of delay.

The next most common cause of delay was inadequate or inexperienced agency staff that made it necessary either to restart a process or to invest time in training or bringing the staff member up to speed. This type of delay was listed in conjunction with six projects (two pre- and four post-EPA 2005). Applicant changes to the project were cited as a cause of delay with respect to four projects (all post-EPA 2005). Other causes listed for individual projects included the inability to access survey sites (post-EPA 2005), incomplete application determinations (post-EPA 2005), third-party environmental protests (pre-EPA 2005), problems resolving environmental concerns (post-EPA 2005), and problems with seasonal timing because of a delay in obtaining a biological opinion and incidental take statement (post-EPA 2005).

**Suggestions to Avoid Delay:** The survey respondents were asked to identify recommendations for future applicants to avoid or minimize delay in obtaining federal authorizations. Although the wording of the suggestions varied, the following common themes emerged.

- Engage in consistent communication and establish strong relationships with FERC and other agencies (28 respondents)
- Ensure applications are as complete as possible (five respondents)<sup>73</sup>
- Hold interagency meetings to create a team atmosphere and encourage working together (five respondents)
- Obtain political support or connections to help prevent delays (five respondents)
- Engage in thorough environmental analysis and planning before beginning the project (one respondent)
- Pay close attention to public land management agencies' planning processes (one respondent)
- Engage the public thoughtfully and address reasonable demands early in the process (one respondent)
- Commence field surveys and ensure access for the surveys early in the process (one respondent).

**Suggestions to Improve Agency Processes:** The following suggestions were provided for how federal agencies (and delegated state agencies) could help prevent delay.

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<sup>73</sup> One respondent remarked, "Providing the agencies as complete an application as possible is the single most effective means to securing permits in a timely manner."

- Clearly identify the single division, department, or office within each agency that will have the lead for the project in order to avoid confusion and duplication. This should include a single point of contact at each agency.
- Provide clear communication among the agency, the project proponent, and FERC regarding project timelines and requirements.
- Provide better agency staff training on EAct 2005 requirements.
- Assign sufficient staff to each project to avoid delays. If sufficient staff is not available, use third-party contractors to process applications.
- Develop better interagency cooperation and coordination during the permitting process, including multiple joint agency meetings. Cooperating agencies need to work more closely and effectively with FERC and with each other.
- Provide better oversight of staff members to ensure schedules are kept, agency requirements are fair and consistent, and internal coordination is maintained.
- Adhere to existing application processing guidelines and interagency agreements.

**Suggestions for Overall Process Improvement:** The most common suggestion for improvement was to provide FERC with the ability to enforce the federal-authorization deadline against cooperating agencies with real consequences for missing such deadline. Several respondents suggested that FERC be authorized to provide automatic authorization if an agency does not act by the deadline. This solution was also expressed in conjunction with the need for enforcement options other than litigation.

Several respondents also recommended that the Commission work with agencies to provide more explicit completeness requirements. Agencies need to provide well-defined application requirements and deliverables to make the permitting process more transparent and easy to understand. Survey respondents for two projects wanted permits to be based on the single FERC NEPA process, eliminating supplemental environmental documents or separate NHPA Section 106 processes carried out by other agencies. Determination of ACHP involvement earlier in the Section 106 process, the ability to obtain site access to conduct surveys, and consistent agency requirements for surveys and drawings were also recommended.

**Effective Permitting Strategies:** The survey asked respondents to identify the most effective methods for avoiding or minimizing delays in the federal agency authorization process. The methods identified focused on early planning and identification of issues; involving agencies early and communicating frequently; filing complete and timely applications; minimizing changes once the process has started; and developing and drawing on relationships with higher-level agency officials and other influential contacts. Specific suggestions included:

- Meeting with agencies that will be commenting or otherwise providing input on the project even if the agency does not have its own authority to issue a permit or authorization required to construct the project.
- Meeting with agencies in the field to address issues of concern.
- Discussing the agencies' application processing guidelines and interagency agreements before submitting an application and making sure the agency follows its own guidelines.
- Involving legal counsel well versed in applicable permitting requirements and who can coordinate with key agency personnel.
- Securing permission for surveys prior to permit application submittals.
- Commencing field surveys well in advance of initiating the pre-filing process and completing surveys on schedule.
- Building a good rapport with agencies, including a strong sense of "team," during the permitting process and ensuring each agency knows that the success of the project is strongly contingent upon both applicant and agency's timely responses and participation.
- Paying careful attention to land management agencies' land use plans.

#### **VIII. Interviews of Pipeline Company Personnel**

To obtain a better understanding of the causes of permit delays, Holland & Hart conducted in-depth interviews with pipeline company personnel regarding four of the post-EPA 2005 projects addressed in the survey. These four projects were selected because (1) they each experienced substantial delays in receiving one or more federal authorizations, and (2) they represent a broad range of geographical locations as well as pipeline lengths.

The interviews provided an opportunity to explore more thoroughly the specific causes of delay for these projects as well as suggestions for improvement. The interviewees were promised anonymity so that they could speak candidly about their experiences with specific agencies. As a result, this report does not identify the interviewees or provide specific details about the interviewees' projects.

Although the interviewees' projects represent diverse locations and lengths, several common themes emerged from the interviews that clarify at least some of the causes of federal permitting delay. The interviews also provide concrete experiences that verify at least some of the concerns that prompted this study. The interviewees identified FERC's lack of permit enforcement authority and the other federal agencies' discretion about what constitutes a

complete application as two of the major causes of federal authorization delay and overall project delay. The common themes from the interviews are discussed below.

#### **A. Desire for Stronger FERC Lead Agency Role**

**Delay Concerns:** All four of the companies interviewed reported having good working relationships with FERC and were hesitant to criticize the agency, particularly since they recognize the difficulty of the process and the lack of enforcement options that EAct 2005 provided for FERC. Still, they each wished that FERC, as the lead agency, had had a greater level of involvement with the entire federal authorization process. For instance, they wanted FERC to take stronger action when agencies did not meet their federal-authorization deadlines. They also wished that FERC had intervened earlier when they experienced problems with other federal agencies that developed into significant delays.

One interviewee felt that most of the agencies were not even aware of the EAct 2005 federal-authorization deadline. If the agencies did know about the deadline, their conduct suggested that they felt no pressure to meet it. Another interviewee wanted more assistance and guidance from FERC when the project proponent ran into problems with other agencies that it could not overcome. Instead, this interviewee felt that FERC too often left it to the project proponents to negotiate the difficult issues with the relevant agencies on their own. Two companies wished FERC had intervened earlier in the Migratory Bird Treaty Act (MBTA) negotiation process and felt that FERC should have been aware of this issue and brought it to the companies' attention during the pre-filing process.<sup>74</sup> Other companies wished FERC had put more pressure on the Corps to accept FERC as the lead agency and not to duplicate NEPA processes.

One company related that a disputed permit was eventually approved after much negotiation and delay. But despite the long and arduous negotiation process, the permit was virtually the same as it would have been if FERC had simply imposed the draft permit conditions that already had been identified when the deadline passed. The company saw this as an indication that if FERC were to intervene in cases of unreasonable delay, it would have little impact on the actual permit conditions ultimately imposed but might speed up the process.

Two contrasting experiences illustrate how FERC can make a difference when it intervenes in a permitting process. For the first project, an agency imposed a requirement that the company felt was unreasonable. The company worked with the agency to negotiate this requirement, but the process continued to cause delay. It appeared that this agency was waiting for FERC to act, and FERC was waiting for the agency to act. But FERC did not get directly involved in negotiating with the other agency. The end result was additional delay that likely could have been avoided had FERC chosen to be involved in the process.

The second project involved a federal agency that attempted to insert requirements into a permit that already had been released for public comment. The company approached FERC,

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<sup>74</sup> MBTA issues are discussed further in Section VIII.C below.

and FERC intervened to prevent the agency's field office from adding requirements so late in the process. In this case, because of FERC's involvement, the other agency's actions did not cause delay. These examples show that the level of FERC's involvement with other agencies during the federal authorization process can affect potential causes for delay.

**Suggestions for Improvement:** The companies all felt that FERC needs to be able to impose consequences or override other agencies when they fail to meet the deadline. Without this tool, the authorizing agency may delay authorizations with impunity. Therefore, it is easy to let other agency priorities take precedence. Most project proponents expressed a desire for FERC to do more outreach and education to the other permitting agencies about the requirements of EAct 2005 and good practices to meet the deadlines imposed.

Several indicated that had the Commission taken action when agencies did not respond in a timely manner, the problems causing them large delays could have been avoided. All of the interviewees indicated that, in hindsight, they should have involved FERC earlier when problems arose and not waited until the permit was late to ask FERC to intervene. Even permits that are issued right on the deadline can cause pipeline companies considerable uncertainty, which requires contingency planning and puts pressure on the schedule.

However, although wanting FERC to take stronger action, the interviewees expressed some concern that more pressure from FERC could result in poor working relationships with particular agencies. They recognized that, without the ability to impose consequences on the other agencies, too much pressure from FERC, especially early in the process, could backfire and result in longer delays. Yet they added that, if FERC had greater involvement as standard operating procedure, the other agencies would come to expect it, and this problem could be avoided.

## **B. State Involvement Often Delays Permitting Processes**

**Delay Concerns:** For two of the four projects, state agencies contributed to a major part of the delay. The delays resulted from inadequate agency staffing, lack of experience with pipelines, and unclear or uncommon state permitting requirements.

For example, one project experienced several months of delay when the state agency with authority to issue an NPDES permit informed the pipeline company that it did not have adequate staff or funding to review and respond to comments from local municipal governments. This revelation came several months after the agency had reassured the company that it was processing those comments and did not require the company's assistance. The pipeline company was forced to negotiate with the local governments on an individual basis to resolve their concerns in order to reach the point where the state agency was willing to issue the permit. This caused major project delays and frustration, as the state agency was unwilling or unable to mediate or broker agreements with the local governments. Another company indicated that although the staff of the state agency was willing to work on the permit application, the fact that the agency representative had not worked before with a large linear



project slowed the process down and required significant company involvement to keep the process on track.

Another project had difficulty interpreting and applying differing state regulations governing access to project sites to conduct on-the-ground surveys for ESA and NHPA consultation and Corps Section 404 permits. The pipeline crossed several different states, and each state had different laws governing site access. Even when the laws allowed access, the state offices often refused to intervene when private landowners denied access for cultural or ecological surveys. The lack of access delayed several federal authorizations, including ESA and NHPA consultation and the Corps 404 permit.

**Suggestions for Improvement:** One company acknowledged that consultation with FERC earlier in the permitting process might have helped avoid delays because a state agency gave the company incorrect advice about the process required to comply with the NHPA. The conflicting standards caused delay in obtaining a federal authorization that could have been routine had the pipeline company been correctly advised to pursue involvement by the ACHP up front.

One company asserted that clear guidelines and predictability from the agencies are the most important elements for pipeline companies. It is not difficult for companies to follow differing state requirements as long as those requirements are clear and generally align with standard practices in other states. Problems arise when agencies provide inaccurate information, change requirements after significant time and effort has already been invested, or impose unclear legal requirements or guidelines.

### **C. Migratory Bird Treaty Act Issues**

**Delay Concerns:** Two of the four projects experienced major delays due to issues related to the MBTA. In both cases, the USFWS required the companies to develop an MBTA conservation plan that included mitigation measures before it would issue its biological opinion (BiOp) to complete the ESA Section 7 consultation. One company reported that this has been a problem with other pipeline projects it has undertaken, and that USFWS requirements for the conservation plan and mitigation differ greatly from state to state, with no real guidance to serve as a starting point for discussions with USFWS.

One of the companies experienced even further delays after the MBTA issue was resolved because the delay resulted in construction taking place during the nesting period for other endangered species. This required reroutes or stoppages to avoid impacts to the species and their nests. The company was not allowed to take any steps or access the site to prevent nesting before the BiOp was issued, and USFWS refused to issue the BiOp until the MBTA issues were resolved.

Because of the substantial delays, both companies also felt that their MBTA conservation plans were overly restrictive because they were negotiating under substantial time pressure and uncertainty about FERC expectations and the legal requirements for MBTA

compliance. One interviewee claimed that USFWS had the company “over the barrel” for the MBTA conservation plan.

**Suggestions for Improvement:** Both companies felt that the Commission should have helped them recognize and address the MBTA issue much earlier in the permitting process. In addition, both felt that FERC guidance on MBTA planning, mitigation, and compensation expectations would greatly facilitate the process in the future.

#### **D. Army Corps of Engineers 404 Permits**

**Delay Concerns:** The Corps 404 permits caused major delay for two of the four projects, and minor delays for the other two projects. Some of these delays were actually the result of delays in other federal authorization processes. One Corps office required a full review of all other environmental permits required before it would sign off on the 404 permit. The MBTA issue mentioned above also contributed to delays in obtaining their 404 permits. Other delays related to agency staffing problems. Because the 404 permit requires compliance with other federal environmental laws, such as ESA Section 7 and NHPA Section 106, there is often a duplication of FERC’s efforts as the lead agency. In some cases, this duplication is not exact, with the Corps imposing different requirements to satisfy the same environmental requirements. One project reported that a Corps office conducted its own tribal consultation that followed different rules relating to mitigation. This process was required in addition to FERC’s NHPA process and caused delay because the Corps office had no deadline for tribal responses and waited to issue the permit until all tribes had given at least some response. Another Corps office initially indicated that a project could use a general permit but later indicated that an individual permit would be required. After the office sat on the permit application for several months, the pipeline company was required to re-apply for the permit, which the agency could contend restarted the clock for processing the application.

#### **E. Lack of Deadline Enforcement Options**

Two companies stated that the legal remedies in federal court provided by EAct 2005 were not a realistic solution for permitting problems. Both companies had experiences with agencies that they felt were overstepping legal bounds, and one company even tried presenting formal legal arguments to an agency when it believed that the agency was not abiding by the requirements of EAct 2005. Both companies, however, indicated that litigation is almost never a realistic option when a company is in the midst of the permitting process. This sentiment is supported by the survey results. As one company expressed, “at the end of the day, keeping up a good relationship with an agency is always more important.” Companies would prefer to preserve a positive relationship and keep an agency working on the authorization rather than filing a lawsuit that would only serve to further delay their project and antagonize the agency.

## **F. Inconsistent Agency Staffing and Coordination with Other Agencies**

**Delay Concerns:** Two projects experienced significant delay in the federal authorization process when agency officials assigned to the project left or were reassigned in the middle of the process. One company was not notified for three months after its agency contact left. The other project experienced delay as the new official had to be brought up to speed and insisted on repeating several assignments that the company had considered complete.

Another problem with staffing involved the communication of inaccurate information that the project proponent relied upon to its detriment. As mentioned above, one agency indicated it would handle interactions with local governments, but after four months, the agency admitted it was overwhelmed and required the pipeline company to take over this process. Another company relied on an agency staff member's assertion that he would make the necessary decisions related to its project. The company later learned that the final decision would be made by the agent's superior, who had not been included in discussions and negotiations. This inaccurate information caused delay and some confusion within the agency.

Consistent with the narrative survey results, interviewees for all four projects also reported that the potential for delay increased when multiple agencies were involved. For example, for three of the projects, the Corps and another agency were each waiting for the other to issue its permit first. Other agencies involved in interagency conflicts that resulted in delay included the USFWS, which delayed its response to a migratory bird plan for over seven months or requiring complete mitigation plans before starting the time clock for FERC's notice of initial consultation. One state agency responsible for issuing water quality certifications waited for FERC to complete all of its NEPA, ESA, and NHPA analysis before signing off on the certificate. And the Corps also waited for FERC to obtain ESA and NHPA authorizations before it would proceed to issue an authorization. In two projects, the USFWS attempted to get involved in other agencies' permitting processes after the deadline for comments had passed. As related above in Section VIII.A., the results of these attempts differed depending upon the level of FERC involvement.

**Suggestions for Improvement:** Two companies expressed the desire that agencies hire staff specializing in linear projects because the issues associated with these types of projects are often different from those associated with single-site projects. Another company recommended hiring more third-party contractors to help understaffed agencies.

## **G. Impact of Hydraulic Fracturing on Pipeline Projects**

Two companies reported that increased public concern over hydraulic fracturing had an impact on their projects. With the increased public interest, they reported that more outside parties are becoming involved in the permitting processes and making demands for mitigation or withholding approvals. In addition, they reported that the parties with direct involvement, such as landowners, state agencies, and non-governmental organizations, have become savvier in general. These parties are recognizing that they have leverage and are using this leverage to

obtain more mitigation requirements from pipeline companies during the federal authorization process, which sometimes results in delay.

#### **H. Duplicative Processes**

Some duplicative processes have been discussed above in relation to the Corps and interagency coordination. In addition to those overlapping efforts, two companies mentioned difficulties caused by similar agency application requirements with small but important differences in the details regarding project drawings. One company delayed its federal permit applications because it did not have the engineering resources to produce the required specifications and drawings for both FERC and the other federal agencies at the same time. The company had to focus on the FERC submissions and then move on to other federal permits to address the differences in detail. The project reported that quality control suffered as a result of confusion over slight differences in drawing requirements between FERC and agencies in different states. The company unable to present the data in the drawings in the way that it felt best represented the reality on the ground. Instead, it had to satisfy the varied requirements of different agencies and FERC. The company has remedied this for future projects by expanding its engineering drawing teams.

A second company also expressed confusion about different drawing requirements for FERC and another federal agency. The agency had similar requirements to FERC's for construction permits, but there was confusion over some of the details. The company was required to make difficult changes to drawings that basically covered the same things. The company reported that this was a difficult process to manage.

#### **I. Pipeline Company Contributions to Delay**

Each of the four companies interviewed indicated they felt their projects were very well planned, that they made considerable efforts to learn from the Commission what problems they should anticipate, and that they had educated FERC and other agencies about their project plans. None of the companies interviewed reported any major changes to their projects that contributed to the delay, but most reported some smaller changes or reroutes. Some company shortcomings that were reported by the interviewees included:

- Inadequate engineering resources to handle FERC and federal agency requirements;
- Unfamiliarity with state laws and the idiosyncrasies of state agencies, including access laws, mitigation requirements for streams, and tribal review of mitigation parcels;
- Waiting too long to ask for FERC's help or involvement in a conflict or process;
- Not enough on-the-ground planning before entering into the permitting process;
- Assuming that no news from an agency was good news; and

- Revising the pipeline project route, requiring resubmission of forms.

## **IX. Implications of Delay**

While the survey did not ask respondents to quantify the costs of delay in the federal authorization process, such delay can have a significant financial impact on interstate natural gas pipeline companies. It can cause immense construction stand-by charges for pre-ordered equipment and construction crews and demobilization/remobilization costs for construction windows that are missed as a result of delay. It can push the construction period into the winter, when bad weather can slow construction, create safety concerns, and require additional manpower and other costly measures. Delay can also increase environmental disturbance and impact property owners and cause restoration challenges that must be addressed in the spring. In addition, it can result in substantial revenue losses for the pipeline company.

Delay in the construction of interstate natural gas pipelines can also have significant ramifications for other parties. Because transmission bottlenecks can create price differentials that directly affects natural gas consumers, a delay in construction extends the period during which consumers experience that price differential. Furthermore, construction delays can result in the loss of economic benefits to the community and construction jobs. Finally, delay in the construction of a pipeline can postpone millions of dollars of sales and use tax revenues to states and ad valorem taxes to local jurisdictions.

## **X. Options to Address Delay in the Federal Authorization Process**

In March 2012, President Obama recognized in Executive Order 13064 that, in the context of infrastructure projects,

our Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities. They must ensure that agencies set and adhere to timelines and schedules for completion of reviews, set clear permitting performance goals, and track progress against those goals. They must encourage early collaboration among agencies, project sponsors, and affected stakeholders in order to incorporate and address their interests and minimize delays.<sup>75</sup>

This Presidential directive underscores the need to minimize or eliminate the causes of delay in the federal authorization of interstate natural gas pipeline projects. The following suggestions are intended to address one or more of the sources of delay identified in this report.

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<sup>75</sup> Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects (March 22, 2012).

## A. Legislative Options

**Schedule Enforceability.** Perhaps the most commonly cited complaint in the survey and interviews was the lack of enforcement authority for the federal-authorization deadline, aside from applicant-initiated litigation in federal court. Congress has mandated that “[e]ach Federal and State agency considering an aspect of an application for Federal authorization *shall cooperate with the Commission and comply with the deadlines established by the Commission.*”<sup>76</sup> However, this congressional directive lacks teeth because there are no repercussions if federal and state agencies do not comply with the deadline established by FERC. Filing a lawsuit is essentially futile because (1) the applicants want to maintain positive working relationships with the agencies for the proposed project and future projects; (2) the time and expense required for such a legal challenge generally outweigh any favorable ruling; and (3) filing a lawsuit virtually guarantees additional delay.

An option to resolve this issue is for Congress to revisit its 2005 amendments to the NGA to require (or at least authorize) FERC to take over issuance of a federal authorization that remains pending when the 90-day deadline expires. Alternatively, the pending authorization could be deemed granted when the deadline passes, unless the agency responsible for the authorization has obtained the concurrence from FERC and the applicant for an extension of the deadline. Until such enforcement options are available, the effectiveness of FERC outreach with the other agencies will be limited because other demands imposed on those agencies that have real consequences will take priority.

**Pre-Certificate Access.** The interviews revealed that the inability to access certain land to conduct biological or cultural resource surveys during the permitting process led to delays in obtaining the required authorizations. Currently, the NGA does not allow a pipeline company to force a landowner to allow access for such surveys until the company receives its certificate from FERC and can exercise the power of eminent domain. Congress could amend the NGA to grant interstate natural gas pipeline companies the right to access private property to conduct non-invasive surveys that are required during the federal authorization process.

**Eliminate MBTA Strict Liability.** Because no incidental take authorization can be obtained under the MBTA, the EPA 2005 federal-authorization deadline has no impact on delays caused by negotiations with the USFWS for migratory bird conservation measures to minimize the likelihood of MBTA liability. The potential for strict criminal liability under the MBTA with no incidental take permit available results in numerous project planning difficulties, including risk-management and delay concerns. This conundrum could be eliminated if the courts universally recognized that the MBTA was not intended to criminalize incidental take that occurs during the implementation of otherwise lawful activities or if Congress amended the MBTA to state that position definitively.<sup>77</sup> Under that scenario, migratory bird conservation

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<sup>76</sup> 15 U.S.C. § 717n (emphasis added).

<sup>77</sup> While the recent Memorandum of Understanding between FERC and the USFWS regarding Implementation of Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds” provides some sideboards to the consideration of migratory bird conservation issues during the federal authorization process, it neither

measures would still be evaluated and imposed, as appropriate, as part of the NEPA and Commission approval process, but incidental take of migratory birds during the construction or operation of pipelines would not subject a project proponent to criminal liability.

**State-Authorization Deadline.** The EAct 2005 fixed-timeline provision is directed solely at federal authorizations. Although technically preempted, interstate natural gas pipeline companies are required by FERC's policy to obtain numerous state-level permits. As demonstrated by the survey and interview results, these state-level permits can be the cause of delay. Congress could amend the federal authorization provision of the NGA to make it applicable to any authorization for an interstate natural gas pipeline, including state and local authorizations that are not pursuant to federal law.

## **B. Process Options**

**Greater FERC Involvement.** The survey and interview results indicate a strong industry desire for FERC to play a more assertive lead-agency role in shepherding a proposed project through the permitting process. As mentioned above, without real consequences for agency delay, the effectiveness of FERC outreach to the agencies will be limited by other pressures on those agencies. However, by adopting a policy of greater interaction and involvement with the permitting agencies (state and federal), the Commission could take a more proactive role so that the project proponent would not be solely responsible for resolving issues with those agencies. The FERC project manager could attend meetings with other agencies to educate them, attempt to resolve permitting issues, and ensure adherence to the 90-day deadline, when applicable. FERC has already conducted considerable outreach to agencies about EAct 2005, and recently appointed a new interagency coordinator, which could prove useful in minimizing agency delays.

Another avenue to facilitate FERC's involvement would be to push for better compliance with the FERC regulation requiring federal agencies and state agencies acting pursuant to federal law to provide notice to FERC when they receive an application for a federal authorization.<sup>78</sup> This would raise FERC's awareness of the agencies involved and provide an opportunity early in the process for FERC to educate an agency about the 90-day deadline and statutory requirements for a timely authorization process.

**Use of Conditional Authorizations.** More than one project experienced a situation in which an agency withheld its authorization pending action by another agency. Delay could be minimized if each agency with jurisdiction over an infrastructure project adopted a policy of authorizing the project contingent upon completion of the other agency's process, (i.e., conditional authorizations), because that agency's authorization would automatically be effective once that other process was complete.

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eliminates strict liability nor provides authorization to take migratory birds. Thus, it does little to alleviate liability concerns and potentials for delay.

<sup>78</sup> 18 C.F.R. § 385.2013.

**Education and Outreach.** It appears that agency awareness of the fixed-timeline provision of EAct 2005 may be limited. Additional outreach by FERC early in the process to other agencies subject to the 90-day federal-authorization deadline could perhaps result in greater recognition of and adherence to the deadline.

**Linear-Facility Specialists.** Some of the delay in the pipeline permitting process was attributable to a lack of agency experience with linear facilities. One policy option to address this issue would be for each agency that may be involved with the authorization of linear projects to assign an agency official with considerable experience with such projects to be the main point of contact and project lead regardless of where that facility is being proposed. For instance, the Corps could have one or more national linear-facility coordinators who could oversee and guide each district office's consideration of a 404 permit for a proposed pipeline. The assigned linear-facility coordinator would be the ultimate decision-maker for the agency after obtaining the input of the agency officials in the offices affected by the proposed action. BLM's use of national project managers for linear facilities is a good example of how specialists can be used to oversee the permitting process. Still, BLM's program could be improved by providing the project managers with the ultimate decision-making authority for the right-of-way grant.

**Use of Third-Party Contractors.** The use of a third-party contractor funded by the applicant to prepare a NEPA analysis is a well-established approach for assisting federal agencies with their NEPA obligations. A similar concept could be employed for other agencies' evaluation of permit applications. The project applicant could fund a third-party contractor to review the information submitted to the agency with the permit application and recommend to the agency whether additional information is required or whether the application is complete and can be acted upon. The efforts of the third-party contractor would be solely under the direction of the agency with no involvement by the applicant other than funding. This approach could help alleviate some of the staffing issues identified as causes of delay in the permitting process.

**FERC Policy on Preemption.** Although this report focuses on the federal-authorization deadline provision of EAct 2005, the survey results and interviews also identified causes of delay with state-level authorizations. State or local laws that regulate environmental issues over which FERC has authority are preempted by the NGA.<sup>79</sup> Nonetheless, as a matter of policy, FERC has "encouraged applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures."<sup>80</sup> As a result, FERC-regulated pipeline companies feel obligated to seek permits under state and

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<sup>79</sup> *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 823 (8th Cir. 2004) (citing *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.")); *but see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (providing that not every state law that has some indirect effect on FERC's authority is preempted).

<sup>80</sup> See *Northern Natural Gas Co.*, 377 F.3d at 823 (quoting *Maritimes & Northeast Pipeline, L.L.C.*, 81 FERC ¶ 61,166 (1997)).



local law. While FERC recognizes, consistent with U.S. Supreme Court precedent, that state and local agencies, through application of state and local laws, may not prohibit or unreasonably delay the construction of facilities approved by FERC,<sup>81</sup> small delays or additional processes are not uncommon. Although FERC's current policy of encouraging cooperation with state and local agencies makes diplomatic sense, if FERC revised its policy to recognize more explicitly and more forcefully that state and local laws that delay the construction of facilities approved by FERC are preempted by the NGA, pipeline companies likely would be able to avoid these delays in many cases.

### C. Regulatory Options

**Eliminate Duplicative Efforts.** The survey and interviews also identified issues with duplicative agency compliance efforts, especially in the context of ESA Section 7 consultation and NHPA Section 106 consultation. The logical solution for this issue is for other agencies with jurisdiction over an aspect of an interstate natural gas pipeline to update their regulations to recognize that FERC, as the lead agency, has the responsibility for satisfying those consultation requirements and that the federal authorizations can be issued conditioned on FERC's conclusion of those processes.

**Clearly Defined Application Requirements.** Several survey respondents indicated that agency requirements for applications were unclear or inconsistent. FERC and industry representatives could work with agencies to develop clear application requirements, provide guidance on common mistakes that result in applications being deemed incomplete, and follow-up with agencies, such as BLM, that have a pattern of designating applications incomplete.

**Agency-Specific EAct 2005 Regulations.** As noted above, one reason suggested for some agencies' failure to adhere to the federal-authorization deadline is limited agency awareness of the requirements of EAct 2005. Knowledge of and compliance with the deadline would be enhanced if agencies responsible for authorization of interstate natural gas pipelines issued regulations acknowledging the deadline and requiring compliance with it.

**Require Expedited NEPA Compliance.** In light of the President's recognition of the need to streamline federal permitting for infrastructure development,<sup>82</sup> the Council on Environmental Quality could issue new rules requiring agencies to expedite the NEPA review for qualified national infrastructure projects. These rules would need to contain clear directives regarding the responsibilities and compliance metrics for the relevant agencies. This expedited NEPA review would increase the likelihood that other federal authorizations required for an interstate natural gas pipeline would be issued in time to meet the project's schedule.

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<sup>81</sup> See *id.* (citing *Maritimes & Northeast Pipeline, L.L.C.*, 80 FERC ¶ 61,136 (1997)); *Schneidewind*, 485 U.S. at 300 (providing that state law that conflicts with the federal regulatory scheme under the NGA is preempted).

<sup>82</sup> See, e.g., Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011); Presidential Memorandum for the Heads of Executive Departments and Agencies on "Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review" (Aug. 31, 2011).

## **XI. Conclusion**

Congress enacted EAct 2005 by strong majorities. One of the Act's significant purposes is to expedite the federal-authorization timeline for interstate natural gas pipelines. Unfortunately, the trend since EAct 2005 is in the opposite direction – authorization delays have increased in both number and length. Consequently, EAct 2005 has not lived up to its promise to reduce the time required to obtain necessary federal permits and further amendments to the Act may be the solution. While the federal authorization process is complex and involves a multitude of actors and issues, the industry survey and interviews verify that the process is not working as intended and that agencies are not meeting their legal obligations to issue authorizations by the FERC deadline. The legislative, process, and regulatory changes suggested in this report offer potential options for reversing the trend toward increased delay in the pipeline authorization process.

## Appendix I

### Computer-Based Survey Questionnaire

1. Please list the name and FERC docket number for the project that you will be addressing in this survey.
2. FERC Certificate of Public Convenience and Necessity (CPCN) Application Process:  
Traditional or Pre-filing?
3. Were pre-filing meetings held with FERC staff?
4. Other Federal Authorizations – Scheduling:
  - Were these federal agency authorizations needed?
  - Date of filing for agency authorization in comparison to CPCN application
  - Was a desired schedule submitted with filing to agency?
  - Did agency indicate it could meet the desired schedule?
  - Were pre-filing meetings held with agency before filing?
  - How long before filing were pre-filing meetings held?

BLM Right-of-Way Grant – Mineral Leasing Act
Army Corps of Engineers 404 Permit
Army Corps of Engineers Rivers and Harbor Permit
ESA Section 7 Consultation
NHPA Section 106 Consultation
Forest Service Special Use Permit
Coastal Zone Management Act Consistency Determination

5. Please list any other federal authorizations that were needed.
6. Other Federal Authorizations – Completeness:
  - Was filing deemed complete after initial submittal?
  - How long after submittal was filing deemed completed?
  - Did agency request additional information to complete filing?
  - How long after original filing did agency request additional information?
  - How long did it take to respond to agency request for additional information?
  - Was additional follow-up information requested to complete filing?

BLM Right-of-Way Grant – Mineral Leasing Act
Army Corps of Engineers 404 Permit
Army Corps of Engineers Rivers and Harbor Permit
ESA Section 7 Consultation
NHPA Section 106 Consultation
Forest Service Special Use Permit
Coastal Zone Management Act Consistency Determination

7. If a federal agency requested additional information after you submitted an application, please identify the type(s) of additional information requested:
  
8. Other Federal Authorizations – FERC Deadline:
  - Please indicate the amount of delay in obtaining agency authorization.
  - Was agency authorization received within 90 days of the issuance of FERC’s final EA/EIS (or by the alternate deadline established by law)?
  - If FERC applied an alternate deadline, what was the length of that deadline?
  - How long after the federal authorization deadline was each agency authorization received?

BLM Right-of-Way Grant – Mineral Leasing Act
Army Corps of Engineers 404 Permit
Army Corps of Engineers Rivers and Harbor Permit
ESA Section 7 Consultation
NHPA Section 106 Consultation
Forest Service Special Use Permit
Coastal Zone Management Act Consistency Determination

9. For those federal agency authorizations that were not issued within 90 days of the issuance of FERC’s Final EA/EIS (or by the alternate deadline established by law), please explain what caused the delay.
  
10. What approach would you recommend to a future applicant for those federal agency authorizations mentioned in your response to Question 9 to avoid and/or minimize delay?
  
11. What recommendations would you provide to those federal agencies mentioned in your response to Questions 9 and 10 to avoid and/or minimize delay in the future?
  
12. EAct 2005 provides a process for applicants to pursue remedies in the United States Court of Appeals for the District of Columbia for federal agency delay for pipeline projects that require a CPCN. For projects proposed after EAct 2005 was passed, did you pursue such remedies for federal agency delay on your project? (Yes or No)

13. For projects proposed prior to EPOA 2005, did you pursue any judicial or other remedy for federal agency delay on your project? (Yes or No)
14. If Yes, please describe those remedies and whether they were effective.
15. What were the most effective methods in avoiding and/or minimizing delays in the federal agency authorization process for your project?
16. How do you think the federal authorization process for natural gas pipeline projects could be improved to prevent and/or minimize delays and improve coordination between federal agencies?
17. May we contact you to follow up for more information concerning your experiences and thoughts? Names of individual respondents will not be associated with individual answers in any publicly available report. This information is being gathered for the INGAA Foundation's internal research purposes only. If yes, please provide us with your name and contact information below.