

Mr. Brian Mills
Office of Electricity Delivery and Energy Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Re: Notice of Proposed Rulemaking: Coordination of Federal Authorizations for Electric Transmission Facilities

Dear Mr. Mills:

I am writing, on behalf of the multi-sector membership of the Western Business Roundtable (“Roundtable”), regarding the Department of Energy’s (“DOE”) notice of proposed rulemaking (“proposed NOPR”) for implementing Federal Power Act (“FPA”) section 216(h), which was enacted in section 1221 of the Energy Policy Act of 2005 (“EPA05”).¹

DOE has stated it intends the proposed NOPR to amend, and incorporate comments received in response to, the Department’s proposed FPA section 216(h) rule, published in September 2008 (2008 NOPR)² and to formalize the elements of a 2009 Memorandum of Understanding (“MOU”) it entered into with a number of other federal agencies.³

In its proposed NOPR, DOE states the specific purpose of the rule is to:

- Require permitting entities to inform DOE of requests for authorizations required under federal law for so-called “Qualifying Projects”;
- Establish a process whereby applicants for federal authorizations for interstate electric transmission facilities that are not Qualifying Projects can request DOE assistance in the federal authorization process;
- Lay out a pre-process for the selection of a federal “lead agency” responsible for compiling a single environmental review document for specific projects and a consolidated administrative record, for Qualifying Projects;

¹ 76 FR. 77432, December 13, 2011

² 73 FR 54461, September. 19, 2008

³ <http://energy.gov/sites/prod/files/Transmission%20Siting%20on%20Federal%20Lands%20MOU%20October%202009.pdf>, October 23, 2009

- Establish intermediate and final deadlines for the review of federal authorization decisions, and set a date certain after which all federal permit decisions and related environmental reviews must be completed within a year, or as soon thereafter as is practicable.⁴

ROUNDTABLE STATEMENT OF INTEREST

The Roundtable is a coalition of corporations and organizations representing a broad cross-section of Western business including, among others: manufacturing; mining; electric power generation/transmission/distribution; energy infrastructure development; energy supply exploration and development and transportation; energy services; and environmental engineering.

We participated in DOE's 2008 proposed rulemaking and appreciate the opportunity to comment on this latest proposed NOPR. Transmission issues are of keen interest to our member organizations, all of which are involved in economic activities in the West. We know what a difference it would make, on the ground, if DOE were to complete implementation of the various transmission reforms mandated by EAct05.

STATE OF REGULATION

FPA section 216(h) requires DOE to coordinate the federal authorization process for electric transmission projects. The Secretary of Energy is tasked with ensuring that once an application has been submitted with such information as is deemed necessary, all federal permit decisions and environmental reviews are completed within one year or otherwise "*as soon as practicable.*"⁵

On October 23, 2009, DOE entered a MOU with eight other federal agencies designed to "*improve the coordination of federal authorizations and reviews required for high voltage electric transmission projects.*" Under the MOU:

- DOE has initial responsibility for designating a "lead agency" for coordination of the federal agency review process. Such designation must be made within 20 days of a determination that a project qualifies for the expedited procedures.
- Projects qualifying for the expedited coordination procedures are high voltage facilities (generally 230 kV and above) or otherwise regionally or nationally significant transmission line projects. Projects excluded from the MOU procedures are projects seeking back-stop siting authorization from FERC; transmission facilities associated with FERC-licensed hydroelectric facilities; transmission lines crossing an international border, federal submerged lands or national marine sanctuaries; and facilities constructed by federal Power Marketing Administrations.
- Lead agencies are charged with developing an "efficient project schedule." No definitive deadlines are set in the MOU.

⁴ 76 FR at 77432

⁵ FPA section 216(h)(4)(B)

- Lead agencies are responsible for compiling a unified environmental review document and administrative record.⁶

GENERAL COMMENTS

The Roundtable has long been an ardent voice calling for substantial upgrades/expansion of the nation's electricity infrastructure systems. The demands being put on the nation's electric grids continue to be significant. As the North American Electric Reliability Corporation put it in its November, 2011 Long-Term Reliability Assessment:

*"...The importance of a secure transmission infrastructure is amplified when considering the significant addition of variable generation resources, pending environmental legislation in both the United States and Canada, and increased demand projections throughout North America in the assessment's 10-year horizon. It is important that Local, State, Provincial and Federal regulators work together to develop timely and effective solutions to resolve siting and permitting issues."*⁷

We applaud DOE for the attention it continues to give to improving the reliability of the nation's electrical system. The Department's leadership can be particularly helpful in advancing infrastructure development in the West.

The Western Interconnect has a number of features that distinguishes it from the rest of the country, and which makes it a particularly challenging region for transmission development. Among them:

- Vast geography and long distances between populations centers;
- Much of the nation's low-cost coal and renewable resources. These resources are typically located great distances from load centers, requiring long transmission corridors. It is important to emphasize, in this regard, that the West is key to meeting the national vision for renewable energy production. Those resources cannot be brought on line without significant additional investment in interstate transmission facilities in the region;
- Extensive federal land ownership and management;
- Multiple electrical control areas and a patchwork of transmission owners, including FERC-jurisdictional utilities, but also federal power marketing agencies, generation and transmission cooperatives, municipalities and others.

We fully appreciate how difficult it is to force institutional change, in the manner that EPAAct05 contemplates. However, we strongly urge DOE to step up to the challenge. DOE understands more than any other federal agency the need to upgrade and expand the nation's electricity grid, and the cost to consumers of a failure to do so.

⁶ <http://www.achp.gov/docs/TransmissionMOU.pdf>. Signees of the MOU with DOE: Department of Agriculture, Department of Commerce, Department of Defense, Environmental Protection Agency, Council on Environmental Quality, Advisory Council on Historic Preservation, Department of the Interior and the Federal Energy Regulatory Commission.

⁷ North American Electric Reliability Corporation, "2011 Long-Term Reliability Assessment," November, 2011, page 33: http://www.nerc.com/files/2011%20LTRA_Final.pdf

In that regard, we strongly urge DOE to use the full suite of tools provided in EPAct05 to improve siting and permitting of transmission infrastructure on federal lands. Those tools include not just DOE's responsibilities under FPA section 216(h), but also the on-going responsibility to undertake congestion studies and authority to designate national interest electric transmission corridors (NIETCs) and regional corridors.

SPECIFIC RECOMMENDATIONS

Here are our suggestions for improvements to the DOE's proposed NOPR:

- **DOE Should Comply With the Statutory Requirement That it Serve as "Lead Agency"**

Under FPA section 216(h) the DOE is statutorily required to act as "*lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews.*" The law defines in detail, the activities it intends DOE and the Secretary of Energy to manage:

- Any authorization required under federal law in order to site a transmission facility;
- Such permits, special use authorizations, certifications, opinions, or other approvals as may be required under federal law in order to site a transmission facility;
- Establishment of prompt and binding intermediate milestones and ultimate deadlines for the review of, and federal authorization decisions relating to, the proposed facility;
- Provision of an expeditious pre-application mechanism for prospective applicants to confer with relevant federal agencies;
- Preparation of a single environmental review document, which shall be used as the basis for all decisions on the proposed project under federal law.⁸

A feature of the 2009 MOU, which has been encompassed in the proposed NOPR, is the movement of DOE from the active role Congress intended in EPAct05 -- as the lead agency with responsibility for implementation of section 216(h) -- to more of a passive "delegate and monitor" function.

Under the MOU, DOE's primary responsibility is the front-end designation of other agencies to serve as "lead agency" for purposes of specific projects. Beyond that point, DOE mostly monitors activities and compiles information. We do not believe that approach keeps DOE sufficiently involved to ensure that the requirements of section 216(h) are being met as to individual projects.

This is particularly problematic in association with development of a consolidated environmental review document. In the proposed NOPR, DOE interprets the section 216(h) requirement that it prepare a consolidated environmental review document, for purposes of NEPA compliance, as merely requiring it to assemble and maintain the work of individual agencies.

⁸ FPA section 216(h)

This approach diverges from the plain language of section 216(h)(4)(C)(5)(A), which states: “As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.”

The argument that DOE should interpret its role as more than simply an assembler of information is reinforced by other federal regulations. Important in that regard is the definition within Council on Environmental Quality Regulations (CEQ) which provide: “‘Lead agency’ means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.”⁹

While we, of course, understand the importance of actively engaging the impacted federal land management agencies, DOE needs to comply with its statutory obligation to actively manage the process, including assuring that: coordination between federal agencies – and with state, multi-state and tribal interests – is occurring; that a unified environmental review is completed; and, importantly, that deadlines are being met. We also share the belief expressed by other commenters that DOE needs to bring its technical expertise to bear as an active participant of any federal review process. Finally, we agree that applicants should have the ability to petition DOE for assistance, should they need it in dealing with other federal agencies during the review process.

EPAct05 contemplated a fairly elegant structure to drive efficiencies in the federal transmission review/approval process. Federal agencies retain their responsibility to approve or disapprove a permit or land use authorization for a transmission project. However, DOE is given enough authorities to assure that the process moves forward efficiently, in alignment with the timelines that are occurring in relevant state permitting processes.

- **DOE Must Assure Statutory Deadlines Are Met**

“The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed: i) within 1 year; or (ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.”¹⁰

FPA section 216(h) statutorily requires federal agencies to complete environmental reviews, and permit decisions, within one year. The only exception is where another provision of federal law prevents this, in which case the deadline is as soon thereafter as practicable.

The key question, of course, is precisely what triggers the start of this regulatory clock. The Roundtable continues to be troubled by DOE’s interpretation of this key feature of FPA section 216(h):

“A permitting entity needs to have a completed, or substantially completed, environmental review before it can make a Federal authorization determination. Therefore, DOE has determined

⁹ 40 C.F.R. §1508.16

¹⁰ FPA section 216(h)(4)(B)

generally that permitting entities will have such data as the Secretary considers necessary one year after: (1) A determination by the permitting entity has been made that the Federal authorization is subject to a categorical exclusion, or an EA has been published which resulted in a FONSI; or (2) 30 days after the close of the comment period on the permitting entity's draft EIS.”¹¹

DOE’s suggestion that an application is not substantially completed until the close of the comment period on a National Environmental Policy Act (NEPA) EIS undercuts the Congressional purpose for enacting this provision of EPAAct05 to start with. The idea was to give certainty to the process and to give applicants – and the investment community supporting construction of this breathtakingly expensive infrastructure – some reasonable certainty regarding the regulatory process. It is the environmental evaluation which currently drags out the timelines for the siting of infrastructure. Taking away the discipline of a timeline for that portion of the process undermines the statutory reforms intended by Congress in enacting section 216(h).

A more reasonable interpretation, using the plain language of the statute (and the legislative history associated with it), would be to have the one-year clock be triggered by the applicant’s submission of a “substantially complete” application. Obviously, agencies can, and should, request that the applicant include environmental information necessary for the agencies to evaluate the project.

Further, part of DOE’s responsibilities as lead agency should be to assure that agencies’ pre-filing processes are concise and streamlined. Otherwise, we fear that delays will simply be moved to that point. What should not occur is an endless “bring us another rock” process designed to frustrate applicants’ filing of complete applications.

- **DOE Must Comply with the Statutory Requirement of a Unified Environmental Review**

“As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.”¹²

Another area where DOE diverges from the statutory language is in section 900.7(c) of the proposed NOPR. One of the key reforms contained in FPA section 216(h) is the requirement that a single, unified environmental review be used as the basis for all federal decisions surrounding a proposed project.

However, DOE’s proposed NOPR diverges from this straight-forward requirement: *“The Lead Agency will prepare a unified environmental review document for the Qualifying Project, incorporating, to the maximum extent practicable, a single environmental record on which all entities with authority to issue authorizations for a given project can base their decisions.”¹³*

Thus, the proposed NPOR weakens the statutory requirement that the lead agency prepare a unified environmental review. A qualifier “to the maximum extent practicable” has been added.

¹¹ 76 FR at 77438

¹² FPA section 216(h)(5)(A)

¹³ 76 FR at 77437

Likewise, the requirement that all federal agencies use the unified record as the basis for decision-making is diluted. Under the proposed NOPR, agencies “*can*” base their decisions on the document. A faithful reading of the statutory language would have that language stated as the requirement “shall base their decisions” on the unified environmental record.

- **DOE Needs to Involve Non-Federal Authorizations in Section 216(h) Process**

“To the maximum extent practicable under applicable Federal law, the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions.”¹⁴

DOE’s proposed NOPR allows federal agencies’ coordination with non-federal entities. That fails to meet the standards laid out in the statute. FPA section 216(h)(4)(A) *requires* DOE, to the maximum extent practicable, to coordinate the federal authorization process with non-federal authorizations at the state, multi-state, and tribal levels.

- **The Section 216(h) Process Should be Applicant-Focused and Applicant-Driven**

We believe DOE could do more to make the FPA section 216(h) process applicant-focused and applicant-driven:

- The section 216(h) process should be available for all FPA-covered transmission facilities requiring federal authorizations, absent good cause for not doing so. We are not clear what the rationale is for the distinctions between projects (qualifying vs. other projects, etc.) that DOE draws. The intent of FPA 216(h) is to streamline transmission siting processes where federal agencies’ actions are required for approval. It is not focused solely on lines of a specific voltage, or only lines that involve the sale of electricity at wholesale. Defining different treatment for different categories of projects unduly complicates what was intended to be a streamlining effort.
- We disagree with the list of exclusions included in the proposed NOPR. In particular, we are troubled by the exclusion of federal Power Marketing Administration (PMA) facilities. As already noted, in the West, transmission ownership and control are a complicated mix of FERC-jurisdictional utilities, federal PMAs, generation and transmission cooperatives, municipalities and others. Any workable coordinated federal siting process should be available for all lines that impact interstate transmission grid and which require federal authorizations.
- The proposed NOPR could better meet the goals of section 216(h) by simply making the process applicant-driven. Rather than trying to pre-determine what transmission projects would benefit from the process, DOE should respond to the requests from applicants.

Where an applicant believes it already has a constructive relationship with relevant federal agencies and the state permitting authorities, DOE involvement may not be the

¹⁴ FPA section 216(h)(4)(A)

most efficient route for the review of a project. On the other hand, some applicants may find DOE's involvement useful, from filing of the application on. Thus, the section 216(h) process should not only be available for projects where EISs are required. Other federal decision making can be crucially important (i.e. decisions on categorical exclusions or environmental assessments, for example). We believe the rule would be strengthened by a clarification on this point.

- The proposed NOPR needs to be strengthened to require that federal agencies actively involve applicants throughout the federal review process and keep them informed of developments within the process. Such notice should include copies of all agency notices to one another about the procedural status of the project, issues being addressed through the coordinated review, and substantive information about the project. Applicants should be afforded the opportunity to provide additional input as the process evolves.

- **Permit Terms Should be Standardized to Cover the Useful Life of Facilities**

“Each Federal land use authorization for an electricity transmission facility shall be issued: (i) for a duration, as determined by the Secretary, commensurate with the anticipated use of the facility; and (ii) with appropriate authority to manage the right-of-way for reliability and environmental protection.”¹⁵

FPA section 216(h)(8)(A)(i) clearly provides that the Secretary of Energy is to decide the duration of a land use authorization. We strongly support language in the final rule that clarifies that DOE will make that determination and that the determination is binding on the permitting agency.

Further, we believe that DOE, in making the determination, needs to tie permit terms to the useful life of the facilities being permitted. Doing so would allow the Secretary to establish the durations of various kinds of facilities on a generic basis. This clear-cut and consistent approach is critically important, given the huge capital investments required for these projects, and their importance to the reliability of the integrated grid.

CONCLUSION

Thank you for the opportunity to comment on this important regulatory matter. We strongly urge DOE to adjust the proposed NOPR to assure implementation of its EPAAct05 obligations in the manner Congress intended under the statute. Doing so will increase the regulatory certainty upon which energy infrastructure investment depends.



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¹⁵ FPA section 216(h)(8)(A)(i)

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