Date: February 12, 2012

Subject: Proposed 216(h) Regulations

To: Brian.Mills@hq.doe.gov and Lot.Cooke@hq.doe.gov.

We appreciate the opportunity to review the Proposed Regulation for 216(h) of the FPA (16 U.S.C. 824p(h)) and provide comments. After review of the proposed rule, we believe a few changes to the text could greatly improve in the likelihood of reducing the time and cost of necessary environmental reviews, consultations, and permit processing for electric transmission facilities crossing Federal Lands while increasing the efficiency and coordination intended by that section of the Energy Policy Act of 2005 and the nine-agency MOU.

Comments are organized by section, with explanation and proposed changes in the wording of a specific section of the proposed rule made in bold.

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Section 900.3. Definitions.

Non-Federal entities: Please clarify that the definition can also include state agencies and Tribal governments.

"Non-Federal entities mean **state and** local agencies **and Tribal governments…."**

Section 900.3 defines "applicant" as a person or entity. Section 900.5(b) refers to only persons. Suggest replacing "persons" in §900.5(b) with the term "**applicants**" and making the definition of "applicant" clearer.

Section 900.4. Pre-application procedures.

It would be helpful to clarify that this section applies to Qualifying Projects and may also be applied to Other Projects upon request of the applicant or the permitting entity or non-Federal entities. Reference §900.5(b) and §900.6(b).

The rule could be improved by ensuring that the engaged Federal and state agencies and Tribes are provided adequate project information from the prospective

applicant such that each can properly respond to requests for additional information, forecast the likelihood of project approval in a realistic manner, and identify potential relevant issues. The project information provided by prospective applicants described in § 900.4, *Pre-application Procedures*, should be the same, with minor modification as suggested below, as that required by the Director in the determination if a project, not otherwise classified as a Qualifying Project ("Other Projects"), should be included in the DOE oversight system as described in §900.5(b).

The pre-application process in §900.4 is a very powerful tool for both applicants seeking Federal authorizations and the permitting entities. Critical information necessary for considering the likelihood of approval is the need for the project within the context of load demand, reliability, and other technical factors, and alternatives that the applicant considers feasible. The Lead Agency's purpose and need must be considered based on the information provided by the prospective applicant in order to develop reasonable alternatives for the environmental review. Public scoping comments on proposed transmission projects often question the validity of the applicant's stated need if the need is not clearly described and properly supported by factual information. It is important that such information be detailed by the applicant early in the pre-application process to ensure sufficient time for the Lead and cooperating agencies to evaluate the information presented in terms of both technical feasibility and environmental and legal considerations. The prospective applicant should also provide information regarding whether the proposed project depends on another project for meeting the need (In other words, does the project have logical termini and independent utility?).

Section 900.4(b): Additional pre-application procedures

The most effective means of conducting interagency scoping is to work together collaboratively during the pre-application meeting of permitting and participating agencies in order to ensure efficiencies and meet all agencies' and Tribal decisionmaking requirements. The potential Lead Agencies should determine the actual Lead Agency and the potential cooperating agencies per §900.6 prior to coordinating the pre-application meeting per §900.4(b). The applicant may also seek clarification from the permitting entities regarding how they will organize to consider the application and fulfill the requirements of law, regulation, agency directives, and the nine-agency MOU. After an application is accepted for review, the answers to these questions guide the requirements of a well-crafted cost recovery agreement between the applicant and involved agencies. The prospective applicant should seek a clear understanding of how the Lead Agency intends to fulfill its inherently governmental responsibilities and avoid substantive departures from CEQ regulations regarding the role of agency and governmental contractors and third-party representatives in Federal decisionmaking. Failure to properly execute these duties could jeopardize the success of an otherwise sound project.

Therefore, we recommend changing the paragraph to:

"Permitting entities contacted by prospective applicants for Federal authorization to site electric transmission facilities will notify participating agencies of Qualifying

Projects **and selected Other Projects**, and facilitate a pre-application meetings **or meetings** for prospective applicants and relevant Federal and state agencies and Tribes to **identify key issues of concern and reasonable alternatives; outline data requirements and applicant submissions; establish roles of Lead and Cooperating Agencies as described in §900.7 and §900.8**; and **develop coordinated processes to fulfill applicable laws, regulations, and agency policies, including inherently governmental functions (40 CFR 1506.5), consider strategies for public engagement** to complete the required Federal agency reviews in a timely manner**; and to establish schedules** ."

Section 900.4(b): Additional pre-application procedures

Prior to the pre-application meeting, the Lead and participating agencies, Tribal representatives, and permitting entities should agree on whether the meeting should be open for non-government representatives and public observation and/or participation in the meeting, in whole or in part for engagement and transparency, per applicable law and agency policy.

Therefore, we recommend adding this following sentence at the end of §900.4:

"**The Lead Agency, in coordination with permitting entities, cooperating agencies, participating agencies and Tribal government representatives, should decide if the meeting, in whole or in part, is open to non-agency representatives and the public, either as observing or participating parties per applicable law and agency policy, considering the need for open intergovernmental communication and public transparency, and act accordingly**."

Section 900.5 Notification of requests for Federal authorizations for Qualifying Project….

"(a) Qualifying Projects. **To enable a permitting entity to determine if a project is a Qualifying Project and for the Lead Agency to coordinate a pre-application meeting or meetings per §900.4(b), the applicant must present sufficient information for consideration by the permitting entities. This information shall include, at a minimum, the information required by §900.5(b)(1)-(4).**"

Section 900.5(b)(2). Other Projects…

Consistent with our comments and recommendations regarding §900.4(a)(2) and §900.5, the description of the proposed action should include additional information as described in the following proposed modification:

"(b)(2) A concise general description of the proposed transmission facility sufficient to explain its scope, **purpose and need, the proposed route and feasible alternatives, and a statement of independent utility or identified additional project(s) necessary to fulfill the purpose and need of the proposed transmission facility."**

Section 900.6(a)(3): Selection of lead agency…..

The DOI and USDA have 20 days from the date the project is determined to be a Qualifying Project to determine which of the two should assume the Lead Agency role per §900.6(a)(2). If DOI and USDA cannot agree or if DOE objects to the determination within two days, the current proposed rule allows for the

cooperating agencies to determine the Lead Agency within 20 days "after determining that a proposal is a Qualifying Project" (§900.6(a)(2)(ii)) regardless of DOI and USDA involvement. It appears that the cooperating agencies should have 20 days to agree on a Lead Agency, not from the date of determining that a project is a Qualifying Project and/or the two days allowed for DOE to object, but from the date that DOI and USDA cannot decide themselves or the date that DOE objects. Absent DOI and USDA involvement, cooperating agencies should have 20 days from the date the project is determined to be a Qualifying Project to identify a Lead Agency. Note: the term "Lead Agency" does not appear to be consistently capitalized in the text of the proposed rule.

Therefore, we recommend the following modification:

(a)(3) "…the cooperating agencies will consult and jointly determine a Lead Agency within 20 days **after determining that a proposal is a Qualifying Project. If the DOI and USDA are involved in a Qualifying Project and notify DOE in writing of their failure to designate a Lead Agency or DOE does not approve the Lead Agency designation per §900.6(a)(2)(ii), the cooperating agencies will consult and jointly determine a Lead Agency within 20 days of such written notification or objection by DOE.**

Thank you for the opportunity to comment on this proposed rule.