DEPARTMENT OF ENERGY

10 CFR Part 900

RIN 1901–AB18

Coordination of Federal Authorizations for Electric Transmission Facilities

AGENCY: Office of Electricity Delivery and Energy Reliability, Department of Energy.

ACTION: Notice of proposed rulemaking and opportunity for comment.

SUMMARY: The Department of Energy (DOE) is proposing to amend an interim final rule published elsewhere in today's **Federal Register** that establishes procedures for DOE coordination of all applicable Federal authorizations for the siting of interstate electric transmission facilities and related environmental reviews pursuant to section 216(h) of the Federal Power Act (FPA). This proposed rule would clarify a provision in section 216(h) that provides that the Secretary of Energy shall ensure that once an application for coordination has been submitted with such data as the Secretary considers necessary, all Federal authorization decisions and related environmental reviews under Federal laws must be completed within one year, or as soon thereafter as practicable in compliance with Federal law. The proposed rule also would require permitting agencies to inform DOE of requests for authorizations required under Federal law for the siting of significant facilities used for the transmission of electricity in interstate commerce, and it provides that DOE, as authorized by section 216(h), may establish intermediate milestones and ultimate deadlines for the review of such Federal authorization applications and decisions.

DATES: Public comment on this proposed rule will be accepted until November 3, 2008. See section III of the **SUPPLEMENTARY INFORMATION** section of this notice for additional information about public comment procedures.

ADDRESSES: You may submit comments, identified by RIN 1901–AB18, by any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

2. *E-mail to SEC216h@hq.doe.gov.* Include RIN 1901–AB18 in the subject line of the e-mail. Please include the full body of your comments in the text of the message or as an attachment.

3. *Mail:* Address written comments to Mr. John Schnagl, U.S. Department of Energy, Office of Electricity Delivery and Energy Reliability (OE–20), 1000 Independence Avenue, SW., Washington, DC 20585. Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt. You may request copies of comments by contacting Mr. Schnagl.

FOR FURTHER INFORMATION CONTACT: Mr. John Schnagl, Office of Electricity Delivery and Energy Reliability (OE–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; Phone (202) 586–1056; e-mail *John.Schnagl@hq.doe.gov* or Lot Cooke, Attorney-Advisor, U.S. Department of Energy, Office of the General Counsel, GC–76, 1000 Independence Avenue, SW., Washington, DC 20585; Phone (202) 586–0503; e-mail *Lot.Cooke@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 1221(a) of the Energy Policy Act of 2005 (Pub. L. 109–58) added a new section 216 to the Federal Power Act (FPA) (16 U.S.C. 791–828c) which deals with the siting of interstate electric transmission facilities. Section 216(h) of the FPA, as amended (16 U.S.C. 824p(h)), which is titled ''Coordination of Federal Authorizations for Transmission Facilities,'' provides for DOE to be the lead agency for purposes of coordinating all applicable Federal authorizations for the siting of interstate electric transmission facilities and related environmental reviews. DOE is proposing rule provisions for public comment under which it will establish intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, proposed electric transmission facilities under section 216(h)(4)(A) of the FPA. In addition, DOE is proposing provisions that would require permitting entities to inform DOE of authorization requests required under Federal law in order to site significant facilities used for the transmission of electricity in interstate commerce for the sale of electric energy at wholesale. In today's **Federal Register**, DOE publishes an interim final rule which establishes the procedures DOE will use in carrying out its responsibilities under section 216(h). Finally, DOE is proposing rule provisions that address the Secretary of Energy's determination under section 216(h)(4)(B) that all necessary data has been submitted by an applicant, after which all permit decisions and related environmental reviews under Federal laws must be completed within one year, or as soon thereafter as practicable in compliance with Federal law.

II. Discussion of Proposed Rule

In deciding how to proceed procedurally in implementing its authority under section 216(h), DOE reached certain conclusions based on its understanding of the purpose of the statute. First, under FPA section 216(h), DOE is to ''act as the lead agency for purposes of *coordinating* all applicable Federal authorizations and related environmental reviews'' (emphasis added). DOE interprets the term ''lead agency'' as used in FPA section 216(h) as making the Department responsible for coordinating environmental review efforts undertaken by other permitting entities, rather than being the Federal entity responsible for the preparation of the environmental review document under the National Environmental Policy Act (NEPA). In instances that the Department has a permitting role in siting an electric transmission facility, DOE may be the lead agency for preparing the environmental review document, but in general DOE and the permitting entities responsible for issuing Federal authorizations will jointly determine the appropriate permitting entity to be the lead agency for preparing NEPA compliance documents in accordance with existing CEQ regulations (40 CFR 1501.5).

Second, it is DOE's view that section 216(h) is intended to give an applicant seeking more than one Federal authorization for the construction or modification of electric transmission facilities access to a process under which all Federal reviews are made in a coordinated manner. With this in mind, DOE has determined that its coordination of Federal authorizations would be most beneficial as a request driven process. We do not believe Congress intended to impose DOE coordination on applicants who are satisfied with existing processes for obtaining the necessary Federal authorizations. If an applicant for Federal authorizations is familiar with existing Federal processes and is comfortable in proceeding under them, a requirement of DOE coordination is not only unnecessary, it would involve additional steps that could make the Federal review process more, rather than less, cumbersome and time-consuming. By establishing a request driven process, DOE provides coordination only in circumstances

where the applicant for Federal authorizations determines that it will be beneficial for DOE to perform that role.

However, DOE believes it is consistent with the intent of Congress in section 216(h) of the FPA that DOE be informed of authorization requests required under Federal law in order to site significant facilities used for the transmission of electricity in interstate commerce for the sale of electric energy at wholesale. This will allow DOE to be aware of Federal authorization requests for significant electric transmission facilities even in cases where no coordination request has been received by the DOE. Under proposed section 900.7, DOE would limit this notification requirement to Federal authorizations where the permitting entity has made a determination that an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) is necessary. In instances where Federal authorizations are subject to lesser environmental scrutiny under NEPA, such as a categorical exclusion (CX) or an environmental assessment (EA) which results in a finding of no significant impact, final agency determinations generally are made more quickly than for projects that require an EIS. Hence, DOE does not believe it is necessary to impose a notification requirement on permitting entities for Federal authorizations that are subject to a CX or an EA which results in a finding of no significant impact. Therefore, the proposed rule requires that all permitting entities inform DOE within five days of issuing a notice of intent to prepare an EIS on a Federal authorization for an interstate electric transmission facility.

In addition, DOE expects that permitting entities will coordinate applicable Federal authorizations and related environmental reviews even in instances where no coordination request has been received by DOE, and, as provided in section 216(h)(2) of the FPA, DOE will be prepared to intercede if it determines that such coordination is not taking place.

Section 216(h)(4)(A) of the FPA provides that DOE ''shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility.'' Proposed section 900.8 provides that in instances where DOE has received a request for coordination of the Federal authorization process, DOE, pursuant to section 216(h)(4)(A) and in consultation with the permitting entities, will establish, as appropriate, intermediate milestones and ultimate deadlines for the review of Federal authorization applications and decisions relating to the proposed facility when a permitting entity has issued a notice of intent to publish an EIS. No intermediate milestones and ultimate deadlines would be established for Federal authorizations that require a CX or an EA which results in a finding of no significant impact. Proposed section 900.8(b) provides that no later than 30 days prior to any prompt and binding intermediate or ultimate deadline established by DOE, any permitting entity subject to the deadline shall inform DOE if the deadline will not, or is not likely to, be met. Under proposed section 900.9(c), DOE, in consultation with the permitting entities, may extend an interim or ultimate deadline.

Further, section 216(h)(4)(B) of the FPA provides that the Secretary of Energy shall ensure that once an applicant has requested a Federal authorization with such data as the Secretary of Energy considers necessary, all permits decisions and related environmental reviews under Federal laws will be completed within one year or as soon thereafter as possible in compliance with Federal law. In order to ensure that statutory mandate is met for all Federal authorizations, both for authorization requests in which the applicant has requested DOE coordination of the authorization process and for authorization requests in which no such coordination request has been made, DOE is proposing that all Federal authorizations shall be completed no more than one year after: (1) A determination by the permitting entity has been made that the Federal authorization is subject to a CX; (2) an EA has been completed which resulted in a finding of no significant impact; or (3) 30 days after the close of the comment period on the permitting entity's draft EIS. If another provision of Federal law, or some other cause, does not permit a permitting entity to make a Federal authorization determination within the time limits set forth in (1), (2), or (3), the authorization shall be completed as soon thereafter as possible, as discussed in more detail below.

DOE believes that once a permitting entity has sufficient data to determine that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS, that it has such data as is necessary to complete its environmental review and issue a final decision on the Federal authorization request within one year. If a requirement of another provision of Federal law does not permit a final decision on the Federal authorization request within one year after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS, the permitting entity shall issue a final decision as soon thereafter as allowed by provision of law.

If a requirement of another provision of Federal law does not permit a final decision on the Federal authorization request within one year after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS, the permitting entity shall inform DOE and the applicant of that fact no later than 30 days after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS. The permitting entity shall cite the provision of Federal law that prevents the final decision on the Federal authorization request from being issued within one year after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS, and the date by which the final decision on the authorization request can be issued in compliance with Federal law.

If for some reason other than a requirement of another provision of Federal law, a permitting entity does not believe it can issue a final decision on the Federal authorization request within one year after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS, the permitting entity shall inform DOE and the applicant of that fact no later than 30 days after the permitting entity has determined that a CX is applicable, or has completed an EA and made a finding of no significant impact, or 30 days after the close of the comment period on a draft EIS. In such a case, DOE may toll or extend the date by which the permitting entity shall issue a final decision on the Federal authorization request. An example of a basis to toll or extend the date by which the permitting entity shall issue a final decision on the Federal authorization request is that substantial additional environmental analysis is required prior to making a Federal authorization

decision. For instance, after a permitting entity has completed an EA it may make a finding of significant impact which requires an EIS, or upon receiving comments on a draft EIS a determination may be made that a supplemental EIS is needed. Under these circumstances, DOE may toll or extend the section 216(h)(4)(B) deadline.

In establishing the one year deadline, DOE believes that the permitting entity will have met its statutory mandate to complete all permit decisions and related environmental reviews upon the issuance of necessary permits and other documents, including where applicable a Record of Decision under NEPA, even if the effective date of the permit may be delayed due to rehearing or other appellate proceedings. In the event a Permitting Entity denies or fails to act on a Federal authorization by the deadline established by DOE pursuant to section 216(h)(4)(B) of the FPA, the applicant for a Federal authorization may appeal to the President pursuant to section 216(h)(6) of the FPA.

III. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE review the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

DOE has determined that this rulemaking does not present a substantial issue of fact or law, or is likely to have the kinds of substantial impacts, that warrant an opportunity for oral presentation of views, data, and arguments pursuant to 42 U.S.C. 7191(b).

IV. Regulatory Review

A. Review Under Executive Order 12866

Today's regulatory action has been determined to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. Review Under the National Environmental Policy Act

DOE has concluded that these proposed regulations fall into the class of actions that do not individually or cumulatively have a significant impact on the human environment as set forth in DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule is covered under the categorical exclusion in paragraph A5 of Appendix A to subpart D, 10 CFR part 1021, which applies to rulemaking that interprets or amends an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed rule addresses the timing of the Secretary of Energy's determination that all necessary data have been submitted by an applicant, which starts the one-year period during which all Federal authorizations and associated reviews must be completed. It also would incorporate the authority granted to DOE by section 216(h) of the FPA to establish intermediate milestones and ultimate deadlines for the review of Federal authorization requests. In addition, the proposed rule would require Federal permitting entities to inform DOE of authorization requests within five days of issuing a notice of intent to prepare an EIS. These provisions, if implemented, would not affect the substantive interests of any entities, including small entities. DOE expects that actions taken under these provisions to coordinate and speed the issuance of decisions on requests for Federal authorizations needed to site a facility used for the transmission of electricity in interstate commerce would be expected to lessen the burden on applicants. On the basis of the foregoing, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act

This rulemaking would impose no new information or recordkeeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

E. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by States, tribal or local governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of State, tribal or local governments on a proposed significant intergovernmental mandate, and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the proposed rule published today does not contain any Federal mandates affecting States, tribal, or local governments, or the private

sector, and, thus, these requirements do not apply.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4779, February 7, 1996) imposes on federal agencies the general duty to adhere to the following requirements: Eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires federal agencies to make every reasonable effort to ensure that a regulation, among other things: Clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibility among the various levels of government. No further action is required by the executive order.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires federal agencies to issue a ''Family Policymaking Assessment'' for any rule that may affect family well-being. This rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, the DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. DOE has determined that the proposed rule published today does not have a significant adverse effect on the supply, distribution, or use of energy and, thus, the requirement to prepare a Statement of Energy Effects does not apply.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 900

Electric power, Electric utilities, Energy, Reporting and recordkeeping requirements.

Issued in Washington, DC, on September 12, 2008.

Kevin M. Kolevar,

Assistant Secretary, Office of Electricity Delivery and Reliability.

For the reasons set forth in the preamble, the Department of Energy proposes to amend part 900 of chapter II of title 10 of the Code of Federal Regulations.

PART 900—COORDINATION OF FEDERAL AUTHORIZATIONS FOR ELECTRIC TRANSMISSION FACILITIES

1. The authority citation for part 900 continues to read as follows:

Authority: 16 U.S.C. 824p(h).

2. Add new §§ 900.7, 900.8 and 900.9 to part 900 to read as follows:

§ 900.7 Notification of requests for Federal authorizations.

A permitting entity which receives an authorization request required under Federal law in order to site a facility used for the transmission of electricity in interstate commerce for the sale of electric energy at wholesale must inform the Director within five days of issuing a notice of intent to prepare an environmental impact statement. The notification can be made to Mr. John Schnagl, Office of Electricity Delivery and Energy Reliability (OE–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; e-mail *John.Schnagl@hq.doe.gov*.

§ 900.8 Prompt and binding intermediate milestones and ultimate deadlines.

(a) Upon receipt of a request for coordination, DOE, in consultation with the permitting entities, will establish, as appropriate, intermediate milestones and ultimate deadlines for the review of Federal authorization applications and decisions relating to a proposed electric transmission facility when a permitting entity has issued a notice of intent to prepare an environmental impact statement.

(b) No later than 30 days prior to any intermediate or ultimate deadline established by DOE under this part, the permitting entity subject to the deadline shall inform DOE if the deadline will not, or is not likely to, be met.

(c) DOE, in consultation with the permitting entities, may extend an interim or ultimate deadline.

§ 900.9 Deadlines for final decisions on Federal authorization requests.

(a) All Federal authorizations shall be completed one year after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement, or as soon thereafter as possible, as provided in paragraphs (b) and (c) of this section.

(b)(1) If a requirement in another provision of Federal law does not permit a final decision on the Federal authorization request within one year

after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement, the final decision will be issued as soon as allowed by provision of law.

(2) If a requirement of another provision of Federal law does not permit a final decision on the Federal authorization request within one year after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement, the permitting entity shall inform DOE and the applicant of that fact no later than 30 days after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement. The permitting entity shall cite the provision of Federal law that prevents the final decision on the Federal authorization request from being issued within one year after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement, and the date when the final decision on the authorization request can be issued in compliance with Federal law.

(c) If for some other reason than a requirement of another provision of Federal law, a permitting entity does not believe it can issue a final decision on the Federal authorization request within one year after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact assessment, the permitting entity shall inform DOE and the applicant of that fact no later than 30 days after the permitting entity has determined that a categorical exclusion is applicable, or has completed an environmental assessment and made a finding of no significant impact, or 30 days after the close of the comment period on a draft environmental impact statement. In such a case, DOE may toll or extend the date on which the permitting entity shall issue a final decision on the Federal authorization request.

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