

## DISSENTING VIEWS

on

### *H.R. 2883, the “Promoting Cross-Border Energy Infrastructure Act”*

H.R. 2883 would substantially weaken the process for federal approval of oil and natural gas pipelines and electric transmission lines that cross the U.S. border with Canada or Mexico. The new process established by the bill effectively exempts such projects from environmental and safety review under the National Environmental Policy Act (NEPA) by narrowing NEPA applicability to just the sliver of the project actually crossing the border. The process created by the bill also tips the scales too far in favor of promoters of controversial projects by establishing a rebuttable presumption that said projects are to be approved. H.R. 2883 would allow a project that is found not to be in the public interest under the current permitting process to reapply under the new weaker process. The bill would exempt all modifications to existing cross-border pipelines, including major expansions of pipelines, from any requirement for federal review or approval.

The effect of these changes will allow large and long-lived cross-border energy projects to be approved with no understanding or consideration of their environmental impacts. In fact, such projects could even be exempted from any permitting requirement at all. The public, including communities and landowners directly affected by the projects, would have scarce to absolutely no information and be left without any opportunity to object or request mitigating action, except to the extent some limited recourse can be located and pursued through state law.

#### **Current Permitting Process for Transboundary Energy Projects**

Proposed oil pipelines, natural gas pipelines, and electric transmission lines that cross the U.S. boundary with Mexico or Canada must obtain presidential permits pursuant to executive orders.<sup>1</sup> Additional statutory requirements apply to trans-boundary, natural gas pipelines and electric transmission lines, as well as to exports of natural gas and electricity.

#### ***Oil Pipelines***

The President has delegated authority to permit cross-border oil pipeline projects to the State Department, which is required to make an affirmative finding that a project is in the national interest.<sup>2</sup> Prior to making the national interest determination, NEPA requires the State Department to prepare, with notice and public comment, an environmental impact statement on a project and evaluate alternatives that would avoid or minimize adverse environmental effects.<sup>3</sup>

#### ***Natural Gas Pipelines and Exports***

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<sup>1</sup> The executive branch authority to issue presidential permits for cross-border energy project derives from the President’s constitutional authority to conduct foreign affairs. See Congressional Research Service, *Presidential Permits for Border Crossing Energy Facilities* (Mar. 15, 2017) (R43261).

<sup>2</sup> Exec. Order No. 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968); Exec. Order No. 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004).

<sup>3</sup> National Environmental Policy Act of 1969, Pub. L. No. 94-83.

The Federal Energy Regulatory Commission (FERC) is authorized to issue a presidential permit if it finds a natural gas pipeline project “to be consistent with the public interest” and receives favorable recommendations from the Secretary of State and Secretary of Defense.<sup>4</sup> FERC may set conditions on a permit to protect the public interest. A cross-border natural gas pipeline must also obtain FERC approval under section 3 of the Natural Gas Act (NGA), as well as favorable recommendations by the State and Defense Departments. FERC must grant an application unless it finds that the proposed export will not be consistent with the public interest. Under FERC’s regulations, an applicant applies for the Natural Gas Act approval and the presidential permit simultaneously in a single application package. One environmental review is performed for the entire submission.

An entity seeking to export natural gas as a commodity through a pipeline or as liquefied natural gas (LNG) must obtain approval from the Department of Energy (DOE). For export to Canada, Mexico and other countries with a free trade agreement, the NGA requires DOE to deem such applications consistent with the public interest and grant them without modification or delay.

### ***Electric Transmission Lines and Electricity Exports***

DOE is authorized to issue a presidential permit if it finds the electric transmission line project “to be consistent with the public interest” and receives favorable recommendations from the Secretary of State and Secretary of Defense.<sup>5</sup> DOE makes the public interest determination “by evaluating the electric reliability impacts, the potential environmental impacts, and any other factors that DOE may also consider relevant to the public interest.”<sup>6</sup> An environmental analysis is required to comply with NEPA. DOE may set conditions on a permit to protect the public interest. Additionally, under section 202(e) of the Federal Power Act (FPA), the transmission of electricity from the U.S. to another country requires approval from DOE. DOE is required to approve an application unless it finds that the proposed transmission of electricity would “impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of [electric] facilities.”<sup>7</sup> DOE may set conditions on the approval.

### **Analysis**

The new approval process established in section 2(a)(2) of the legislation requires the relevant official to issue a “certificate of crossing” for a border-crossing facility within 120 days of final action under NEPA, unless the official finds that the project “is not in the public interest of the United States.” This language replaces the existing federal approval process that requires a presidential permit for the entire trans-boundary project, not just a segment. The relevant officials are FERC for oil and natural gas pipelines, and the Secretary of Energy for electric transmission lines. Moving the responsibility for approval of oil pipelines to FERC could lead to delays since FERC currently has no authority or experience with the siting of oil pipelines.

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<sup>4</sup> Exec. Order No. 10485, 18 Fed. Reg. 5397 (Sept. 3, 1953).

<sup>5</sup> Exec. Order No. 10485, 18 Fed. Reg. 5397 (Sept. 3, 1953).

<sup>6</sup> U.S. Department of Energy, *Interpretative Guidance on the Requirements of 10 C.F.R. § 205.322* (Jun. 2, 2011).

<sup>7</sup> Federal Power Act § 202(e); 16 U.S.C. 824 a(e).

Unlike the existing process, this provision establishes a rebuttable presumption of approval, tipping the scale in favor of the project. Instead of requiring an agency to affirmatively find that a project is in the public interest, it shifts the burden of proof to opponents of the project to show that it is not in the public interest. Further a “border-crossing facility” is defined as the portion of the project “that is located at an international boundary of the United States.” These trans-boundary projects are multi-billion dollar infrastructure investments that can stretch hundreds of miles and last for decades. Before making decisions about whether to approve such projects, federal agencies should be required to carefully consider their potential impacts on the environment and on communities along their routes. However, this language limits the scope of review for federal approval to just a sliver of a much larger project and makes it extremely difficult – if not impossible – for an agency to prove an application as contrary to the public interest.

Section 2(a)(3) temporarily excludes from the new permitting process any cross-border project with permit approval pending on the date of enactment. This exclusion ends when the application is denied, or two years later for any application still pending. This provision would give controversial projects incentive to simply wait until the exclusion expires, and would give any project denied a presidential permit a second bite at the apple under the new, rubber-stamp process.

Subsection (b) amends section 3 of the Natural Gas Act to require DOE to grant authorization for the export or import of LNG to or from Canada or Mexico, within 30 days. Currently, companies wishing to export LNG to Canada or Mexico must obtain federal approval before doing so. These applications are relatively simple filings, and approvals can include conditions, such as prohibitions against simply using Canada or Mexico as a pass-through before shipping the gas to another country. This provision sets a deadline for DOE to grant authorization, but provides no mechanism for a deadline extension. If DOE is faced with rigid deadlines it cannot meet, the result will likely be unnecessary application denials rather than expedited approvals.

Subsection (c) of the bill repeals FPA section 202(e), which requires approval from DOE for the transmission of electricity from the U.S. to another country. This could significantly disrupt electricity and transmission markets by undermining FERC’s ability to ensure non-discriminatory open access to the transmission grid. Owners of trans-boundary transmission lines could demand discriminatory charges when providing service across the U.S. border with Canada or Mexico, or deny access altogether.

Subsection (e) says that no certificate of crossing or presidential permit is required for modifications to existing projects. Under this subsection, modifications include a change in ownership, volume expansion, downstream or upstream interconnection, or adjustments to maintain flow (such as an increase or decrease in the number of pump or compressor stations). Many modifications, as defined by this bill, could have impacts just as significant as those resulting from an entirely new project. But, as a result of this language, controversial modifications to existing cross-border pipelines or transmission lines would not require federal approval and would not be subject to any environmental review.

The provisions of H.R. 2883 raise significant concerns, so during Full Committee markup, Full Committee Ranking Member Pallone and Energy Subcommittee Ranking Member Rush offered amendments to address two of the major issues with the bill. The Pallone amendment removed the limitation on NEPA review to only the border-crossing facility, and the Rush amendment removed the presumption of approval language. Neither of these amendments were adopted.

For the reasons stated above, we dissent from the views contained in the Committee's report.



Frank Pallone, Jr.  
Ranking Member



Bobby L. Rush  
Ranking Member  
Subcommittee on Energy