

178 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Certification of New Interstate Natural Gas Facilities Docket Nos. PL18-1-001

Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews PL21-3-001

ORDER ON DRAFT POLICY STATEMENTS

(Issued March 24, 2022)

1. On February 18, 2022, the Commission issued (1) an updated policy statement describing how the Commission will determine whether a new interstate natural gas transportation project is required by the public convenience and necessity under section 7 of the Natural Gas Act (NGA) (Updated Policy Statement)¹ and (2) an interim policy statement explaining how the Commission will assess the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA) (Interim Greenhouse Gas (GHG) Policy Statement).²
2. Upon further consideration, we are making the Updated Policy Statement and the Interim GHG Policy Statement draft policy statements. The Commission invites comments on the draft policy statements by April 25, 2022,³ and reply comments by

¹ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Policy Statement).

² *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

³ We note that in Docket No. PL21-3-000, the Commission invited comments on the Interim GHG Policy Statement by April 4, 2022. As stated above, comments on this statement are extended to April 25, 2022.

May 25, 2022. The Commission will not apply the Updated Draft Policy Statement or the Draft GHG Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets.⁴

The Commission orders:

(A) The February 18, 2022, *Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* are designated as draft policy statements.

(B) Comments on the draft policy statements may be filed by April 25, 2022 and reply comments by May 25, 2022.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴ Updated Policy Statement, 178 FERC ¶ 61,107 at P 100 (stating the policy statement will apply to new or pending applications); Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 129 (same).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities Docket Nos. PL18-1-001

Consideration of Greenhouse Gas Emissions in Natural PL21-3-001
Gas Infrastructure Project Reviews

(Issued March 24, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur with today's order¹ insofar as it redesignates the Commission's recently-issued Updated Certificate Policy Statement² and Interim GHG Policy Statement³ as draft policy statements, rendering them inoperative. I dissent in part because the Commission seeks comment on draft policy statements which exceed the Commission's legal authority and which advance bad policy.⁴
2. While I welcome this order as a positive development, it ultimately does little to dispel the "fog of indecision"⁵ that the Commission has cast over the development of vital natural gas infrastructure.
3. There still lingers the threat that the now-draft policy statements will be applied, in some form, at some point in the future. The Commission has converted the policy

¹ See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (Order on Draft Policy Statements).

² See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Danly, Comm'r, dissenting) (Updated Certificate Policy Statement).

³ *Consideration of Greenhouse Gas [GHG] Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Danly, Comm'r, dissenting) (Interim GHG Policy Statement).

⁴ See Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2.

⁵ See *Hearing to Review FERC's Recent Guidance on Nat. Gas Pipelines Before the S. Comm. on Energy and Nat. Res.* (Mar. 3, 2022 Senate Hearing), 117th Cong. (2022) (Senator Barrasso quoted Alan Armstrong, the CEO of The Williams Companies, Inc., as stating the Interim GHG Policy Statement "has shrouded FERC certificate decisions in a fog of indecision.").

statements into “drafts”; it has not rescinded them. I am concerned that the same philosophies that animated the Commission’s issuance of these policy statements in the first place will drive similar action in the future. Colleagues who claimed that judicial precedent compelled the Commission’s adoption of the contents of the now-draft policy statements⁶ have not recanted, nor have they disclaimed the policy statements’ sweeping jurisdictional claims.⁷ Given how long it takes to develop natural gas infrastructure, project sponsors—whether of projects already pending before the Commission or those considering the submission of a new certificate application—cannot have any confidence that their projects will not once again be subject to these policy statements, even if they issue in modified form in the future.

4. Applicants and prospective applicants are now left to guess as to what modifications the Commission might make to the policy statements. Can they have any confidence that the Commission now agrees that the issue of greenhouse gas emissions and their mitigation is an issue properly left to Congress? Can they have any confidence that the Commission will not attempt to implement the substance of the policy statements through individual certificate proceedings? Might the Commission again decide that any newly-issued policy statements will apply to pending applications? None of these

⁶ See, e.g., Written Testimony of Chairman Richard Glick for March 3, 2022 Senate Energy and Natural Resources Committee Hearing, at 9, <https://www.energy.senate.gov/services/files/270F8F6E-C554-43CF-B683-EB60583873D8> (“The principal purpose of the Interim Greenhouse Gas Policy Statement is to provide a framework for considering reasonably foreseeable greenhouse gas emissions in our analysis under NGA sections 3 and 7 that is consistent with binding court precedent.”); *Transcript of the 1087th Meeting*, FERC, at 36-37 (Feb. 17, 2022), <https://www.ferc.gov/news-events/events/february-17-2022-virtual-open-meeting-02172022> (Commissioner Clements stated, “I think [the Updated Certificate Policy Statement] is an important step towards establishing a framework for making wise and legally durable decisions that account for the complexities of an energy system undergoing profound transformation.”); Written Testimony of Commissioner Willie L. Phillips for March 3, 2022 Senate Energy and Natural Resources Committee Hearing, at 1-2, <https://www.energy.senate.gov/services/files/794290C0-191C-4AF9-A747-E3108A111CEB> (“Our failure to comply with court precedent interpreting the NGA and NEPA risks possible remand or vacatur, which may result in further delays or curtailment of needed service. I believe the Commission’s recently issued guidance is a first step in addressing the uncertainty and delay associated with the Commission’s review of proposed natural gas infrastructure projects.”).

⁷ See, e.g., Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 109 (“the Commission has broad authority to require mitigation of GHG emissions by a project sponsor”).

questions have answers and I worry that, despite the continued uncertainty, today's order could lull stakeholders into a false sense of comfort.

5. How the Commission will process certificate applications in the absence of the policy statements also remains unclear. I have explained in some detail in correspondence with Members of Congress how certificate applications are languishing with the Commission.⁸ Most recently, I explained how applications for LNG export facilities and pipelines to provide gas to such facilities are being delayed.⁹ Even relatively minor requests for such things as expanded construction hours have been neglected, having awaited Commission action for over a year.¹⁰ Much of this delay is due to the decision to conduct full environmental impact statements (EISs) for projects for which simpler environmental assessments would satisfy the Commission's obligation to take the necessary "hard look" at the environmental effects of the proposed project.¹¹ Will the Commission continue to require EISs in circumstances under which no court has ever said an EIS is required?¹² In the time since the now-draft policy statements were

⁸ See, e.g., Commissioner Danly March 2, 2022 Letter to Senator Barrasso, Docket Nos. PL18-1-000, et al., <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-senator-barrasso>; Commissioner Danly February 1, 2022 Response to Senator Barrasso December 15, 2021 Letter, <https://www.ferc.gov/news-events/news/commissioner-danlys-letter-response-senator-barrassos-december-15-2021>; Commissioner Danly Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al>.

⁹ See Commissioner Danly March 23, 2022 Letter to Representatives Cathy McMorris Rodgers and Fred Upton, <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-honorable-cathy-mcmorris-rodgers-and-fred-upton>.

¹⁰ See Commission Staff Notice in Adelphia Gateway, LLC Docket No. CP21-14-000 (Accession No. 20210527-3046) (announcing schedule for Environmental Impact Statement for project proposed under blanket certificate to add an electric motor-driven compressor unit at its Marcus Hook Compressor Station and to increase Adelphia Gateway, LLC's certificated capacity by 16,500 dekatherms per day).

¹¹ See Commissioner Danly, Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al> (explaining the Commission's de facto policy for preparing Environmental Impact Statements for projects over 20,006 metric tons per year of carbon dioxide equivalent).

¹² *Id.* The D.C. Circuit recently upheld the Commission's discussion of significance of direct GHG emissions in an Environmental Assessment. See *Food & Water Watch v. FERC*, No. 20-1132, --- F.4th ---, 2022 WL 727037, at *9 (D.C. Cir.

issued, Commission staff has also begun employing the 100,000 tons per year significance threshold in NEPA documents.¹³ Is this going to continue, or will staff revert to its prior practice of explaining that it is unable to assess the significance of the impacts of project-level emissions on climate change? The Commission, as a body, should decide the answer to these questions.

6. If the Commission truly wished to dispel uncertainty, it should have completely rescinded the policy statements. While today's order marks a critical step in the right direction, the Commission must also act to restore consistency to its decision-making—no more standardless standards or “eyeball tests.”¹⁴ No more questioning the finality of certificates that have survived Commission and judicial review.¹⁵ No more unjustified, surprise seizures of jurisdiction in individual adjudications.¹⁶ The Commission must also eliminate the unnecessary barriers that have turned it into a bottleneck for certificate applications, most significantly the now *de facto* policy that the Commission's standard environmental review requires preparation of an EIS.¹⁷ We cannot allow further unnecessary delay.

Mar. 11, 2022).

¹³ See, e.g., Commission Staff, Environmental Assessment for Golden Pass LNG Export Variance Request No. 15 Amendment, Docket No. CP14-517-001, at 25 (Mar. 22, 2022) (“The Amendment's construction emissions of 93,642 metric tpy of CO₂e would not exceed the Commission's presumptive significance threshold.”); Commission Staff, Environmental Impact Statement for Wisconsin Access Project, Docket No. CP21-78-000, at 54 (Mar. 18, 2022) (“The Project's operational and downstream emissions would exceed the Commission's presumptive significance threshold based on 100 percent utilization.”); Commission Staff, Environmental Impact Statement for Clear Creek Expansion Project, Docket No. CP21-6-000, at 8 (Mar. 15, 2022) (“The Project's construction and operation emissions would fall below the Commission's presumptive significance threshold.”).

¹⁴ See, e.g., *N. Nat. Gas Co.*, 175 FERC ¶ 61,238 (2021) (Danly, Comm'r, concurring in part and dissenting in part at P 1) (opposing application of “eyeball” test to determine significance of project on climate change).

¹⁵ See *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly and Christie, Comm'rs, dissenting).

¹⁶ *Id.*

¹⁷ *Supra* note 12.

7. Congress has charged the Commission with encouraging the “orderly development of plentiful supplies of . . . natural gas at reasonable prices.”¹⁸ The project applications we review comprise a critical element of the infrastructure that is required for Americans to enjoy the benefits of affordable, abundant domestic energy. The Commission can fulfil the objectives of the Natural Gas Act and unleash this abundance; we should follow the advice to “just do [our] [] job.”¹⁹

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly
Commissioner

¹⁸ *NAACP v. FPC*, 425 U.S. 662, 670 (1976).

¹⁹ Matthew Choi, *Glick’s ticking clock*, POLITICO, Mar. 23, 2022, <https://www.politico.com/newsletters/morning-energy/2022/03/23/glicks-ticking-clock-00019509> (quoting Senator Joseph Manchin, III).