

SUMMARY OF REGULATIONS IMPLEMENTING FEDERAL POWER ACT SECTION 216(h)

September 2008

Introduction

The Energy Policy Act of 2005 added section 216(h) to the Federal Power Act providing for the Department of Energy to act as the lead agency for coordinating all applicable Federal authorizations and related environmental reviews required under Federal law in order to site an electric transmission facility. The Act authorized DOE to issue any regulations necessary to implement the provisions of 216(h).

Pursuant to section 216(h), in August 2006, DOE and eight other Federal agencies signed a Memorandum of Understanding that established a framework for early cooperation and participation that would enhance coordination of the review of all applicable authorizations and related environmental reviews.

DOE engaged in coordination discussions with the signatories of the MOU to develop implementing regulations. Based on the results of those discussions, DOE drafted an Interim Final Rule and a Notice of Proposed Rulemaking (NOPR). Both documents were published for comment in the *Federal Register* on September 19, 2008 (73 FR 54456).

These procedures provide transmission developers the opportunity to seek DOE assistance in coordinating the review by multiple Federal agencies. This will help to ensure timely and efficient reviews and permit decisions.

Interim Final Rule

The Interim Final Rule will take effect 30 days after publication in the Federal Register. This rule establishes procedures DOE will use in fulfilling its role in coordinating Federal authorizations required for siting transmission facilities.

- a. The Interim Final Rule clarifies several provisions of section 216(h):
 - i. 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). However, the rule makes clear that selection of a lead agency for preparing NEPA compliance documents will be consistent with regulations issued by the Council on Environmental Quality.

- ii. This provision applies to “transmission” facilities as that term is used in the Federal Power Act.
- b. The rule calls for DOE to establish and maintain, to the extent practicable and in compliance with Federal law, a single Internet site where the information used or generated by the permitting agencies can be consolidated and posted for public review.
- c. DOE will provide this coordination when requested by an applicant seeking more than one transmission siting authorization under Federal law.
- d. The Federal Energy Regulatory Commission (FERC) will provide this coordination role for applicants who are in a pre-filing process with FERC or have a permit request filed with FERC. DOE has delegated its 216(h) responsibilities to FERC for permit requests by applicants seeking siting of transmission facilities in a National Interest Electric Transmission Corridor.
- e. The Administrative Procedure Act exempts rules of agency procedure from its provisions requiring notice and opportunity for public comment before issuance of a rule (5 U.S.C. 533(b)(A)). Nevertheless, DOE is publishing this interim final rule with a public comment opportunity. DOE will review any comments received in determining whether revisions of the interim final rule are warranted.

Notice of Proposed Rulemaking

The NOPR implements the elements of the regulations pertaining to the responsibilities of other Federal agencies. Public comments on the NOPR will be accepted until November 3, 2008. Key provisions include:

- a. Requires Federal 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 whenever an environmental impact statement is the appropriate NEPA compliance document, even when no request for DOE coordination is received.
- b. Establishes a presumption that Federal authorization decisions must be completed within one year, or as soon thereafter as practicable in compliance with Federal law, from one of the following events:
 - i. 30 days after the close of the comment period on a draft EIS;
 - ii. Completion of an environmental assessment under NEPA and a finding of no significant impact; or
 - iii. A determination that a categorical exclusion under NEPA applies to the request.

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