Oral Statement of Jennifer Danis

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on behalf of the
New Jersey Conservation Foundation and
the Stony Brook-Millstone Watershed Association

Before the U.S. House of Representatives Subcommittee on Energy and Power
of the Committee on Energy and Commerce

A Legislative Hearing on the Proposed "Promoting Interagency Coordination for Review of Natural Gas Pipelines Act"

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Thank you for the opportunity to testify. My name is Jennifer Danis and I am a Senior Attorney with the Eastern Environmental Law Center, representing New Jersey Conservation Foundation and Stony Brook- Millstone Watershed Association.

The proposed changes to 15 U.S.C. 717n are unnecessary and would upset the careful balance of cooperative federalism that exists under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. The changes would inappropriately expand FERC's Natural Gas Act authority and undermine states' rights, and undermine the important role that other federal and state agencies play in protecting natural resources for the public. The proposed changes are a solution in search of a problem, because FERC approves over 90% of projects within a year. I review each proposed change in detail in my written testimony, but for brevity's sake, this morning I address the general problems underlying those proposed changes with a broad brush.

Under the Natural Gas Act, or NGA, FERC is responsible for administering applications for both Section 3 and Section 7 approvals. It does so on a case by case basis, subject to the statutory standards of the NGA, operating under no larger federal energy program. These approvals constitute major federal actions for the purposes of NEPA, and as such, FERC is required to consider their environmental impacts under NEPA.
FERC uses an extraordinarily narrow interpretation of its regulatory role under NEPA. For example, FERC has expressed its view that it is not FERC's duty to assess project purpose and need beyond accepting the applicant's stated project goal. This approach limits FERC's NEPA review to a mere recitation of legal requirements, devoid of the real analysis of alternatives to the proposed projects that should form the heart of any NEPA analysis.

FERC will only consider alternatives to natural gas transmission pipelines that are other natural gas transmission pipelines. Similarly, FERC takes an extremely narrow approach to environmental impacts. FERC's assessment of environmental impacts routinely finds that a project's environmental impacts will not be significant so long as other federal agencies, or state agencies acting pursuant to federal law, separately assess the project's environmental harms under statutes such as the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. FERC considers authorizations on a case by case basis, not subject any federal energy program or regional planning. As such, FERC's ad hoc authorizations demand robust ancillary Federal authorizations by agencies operating subject to comprehensive plans to protect our waters and air for future generations.

Thus, for FERC projects, the comprehensive environmental impacts analyses required by NEPA are consistently performed by other federal and state agencies in their independent reviews under the above-listed substantive environmental laws. Although the proposed bill is entitled, "Promoting Interagency Coordination for Review of Natural Gas Pipelines Act," the essence of the Act's proposed changes would generate -- not resolve -- conflict between and among the federal and state agencies currently responsible for evaluating the actual environmental impacts of Section 3 and 7 projects. In fact, the proposed statutory amendments threaten to abrogate state and federal powers and duties under those substantive federal environmental laws.

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Congress carefully allocated cooperative and specific roles for the states and for the relevant federal agencies when enacting the Clean Water Act, the Clean Air Act, and the

Coastal Zone Management Act. These substantive environmental laws all explicitly recognize the critical role that the states play in protecting water and air quality. In fact, a key legislative purpose of the Clean Water Act, was to uphold "the primary responsibility for controlling water pollution [that] rests with the States." From its inception, the 401 certification requirement was a mechanism to explicitly protect states' ability to regulate water quality standards and pollution control, ensuring states' abilities to enforce more stringent standards than federal ones. Under the Clean Air Act and the Coastal Zone Management Act, the state may also designate standards more protective, but not less, than federal ones.

These NGA amendments would create overt clashes with the existing federal statutes designed to protect the nation's water and air quality, and to preserve the state's role in that process. For example, the proposed amendments attempting to allow FERC to define the scope of environmental review *for* the states or agencies acting pursuant to Clean Water Act authority would clearly run afoul of the Clean Water Act's goals and language. The Clean Water Act is a model of cooperative federalism. There is no need for Congress to disturb this careful balance by moving these proposed amendments forward. States' exercise of section 401 authority has been both expeditious and judicious, and overwhelmingly resulted in project approvals. Of the hundreds of energy infrastructure projects authorized by FERC, there have only been three -- a tiny percentage -- that states have determined cannot be constructed in accordance with controlling water quality standards. Industry cries of states "abusing" their reserved and primary powers to protect

water quality, therefore, must stem from their mistaken belief that any certification denial or state review constitutes an abuse of authority.

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The same principles apply to the cooperative federalism embodied in the Clean Air Act. Courts have made clear that states retain the right to deny an air quality permit pursuant to its State Implementation Plan (or SIP). States have significant authority and responsibility to develop SIPs, and may impose air quality or emission standards more stringent than EPA promulgated standards. For Section 3 and Section 7 NGA projects, emissions associated with LNG terminals and compressor stations often trigger state review for Clean Air Act compliance and permitting. The Clean Air Act's complex system of cooperative federalism precludes FERC from sidestepping or controlling the requisite environmental review process arising thereunder. As is true with the FERC's limited NEPA review of water impacts, which relies on states to do their jobs under the Clean Water Act section 401 review, FERC's limited NEPA review of air impacts routinely assumes an applicant independently will satisfy the relevant state's Clean Air Act permitting review, to conclude that its Section 3 or Section 7 project will not have significant adverse impacts.

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The Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act do not accord FERC any role in their statutory or regulatory schemes. FERC has neither the statutory authority nor the substantive expertise to play any role in the implementation of these statutes. Thus, these proposed amendments, all of which attempt to create a role for FERC in those independent agency determinations, stand in conflict with those

environmental statutes and well-established judicial precedent. The only possible purpose of so many of the Act's proposed changes is to abrogate states' rights and powers, and bestow those stolen powers upon FERC. None of the proposed changes, except for the provisions directing FERC to consolidate information regarding ancillary Federal authorizations into one coherent location, will reduce confusion or increase efficiency. The changes range from decreasing efficiency, by suggesting that States conduct two section 401 review processes, one without real impacts data, and then a second one with real impacts data, to creating inescapable conflicts of interest, by suggesting that private corporations, funded by project proponents, step into a regulatory review role with respect to substantive environmental review for those projects.

The proposed amendments fail to promote interagency coordination -- rather they inappropriately place a non-environmental agency, FERC, in the position of usurping Federal authorizations under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act.

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The proposed "Promoting cross border energy infrastructure act" would replace the current requirement that proposed oil and natural gas pipelines and electric transmission lines that cross the U.S. border with Mexico or Canada obtain a presidential permit, after completing a robust environmental review and determination that the project is in the national interest, with a process that: (1) eliminates the national interest requirement, and shifts the burden of proof to the reviewing agency to prove that a narrow portion of the

project would not be in the public interest, making it difficult to ever disapprove a project; (2) significantly narrows and limits environmental review to a small portion of the project, redirecting this review to FERC; and (3) exempts many types of projects that carry high environmental costs from any permit requirement. The Act does not serve the national interests currently promoted and protected by the Executive Branch, under a decades-long paradigm employed by both Democratic and Republican administrations.

Thank you for the opportunity to testify today.