

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

Improving Performance of Federal)	78 Fed Reg. 53,436 (Aug. 29, 2013)
Permitting and Review of)	FR Doc 2013 -- 21098
Infrastructure Projects)	

**COMMENTS OF WIRES ON THE DEPARTMENT OF ENERGY
REQUEST FOR INFORMATION**

WIRES¹ respectfully submits these comments in response to the Request for Information (“RFI”) issued by the Office of Electricity Delivery and Energy Reliability (“OEDER”) of the Department of Energy (“DOE” or “the Department”) in conjunction with the Member Agencies of the Steering Committee under the March 22, 2013 Executive Order of the President (“EO 13604”). The RFI concerns a draft proposed Integrated Interagency Pre-Application (“IIP”) process for onshore electric transmission projects on federal lands or otherwise requiring federal authorization.² WIRES believes the RFI is a potentially critical step toward implementing EO 13604, the subsequent Presidential Memorandum,³ and the IIP because it gives DOE an opportunity to assess the actual impacts of the IIP process on infrastructure development and the extent to which the IIP fulfills the intent of Congress in this area, as articulated in Section 216(h) of the Federal Power Act (“FPA”).⁴

¹ WIRES is a national 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 78 Fed. Reg. 53,436 (Aug. 29, 2013).

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-

WIRES expresses its support for the sustained efforts of DOE and other interested Executive Branch departments and agencies to ensure that applications for diverse federal permits and approvals are addressed in an efficient and coordinated fashion that serves the resource protection interests of the federal agencies as well as the interests of persons seeking to upgrade or extend electric transmission infrastructure subject to federal authority. As the following comment explains, however, the IIP as currently drafted would not advance the goals enunciated by the Administration with respect to saving time and resources for both applicants and the permitting agencies while contributing to the best balanced decisions. If the IIP process can be coordinated with the National Environmental Policy Act (NEPA) so that there are minimal overlaps and no timing penalties, then the process would provide value and would be used by the industry. WIRES wants it to be more likely rather than less likely that applicants and agencies will utilize the IIP and that the IIP will achieve the goals DOE has set for it.

In a nutshell, WIRES nevertheless finds the IIP process, as drafted, likely will be –

- Unpredictable in terms of participation by relevant federal agencies in key early meetings
- Unnecessarily burdensome on applicants at the beginning of the process
- Duplicative of, and uncoordinated with, the scoping requirements of NEPA
- Unsupported by any funding mechanisms for agency participants
- Out of sync with new competitive procurement processes authorized with FERC

WIRES therefore urges DOE to make some key improvements before formally instituting this process. WIRES will continue to help advance the goals that DOE has enunciated.

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. WIRES filed comments to DOE's 2011 rulemaking to implement Section 216(h), *Coordination of Federal Authorizations for Electric Transmission Facilities*, 76 Fed. Reg. 77,432 (Dec. 13, 2011), which is still pending. Today, seven years after Congress passed FPA Section 216(h), perhaps the Administration is on the verge of making extensive inter-agency coordination a reality.

I.

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

II.

INFORMATION AND COMMENTS FROM WIRES

A. Background. WIRES supports the Department’s efforts to coordinate, streamline, and expedite the siting of electric transmission facilities that will be located wholly or in part on federal lands or that affect federally-protected resources. WIRES members have monitored and/or participated in many stakeholder meetings that have gathered facts, industry experience, and opinion about what kind of pre-application process would be the most workable and efficient and lead to the best decisions in the interest of federally-protected resources and the future of investment in the electric power grid and the consumer and economic interests that depend on the grid. DOE staff, the President’s Council on Environmental Quality (“CEQ”), the Rapid Response Team for Transmission (“RRTT”), and a range of other federal personnel have demonstrated an increased understanding of the need for additional electric transmission infrastructure and the many barriers that stand in the way of developing even the most environmentally-responsible projects. We appreciate the effort that has gone into development

of the IIP over the past two years and the opportunity that the RFI affords all designated stakeholders to evaluate the appropriateness and impact of the procedures described.

WIRES believes the IIP could represent an important step forward in alleviating burdens on agencies and project applicants alike. The process aims at important administrative efficiency and public policy goals, as articulated in the RFI. The multi-stage meeting and decision procedure articulated in the RFI would enhance public engagement and outreach, provide early feedback on routing options, promote greater predictability, and ostensibly reduce decisional times while ensuring compliance with applicable laws. These objectives require clearer directives, however. Despite its high expectations for DOE's program, WIRES recognizes that the federal regulatory establishment is experiencing practical constraints, including shortages of resources and finances, even though it has important statutory obligations that cannot be ignored. Moreover, the departments and agencies that DOE is charged with coordinating under Section 216(h) of the FPA are large and diverse, presenting enormous management and coordination challenges. For those reasons, execution of its role as the lead agency coordinating the infrastructure permitting processes of other Executive Branch entities becomes critical to the successful deployment of energy delivery infrastructure that the nation needs now and in the future.

Pre-application processes have been used to great advantage in similar circumstances by the Federal Energy Regulatory Commission with respect to the authorization and environmental review of jurisdictional hydroelectric projects and interstate natural gas pipelines. Because high voltage electric transmission is subject to even more dispersed and decentralized regulatory authorities than those energy facilities, effective collaboration between and among agencies and between agencies and project sponsors becomes critical. The IIP is therefore a welcome addition

to the procedural tools that are available in the transmission infrastructure area. WIRES believes the IIP can be improved, however. As our comments below explain, we recommend that DOE's best option is to ensure that the pre-application processes are accompanied by action-forcing mechanisms and a higher level of accountability for all federal departments and agencies that implement the proposed process. In general, WIRES is motivated to take this view because:

- The special responsibilities of federal agencies must be coordinated efficiently and effectively with Congress' supervening permitting and environmental review requirements in FPA Section 216(h), crafted specifically for electric transmission on federal lands, providing DOE – and all federal departments – with a much stronger set of responsibilities which, in our view, go beyond the pre-application stage.
- The IIP should not be driven by lowest-common denominator solutions that are necessitated by a lack of dedicated resources, jurisdictional disputes within the Executive Branch, or the ability of agencies to opt-out of cooperation with private sector applicants and stakeholders.
- The President's new focus on transmission infrastructure and his initiatives in support of investment in all infrastructure is a highly important aspect of his efforts to promote job creation, economic recovery, and the Administration's clean energy initiatives.

WIRES and its members are strongly committed to strengthening the grid in the interest of enhanced reliability, access to diverse energy resources (including those encouraged by public policy innovations), competitive wholesale power markets and lower consumer prices, economic development, and energy independence. Many of its members engage in the development or upgrade of high-voltage transmission facilities. Others will be the transmission customers that will depend on, and help pay for, those facilities so that widely dispersed wind, solar, natural gas, and other resources can reach attractive electricity markets.

Facilities siting has been, and will continue to be, an important challenge for all energy infrastructure. In addition to individual states where siting authority traditionally resides, the

interests of the federal government can also come into play, particularly in the West. Federal land management agencies, notably the Bureau of Land Management (Department of the Interior) and the U.S. Forest Service (Department of Agriculture), have sprawling responsibilities for federal land management. In addition, a range of other agencies are charged with protecting fish, wildlife, habitat, wild and scenic rivers, endangered species, coastal zones, clean air, and so on. These diverse regulatory requirements were developed and implemented over decades, with little attention to efficient and effective coordination among resource agencies or between resource agencies and economic regulators in individual cases. Laws and policies that encourage efficiency, consistent standards, and inter-agency coordination often lack suitable methods of implementation. Nowhere is this more true than in the case of siting linear or networked infrastructure like electric transmission that can affect many natural features subject to the jurisdiction of multiple resource and land management agencies, necessitating series of regulatory mitigation and oversight procedures and approvals by multiple federal (not to mention State) agencies. The IIP is therefore a welcome step toward addressing these complications.

B. Comments and Proposals.

1. Transparent and Binding Implementation Procedures.

Section 4 of the June 7, 2013 Presidential Memorandum suggests, and the RFI explicitly states, that “implementation of [IIP] process may require some Federal Entities to revise their existing review and permitting regulations, policies and procedures.” WIRES believes that the goals of the IIP process, especially “increasing efficiency and interagency coordination ... [and] increasing accountability,” require that the IIP process be described in the rules that govern the practices of each agency involved in the pre-application process for transmission infrastructure. While it is true that DOE, perhaps even without invoking its authority under Section 216(h) of the Federal Power Act, cannot prescribe rules for other Executive Branch agencies, it should set

the benchmark for coordination and compliance by other departments and agencies by instructing them to adopt the IIP structure and timelines into their parts of the Code of Federal Regulations. It is neither logical nor administratively possible to establish a process that presumes to govern the work of several agencies sharing authority to review and permit aspects of the same infrastructure projects, while also affording some of those agencies an opportunity to opt out of participation in the process, to act under different timelines, or to fail to commit to efficient decision making.

WIRES believes that the RFI should be a prelude to a properly docketed proceeding or a proposed rule that ensures that DOE and its fellow agencies will move forward with implementation under proper regulations. As published, the RFI is not a proposed rulemaking under the Administrative Procedures Act. So far, the process DOE is pursuing looks like one driven by “insider” interests, contrary to the kind of transparency that DOE espouses. A rulemaking would ensure due process and help ensure that agencies ultimately have definite benchmarks by which applicants and affected interests can monitor the progress of implementation of DOE’s new procedures and individual permitting cases. We also point out that a notice-and-comment procedure would enable all parties to understand the views of other stakeholders and commenters, which is currently quite difficult. Published regulations, as distinguished from guidelines, also heighten agency accountability and would make permitting processes generally more transparent and successful. WIRES emphasizes that a rulemaking procedure does not have to be inordinately long, especially given the lengthy stakeholder outreach in which DOE, CEQ and the RRTT have already been engaged. The adoption of regulations is consistent not only with the strong DOE leadership role anticipated by the Congress, but also with effective management of agency business.

One of DOE's primary objectives must be to not simply tell other agencies how to conduct business under their own permitting authorities, but to induce cooperation and coordination through clear and open procedures and goals. The regular and dependable cooperation of all federal participants in siting processes will be thwarted unless DOE can provide a thorough understanding of the procedural paths that are expected. Its IIP is elaborate on one hand and largely discretionary on the other. DOE should therefore consider a more direct approach to the IIP consultation process, coupled with insistence that all relevant agencies agree to participate in each IIP case involving Qualified Projects.

2. Participation In IIP.

All departments and agencies with authority over any aspect of siting infrastructure should be required to participate in IIP. We are aware of the difficulties involved in determining whether all affected federal agencies must participate in an IIP process that involves discharge of their distinct statutory responsibilities and administrative practices and limitations. WIRES believes the IIP process must be mandatory unless there are extenuating circumstances clearly defined by DOE and explained by the affected agency on the record which support departure from the IIP process. We interpret Paragraph E(3)(b) as a commitment by DOE to adopt rules that enforce participation unless a Federal Entity's interests in the application are truly *de minimus*.

Moreover, WIRES emphasizes that, as discussed in the RFI, relevant state agencies should be an integral part of the IIP process. When such states are actually co-leads with DOE, fairness and efficiency argue for ensuring that they shoulder similar responsibilities as federal agencies as part of their participation in the IIP process.

Funding is a key issue, and a lack of resources threatens to undermine this helpful initiative. The Administration must ensure that agencies have the resources to carry out the IIP's mission and processes. This can be accomplished in part by establishing a funding mechanism such as cost recovery agreements among departments or by having DOE administer a single infrastructure cost-sharing arrangement with DOE in effect operating as a single banker. We urge DOE and the affected agencies to devise a funding mechanism as a first step toward implementation.

3. Coordination with NEPA.

The proposed process does not alter the customary allocation of NEPA and other responsibilities, but that makes it all the more critical for DOE to articulate clear and enforceable performance standards and oversight procedures to help separate good projects from bad projects and to improve the siting of infrastructure on federal lands overall, without unduly burdening project applicants or undermining protections afforded by law to valuable national resources. Unfortunately and without explanation, the RFI states that “[n]one of the IIP Process meetings are part of the NEPA or other environmental and review processes but will inform those processes. Feedback provided by the Federal Entities is preliminary and would not constitute a commitment to approve a Federal Authorization request.” Although WIRES understands why the IIP is not sufficient for final decisions on the merits, it finds nothing in law or policy that necessitates this absolute separation from NEPA, which would ultimately work to devalue much of the work performed by both agencies and the applicants in the course of the IIP process. While WIRES understands the importance of maintaining the integrity of the NEPA process, we also find that “informing” a subsequent procedure is an ambiguous concept that may lend itself to confusion or arbitrariness.

As proposed, the IIP process will duplicate parts of, or at least supplement, the NEPA process. However, this absolute separation is problematic if saving time is the purpose of the IIP. In fact, the IIP constitutes a very large add-on to the existing regulatory process which, by some estimates, will delay permitting processes by many months. Given the substantive requirements and objectives of the IIP process as described in the RFI, it will serve many of the analytical objectives of NEPA, thereby justifying an “off-ramp” that would allow either early entry into the NEPA scoping process or the simultaneous commencement of NEPA compliance work.

Because the IIP process mirrors NEPA (e.g., identifying alternative corridors/routes, public outreach), it should therefore become integrated with the NEPA process, even though these activities are being conducted prior to submitting a federal application. Efficiency considerations dictate that the “record” or outcomes, if any, of the IIP process can and should be applied to the NEPA process in furtherance of the government’s responsibilities under NEPA. In fact, the DOE RFI requires the IIP process to maintain an Administrative Record to support resulting decisions. WIRES therefore suggests that scoping under NEPA be commenced well before the IIP process is completed, allowing the second half of the IIP process to be devoted to identifying a range of alternatives and advancing environmental review. DOE may need to encourage CEQ to interpret or amend its NEPA guidelines to facilitate the integration of the IIP process with NEPA.

One important remaining point. If, after the meetings and consultations conducted under the IIP process, applicants have to essentially repeat many of the same procedures under NEPA, pursuant to the same legal and policy objectives, the net effect of DOE’s proposed process will be duplication, delay, and expense. We calculate that the IIP process may consume over 20

months under favorable circumstances. If applicants anticipate such delay and expense, it is likely that few proponents of “Qualifying Projects” would willingly initiate the IIP process. Transmission planners and developers always expect that siting and permitting infrastructure will be a complex and challenging process. However, the investment in time and effort – by both industry and government agencies – will be well worth it if the process produces better projects and timelier solutions. By “telescoping” NEPA and the IIP process, DOE can meet those ambitious goals.

4. Appropriate Information Requirements.

The detailed information requirements for initiating the IIP process are beyond the level of detail normally required to have an initial siting meeting and, because of this, may limit the practical use of the process or create unnecessary delays in its implementation. Despite calling for the use of “existing, relevant, and reasonably available information,” the list of information required for the initial meeting goes beyond what is reasonable at this early stage. For example, though certainly important later in the process, identifying low income or minority communities; assessing potential impacts on military facilities, ranges, aviation systems, and airspace; or providing information on intended mitigation plans (onsite and offsite) are not reasonable information needs when only the substation endpoints are known. In fact, even the applicant’s ability to co-locate with other existing linear facilities is typically not known at this stage in the process, and in fact, may not be known until much later. Though the language used in the RFI suggests that the information list is a guide and not a binding requirement, DOE’s subsequent review and formal approval of the information prior to setting up the initial (and each successive) meeting establishes the precedent that the list may be considered a “check list.” Used in this manner, the information requirements for the meeting may in fact inhibit the applicant’s ability

to meet with the federal agencies early on in the process and get valuable information and insight on broad scale siting challenges.

Information requirements for later meetings become successively more detailed, and in many cases, are not unreasonable. However, with the requirement for a Public Involvement Plan, Tribal Consultation Plan, written plans for mitigating issues, and quarterly reporting the applicant's requirements for meeting with the federal agencies are extensive, and may actually preclude the efficient and timely scheduling of meetings at key decision phases of the siting process.

Thus, if the intent of IIP is to ensure early coordination with potentially-impacted federal agencies, then the initial meeting should only require high level, readily available information, and the list should be explicitly presented as a guide, not a requirement. Frequently, project engineering will evolve depending on the emerging requirements and siting suggestions of the relevant agencies. The expense of producing a high level of detail that may prove tentative and ultimately useless will constitute waste that government should not be inducing. WIRES urges DOE to adopt a more practical approach that will encourage applicants to utilize the IIP process. That said, information requirements need to be sufficient to discourage "tire kickers," whose project ideas are not sufficiently developed, from consuming federal resources and delaying permitting for legitimate projects.

WIRES therefore encourages DOE to work with the industry and other commenters to narrow the type and amount of project data and projections required at the outset of the IIP. If and when the IIP produces information and consultation that is made directly relevant and applicable to the NEPA review process, as recommended above, earlier development of more definitive information will be appropriate.

5. Out of Sync With Order No. 1000 Procurement Processes.

In practice, the IIP process is predicated on one applicant seeking permits for one project. The four-stage meeting procedure does not contemplate the need for agencies to consult with proponents of competitive applications. While that may not be the norm, such situations can arise under the competitive procurement processes that FERC has authorized under Order No. 1000-compliant tariffs for some organized markets. An example of this problem is presented by a pilot solicitation by PJM for projects to serve a designated area known as the Artificial Island solicitation. The competitive submittals will help PJM decide which proposals provide optimal benefits versus costs, resulting in the designation of one or more for inclusion in its Regional Transmission Expansion Plan. PJM received 26 applications for projects that compete but are not identical. It is likely that PJM will want these applicants to obtain the best information about permitting and an understanding of siting challenges, both of which the IIP is designed to provide. On one hand, these applicants can enter the IIP process one at a time, inundating federal resources and complicating IIP procedures. Or, on the other hand, the IIP appears intended to address only those applicants that have been selected from among the competitors, which essentially leaves regional planners to evaluate the competing projects and their intended routes without the benefit of IIP consultation.

WIRES believes that PJM and other regional transmission organizations will propose possible solutions, and WIRES is not inclined to recommend a one-size-fits-all solution. However, it is apparent that the first stages of the IIP must work in conjunction with processes that raise the possibility that multiple project proponents will seek the kind of efficiency and timely solutions that IIP processes offer. Both regional planners and managers of the IIP processes must ensure that such competitive process efficiently sort out winners and losers,

including deterring evaluation of projects that are not fully developed. We recommend that DOE and its fellow departments build into the IIP process an early consultation procedure that would afford any applicant wishing to consult under IIP ready access to a certain baseline of information about agency views and procedures and probable environmental impacts and mitigation strategies. This would assist the regional planners and allow them to whittle down the field for the later stages of the IIP process. WIRES commends to DOE the comments of RTOs that may face this problem as a result of Order No. 1000. Suffice it to say, the IIP process as drafted does not contemplate this challenge and therefore does not sync up with competitive procurement procedures for competing projects affecting federal lands or resources.

6. Need for Timelines for Action.

Consistent with the express goal of IIP to “ultimately reduce the time required to reach a decision to approve or deny a project,” WIRES urges the DOE to specify fixed timelines for the various steps and meetings in which federal agencies will be engaged under IIP, with a procedure for exceptions. Such timelines can be established uniformly for all IIP processes, or each agency can develop its own binding timeframes for action, subject to review by DOE or CEQ and exceptions as necessary. While each of the four steps in the IIP process has a prescribed timeline, our members project that the process will take about 1.5 years to complete. DOE and the identified agencies must find ways to improve efficiency and to cut down that projected time but, even more important, DOE must work with the Council on Environmental Quality to integrate the work of the IIP process into the NEPA process, as prescribed above.

7. Applicability to All Projects and Applicants.

The IIP should be available to all transmission applicants and all transmission facilities regardless of size. The administrative and regulatory burdens associated with providing data for environmental reviews and obtaining all proper authorizations are not always proportionate to the number of circuit miles or voltage levels of projects. If application of IIP to a greater number of proposed projects at first strains the resources of the agencies, it can be phased in. However, we are not aware of any appropriate demarcation based on voltage or other operational characteristics that could equitably separate projects that are eligible for IIP from those that are not.

8. Cover Pending Applications.

The rules should provide flexibility so that applicants/developers of transmission that have begun consultations and permit applications do not have to start over when the IIP is initially adopted or implemented. We anticipate a transition period, during which both applicants and agencies will have to accommodate the work that has already been done.

9. Ongoing Oversight.

DOE should take a strong role in ensuring compliance and transparency, consistent with the needs of the industry and Congress' mandate in Section 216(h). However the term "lead agency" is construed, DOE must (at a minimum) maintain oversight and a reporting role with respect to conduct of the IIP process by other Executive Branch agencies.

10. Funding Agency Collaboration.

A critical determinant of the success of the IIP process will be whether individual departments and agencies can provide the human resources to staff the consultations and evaluations. The quality of the final IIP processes may be insufficient to ensure quality results.

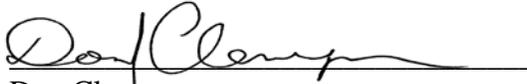
Even if this issue is beyond the scope of the RFI, it is nevertheless critical to the success of IIP. We are aware that some departments have authority to charge fees for service, but many do not. There is currently no national cost recovery mechanism. Nor is DOE considering financing the involvement of other departments as part of its lead agency responsibilities. Such funding would provide DOE with essential leverage in promoting the IIP process. WIRES suggests that DOE explore how it can “bankroll” and reimburse the work of other departments that are unable to dedicate the financial resources to this process. If that proves administratively impossible, or if it is advised that such a practice is not supported by law, it should then seek legislation.

III. CONCLUSION

In conclusion, WIRES believes DOE should seriously consider revising the proposed “IIP” pre-application process to adopt a coordination scheme that will be attractive to project proponents and efficient for regulators. The responsibility for implementing the EPC Act mandate under Section 216(h) lies with all of the affected agencies, and WIRES appreciates that DOE must rely on the art of the possible with respect to active participation by managers and policymakers from the far corners of the federal establishment. Nevertheless, we strongly urge all federal agencies to participate and to adopt strong but flexible rules and timelines for action. The principal value of the IIP for applicants lies in its potential for efficiency, fairness, and predictability. To the extent applicants perceive uncertain outcomes, undue burdens early in the process, participation by some but not all relevant agencies, subjective judgments about the merits of projects and routes, or duplication of effort between NEPA and IIP, they will be less willing to initiate the process at all. In order to ensure that the requirements of the law and the needs of the industry are met, WIRES urges DOE to assert its leadership in ensuring the pre-

application processes are working effectively. WIRES offers the Department its continued support in developing ways to make the siting of energy infrastructure on federal lands more timely and efficient.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Don Clevenger", written over a horizontal line.

Don Clevenger
President, WIRES

James J. Hoecker
Counsel to WIRES
Husch Blackwell LLP
Hoecker Energy Law & Policy
750 Seventeenth St., N.W., Suite 900
Washington, D.C. 20006
James.hoecker@huschblackwell.com