

**UNITED STATES DEPARTMENT OF ENERGY
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY**

Improving Performance of Federal) 81 Fed Reg. 5383 (Feb. 2, 2016)
Permitting and Review of)
Infrastructure Projects)

**COMMENTS OF WIRES ON THE DEPARTMENT OF ENERGY
NOTICE OF PROPOSED RULEMAKING**

WIRES¹ respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NOPR”) issued by the Office of Electricity Delivery and Energy Reliability (“OEDER ” or OE-20”) of the Department of Energy (“DOE” or “the Department”) in response to best practices identified pursuant to the March 22, 2013 Executive Order of the President (“EO 13604”).² The NOPR is intended to form the basis of a final rule to coordinate and streamline the multiple federal permitting of infrastructure projects affecting federal lands and resources, principally through an Integrated Interagency Pre-Application (“IIP”) process that applies to onshore electric transmission projects on federal lands or that otherwise require federal authorization.³ The IIP is a mechanism designed to fulfill Congress’s goal of promoting a stronger high voltage electric transmission network, as articulated in Section 216(h) of the Federal Power Act (“FPA”),⁴ through regulatory efficiency and streamlined procedures. Many aspects of

¹ WIRES is an international non-profit coalition of investor-, publicly-, and cooperatively-owned electric transmission providers, transmission customers including renewable energy developers, service and technology companies, construction firms, and regional grid organizations, formed in 2006 to promote investment in electric transmission through development and dissemination of information about the nation’s need for a stronger, well-planned, and environmentally beneficial high-voltage transmission system. WIRES’ website is www.wiresgroup.com.

² 81 Fed. Reg. 5383 (Feb. 2, 2016)

³ Memorandum on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures, Daily Comp. Pres. Doc. 346 (May 17, 2013).

⁴ 16 U.S.C. 824p (2005) (“EPAAct”). Section 1221(a) of the EPAAct, which adds Section 216 to the FPA, promotes efficient evaluation and siting of electric transmission, including the siting of those facilities that are located on federal lands subject to one or more executive branch agencies or that affect federally- protected resources. The first effort to promote this kind of interagency coordination was the *Memorandum of Understanding Regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Land*, October 23, 2009. The bare fact that it has taken 11 years since passage of the Energy Policy Act of 2005 to advance to this point is a testament to the difficulties associated with synchronizing the implementation of environmental and land-use laws passed over a half century with no coordination mechanisms or mandate, or (understandably) any appreciation of the complexity of the growing interstate commerce in electric power or the need for an adequate transmission platform to support it.

the NOPR have already been explored by DOE and commenters in response to the 2013 Request for Information regarding implementation of Section 216(h).⁵

COMMUNICATIONS

All correspondence and communications regarding this filing should be addressed to the following:

James J. Hoecker
Counsel to WIRES
Husch Blackwell LLP
Hoecker Energy Law & Policy
750 17th St. N.W., Suite 900
Washington, D.C. 20006
Telephone: 202-378-2300
James.hoecker@huschblackwell.com

INTRODUCTION

WIRES once again applauds the Department's efforts to improve the federal regulation of transmission infrastructure development. Regulatory delay and expense are among the greatest risks to infrastructure development. In a period when the Nation's electric system is undergoing rapid and transformative changes and stress, modernizing and strengthening its foundational infrastructure is critically important and must be facilitated through efficient and well-coordinated regulatory permitting and siting processes. The IIP is an important tool which, if structured and made to work to its maximum potential, will be more efficient for applicants and federal regulatory authorities, and will ultimately result in cost savings for the consumers who depend on grid facilities and services. Further, an effectively structured IIP will help to avoid reliability and congestion problems created by an inadequate grid and help meet the challenge of transforming the Nation's electric generation grid to support the integration of lower-cost, lower-carbon electric resources.

WIRES is well-aware of the challenges associated with coordinating the decision-making of multiple, large federal departments. For that reason alone, we applaud DOE's persistence in this matter. DOE's focus and hard work has been extraordinary, especially in light of the difficulties built into laws affecting private infrastructure development and coordination of federal regulatory authorities.

⁵ 78 Fed Reg. 53,436 (Aug. 29, 2013)

COMMENT

Having said the foregoing, WIRES believes there are a number of issues in the proposed IIP that call into question whether the process will consistently provide the efficiencies anticipated by the Department. As we explained in our 2013 comments to DOE⁶, the proposed IIP has certain inherent flaws, many of which remain unaddressed in this NOPR. Due to these issues, the procedures proposed by this rulemaking may result in –

- Unpredictable participation by relevant federal agencies in coordinating meetings;
- Adding to, instead of easing, burdens on applicants at the beginning of the long approval process due to the lack of coordination with the scoping requirements of NEPA; and
- A continued lack of established procedures for applicants to fund agency participation in all instances.

In the final analysis, DOE's extraordinary effort to coordinate implementation of other agencies' laws and mandates that were never designed to be implemented seamlessly together will fall short of achieving the kind of efficiency the Department foresees and the industry deserves. We therefore urge the Secretary to help develop a systemic, legislative overhaul of the environmental review procedures that have necessitated this rulemaking.

IIP Benefits and Limitations. WIRES recognizes that DOE is statutorily limited under FPA Section 216(h). Further, DOE must contend with the potential reticence of other Executive Branch agencies to fundamentally change how their individual responsibilities under diverse environmental and land management laws are administered. WIRES nevertheless finds that the IIP may provide important benefits in some cases. For example, an IIP-type early coordination process was employed for the Great Northern Transmission Line Project, which proceeded from a Notice of Initiation to Final Environmental Impact Statement ("FEIS") in 15 months. This is a great testament to the role DOE played as Lead Federal Agency to help facilitate such a timeframe. DOE's regulatory authority helped drive an expeditious and favorable outcome in this case. Such a timeframe should be ample in most cases for all

⁶ Because WIRES' views today track its prior 2013 comments, it incorporates those comments by reference here. The absence of DOE responses to most of those comments makes it difficult for WIRES to reassess the merits of its original approach. All comments are found at <http://energy.gov/oe/downloads/comments-request-information-improving-performance-Federal-permitting-and-review>

affected agencies to participate fully in analyzing a project's impacts,⁷ but unfortunately this case is not the norm.

The principal improvement in the proposed IIP, compared to earlier versions, is that the number of IIP meetings is cut from four to two. In this regard, we believe that DOE has been very responsive to comments on the Request for Information. WIRES agrees that two meetings should be sufficient opportunity for agencies to investigate a project and formulate appropriate conclusions, identify issues, and begin environmental investigation into the impacts of the project. However, the goal of placing both applicant's and agencies' issues on the table early in the process to accelerate the exchange of information will not be achieved unless all affected agencies participate in timely fashion. The opportunity for agencies other than DOE to opt out again reveals the Department's limited authority to make participation in the IIP mandatory for all affected agencies. The NOPR urges other agencies with jurisdiction by law or special expertise, notably those land management agencies within the Departments of Agriculture and the Interior, to be active in the process or explain why they cannot do so. While this demonstrates the limits of DOE's powers of persuasion and/or its authority to compel, it may be the best that can be done under Section 216(h) in the absence of a stronger directive from the White House or a change in the law.⁸

Similarly, the NOPR proposes a number of timelines for interim steps in the IIP process that may or may not be enforceable. WIRES would ideally prefer such timelines be mandated because processing times will otherwise become quite elastic under the demands of other matters, limited resources, or the inevitable differences in the priorities of multiple affected agencies. Here, too, the NOPR accedes to the Department's inability to regiment the efficient discharge of other agencies' responsibilities to identify, analyze, and mitigate impacts of potential projects. Writ large, what is required is an approach which may only be undertaken by the President's Council on Environmental Quality ("CEQ") or, in the final analysis, by Congress. In other words, the IIP, the inevitable NEPA review, and subsequent permitting by individual agencies under widely diverse statutes and regulations are each part of a lengthy, often

⁷ We nevertheless point out that Great Northern is a transmission project that crosses an international boundary and that DOE was therefore the Lead Agency. The question persists whether such a timeline would be possible if other federal agencies, tribes, states, or local governments were more heavily involved. Even under the NOPR, the IIP process alone could require a year, to be followed by an entirely new process under the National Environmental Policy Act ("NEPA") which would revisit many of the same issues and resources.

⁸ The Administration created a more hands-on approach to coordinating federal agency permitting activity, known as the Rapid Response Team for Transmission ("RRTT"). This labor-intensive work by federal agency representatives and individual project sponsors did produce results in a limited number of difficult cases.

duplicative, and expensive process governing large infrastructure projects that should be viewed and administered holistically according to established, complementary, and enforceable timelines.⁹

WIRES concludes that the IIP, as proposed, has obvious limitations. Moreover, it is voluntary. Therefore, if the applicants that choose to use the process to work with federal agencies early in the approval process have productive experiences in expediting regulatory processes, increased use of the process will constitute a vote of confidence that the impact of those limitations can be minimized and the process improved.

NEPA Coordination. WIRES believes the difference between the IIP's success and serious underperformance will ultimately be the extent to which the work performed during the IIP is credited to the NEPA process. The importance of DOE's Final IIP Resources Report cannot be overestimated in this regard. It will marshal the information and conclusions of the IIP in a way that is "designed in terms of format and substance to be similar to" key early documents required by CEQ Guidelines to promote early consultation and engagement. In WIRES' estimation, the Report and the IIP generally should suffice as the scoping process under NEPA and fulfill that critical function in inaugurating environmental review. Unless the Lead Agency in the NEPA process "credits" the IIP for partial fulfillment of the applicant's procedural obligations under NEPA, the IIP may lose considerable utility. Instead it may create undue delay, force duplication of efforts, and effectively increase burdens on both applicant and agencies alike. If such incorporation of IIP inputs into the NEPA process is not expressly permitted or encouraged by the CEQ Guidelines, DOE should petition CEQ to adopt this recommendation. As we noted, any applicant for permits affecting more than one federally-protected resource confronts not one but potentially several protracted approval processes. The IIP is intended to streamline those processes, not simply add another procedure. The operative policy is for DOE and CEQ to find ways to seamlessly integrate the IIP with the NEPA process.

Additional Recommendation. WIRES concludes its comments with an additional suggestion that ranges beyond the NOPR but is within DOE's responsibilities. We recognize that the challenge in the federal permitting processes arises because of historical, uncoordinated regulatory requirements that were adopted piecemeal during decades of modern environmental legislation. The President expressly acknowledged this kind of dysfunction in the law during his 2011 address to Congress:

Let me take this one step further. We shouldn't just give our people a government that's more affordable. We should give them a government that's

⁹ E.g., the Deepwater Port Act, 33 U.S.C. § 1504(i) (2012), establishes a deadline of 330 days within which the U.S. Maritime Administration must act under NEPA. Such statutory deadlines usually govern the work of a single agency, as in this case, and not the diverse regulatory work of several agencies under different laws and management.

more competent and more efficient. We can't win the future with a government of the past. (Applause.)

We live and do business in the Information Age, but the last major reorganization of the government happened in the age of black-and-white TV. There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. (Laughter.) I hear it gets even more complicated once they're smoked. (Laughter and applause.)¹⁰

The President put his finger precisely on the difficulties faced by proponents of infrastructure whose proposals face a range of requirements to protect sensitive resources (like salmon) administered with different criteria, timelines, and strategic objectives. The IIP is certainly one approach that can be taken to overcome the delays and inefficiencies in the structure of existing environmental and resource laws. WIRES wishes to at least offer a third way that could tear out the inefficiencies root and branch, and that way is legislative. Building on the Fixing America's Surface Transportation Act ("FAST Act"),¹¹ and the procedures under that Act, the Secretary, following the President's insight and concerns above, would do well to seek a systemic solution to these challenges and offer them to Congress.

In sum, WIRES believes that a mini-Hoover Commission or advisory committees to the affected Executive Branch leaders, such as the Secretary's Electricity Advisory Committee, would be capable of developing a legislative proposal that would consolidate administration of the diverse federal requirements involved in evaluating infrastructure development and then to commit the resources to a single agency or process with sufficient responsibility and staff resources to be able to make effective decisions. Experience with IIP-type processes and the RRTT over the past eight years would be useful in informing this undertaking.

¹⁰ President Barack Obama, *2011 State of the Union* message, White House Speeches and Remarks.

¹¹ "Fixing America's Surface Transportation Act of 2015", Title XLI – Federal Permitting Improvement, Pub. L. No. 114-94, §§ 41001-41014 (2015).

CONCLUSION

The Department and OE-20 are congratulated for issuing the NOPR to formalize the IIP. That proposal can nevertheless be improved, especially by working with CEQ to ensure the work done during the IIP, if judged meritorious in DOE's post-IIP report, contributes to faster, more effective discharge of an applicant's NEPA responsibilities. If CEQ's Guidelines require amendment to provide for such coordination, WIRES would support such a request. In addition, the other Executive Branch agencies typically involved in permitting infrastructure should be urged to adopt the IIP or equivalent procedures into their own regulations, including procedures that recognize DOE's leadership and coordination role under Section 216(h).

WIRES thanks the Department for considering these comments and recommendations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. McKee", is written over a horizontal line.

Robert McKee, American Transmission Co.
President, WIRES

Date: April 4, 2016

James J. Hoecker
Counsel to WIRES
750 Seventeenth St., N.W., Suite 900
Washington, D.C. 20006
James.Hoecker@huschblackwell.com