Updates
May 12, 2023
Biden Administration Takes Steps To Accelerate Transmission Permitting

The Biden administration (the Administration) has set ambitious goals to reduce U.S. greenhouse gas emissions to at least 50% below 2005 levels by 2030 and to reach net-zero emissions by 2050. To achieve these ends, the recently enacted Infrastructure Investment and Jobs Act (IIJA) and Inflation Reduction Act (IRA) made significant investments in clean energy manufacturing and generation, but the benefit of those investments will not be fully realized unless the United States quickly expands electric transmission infrastructure. To transition to a 100% clean energy electricity sector and realize the full benefits of the investment generated by the IIJA and IRA, the U.S. Department of Energy (DOE) estimates that the nation needs to roughly double transmission system capacity by 2035 and triple capacity by 2050.

On May 10, 2023, the Administration announced its support for permitting reforms contained in Sen. Joe Manchin's (D-WV) Building American Energy Security Act of 2023, which was introduced on May 1, 2023. The Administration also advocated for the inclusion of the following features in any bipartisan permitting reform package: accelerated deployment of critical electrical transmission; improved permitting efficiency and predictability; and robust community engagement, among others.[1]

Consistent with these priorities, the Administration also announced an updated memorandum of understanding (MOU) between nine federal agencies regarding the implementation of section 216(h) of the Federal Power Act (FPA).[2] The MOU designates DOE as the lead federal agency for facilitating federal authorizations for transmission facilities. The MOU allows DOE to (among other things) designate a lead or co-lead agency and a standardized schedule for reviews, including the issuance of an environmental impact statement (EIS), if needed, within two years. The MOU also directs DOE to update its regulations under section 216(h) within six months, including the Integrated Interagency Pre-Application (IIP) process. This Update provides an overview of section 216(h) of the FPA along with the MOU and the impact they will have on transmission siting.

Section 216(h) and the 2009 Interagency MOU

Section 216(h) of the FPA, as amended by the Energy Policy Act of 2005, authorizes DOE to act as the lead agency to coordinate federal authorizations and related environmental reviews required to site an interstate electric transmission facility.[3] In 2009, pursuant to section 216(h), nine federal agencies (Department of Agriculture [USDA], Department of Commerce [DOC], Department of Defense [DOD], DOE, Environmental Protection Agency [EPA], Council on Environmental Quality [CEQ], Federal Energy Regulatory Commission [FERC], Department of Interior [DOI], Advisory Council on Historic Preservation [ACHP]) signed an MOU to expedite the siting and construction of qualified onshore electric transmission infrastructure projects in the United States.[4]

Integrated Interagency Pre-Application Process

Section 216(h)(4)(C) requires that DOE establish an expeditious preapplication mechanism to allow project proponents to confer with federal agencies involved, and for each such agency, to communicate to the proponent any information needs relevant to a prospective application and key issues of concern to the agencies and the public. Preapplication permitting and review procedures can result in more efficient processing of final applications for energy infrastructure siting—particularly when such applications require multiple federal authorizations. Following the directive under a 2013 presidential memorandum, DOE published regulations in 2016 that established the Integrated Interagency Pre-Application (IIP) process, which provides for the timely coordination of federal authorizations for proposed transmission facilities pursuant to section 216(h); this process includes developing an early preapplication process to support federal coordination and selecting a NEPA lead agency.[5] The IIP process applies to interstate high voltage projects that cross jurisdictions administered by more than one federal agency or where federal financial assistance will be provided. 10 C.F.R. § 900.3. The proponent of such a project may, but is not obliged to, invoke the IIP process.

The IIP process provides an opportunity for nonfederal agencies (tribal, state, or local governments) to coordinate nonfederal permitting and environmental reviews with those of the federal permitting agencies. It further provides transmission project proponents with a mechanism to coordinate and share information with federal permitting agencies and nonfederal entities. The IIP process is intended for project proponents who have identified potential study corridors and/or potential routes within an established project area and the proposed locations of any intermediate substations for a qualifying project. 10 C.F.R. § 900.4. The IIP process is also intended to accommodate qualifying projects that have been selected in a regional electric transmission plan for purposes of cost allocation or a similar process where an electric transmission plan has been identified and the permitting and siting phase must commence.

2023 Interagency MOU

The 2023 MOU supersedes the 2009 MOU to expand efforts to ensure preconstruction coordination and provide updated direction to federal agencies in expediting the siting, permitting, and construction of electric transmission infrastructure under section 216(h). The 2023 MOU is designed to improve coordination among project applicants, federal agencies, tribes, states, and multistate entities involved in the siting process. It is intended to set clear timelines for federal reviews and authorizations, enhance the capacity of federal agencies to perform effective and legally sound reviews and authorizations, and provide technical assistance and resources to states and tribes so they can participate in federal reviews and carry out related state and tribal reviews and authorizations.

Through the MOU, DOE will serve as the lead agency to coordinate all required federal authorizations and related environmental reviews and prepare an EIS to serve the needs of all relevant federal agencies for qualifying electric transmission proposals.[6] The new MOU is not limited to projects sited on federal lands but would include, for example, projects for which federal financial assistance would be provided (similar to qualifying projects under the IIP process). DOE will establish prompt and binding intermediate milestones and ultimate deadlines for decisions on federal authorizations and related environmental reviews, including a final decision on all federal authorizations within two years of publishing a notice of intent to prepare an EIS or as soon as practicable. If the qualified project is not a "covered" project under FAST-41, DOE will post and manage project-specific schedules on the Federal Permitting Dashboard as a "Transparency Project" pursuant to 42 U.S.C. 4370m-2(b)(2)(A)(ii). The signatory agencies also agree to proceed with their project authorization schedules according to the schedules established by DOE. Any disagreements will be elevated to the chair of CEQ and director of OMB. The secretary of DOE, Federal Permitting Improvement Steering Council (FPISC) executive director, and other signatory agencies will consult to ensure the harmonization of section 216(h), FAST-41, and the MOU.

The MOU requires the Secretary of Energy to update DOE's regulations implementing section 216(h), including those establishing the IIP, to do the following:

1. Make participation by applicants in the IIP process a precondition for a decision under the section 216(h) coordinated permitting process.
2. Require applicants to submit applicant-prepared resource reports and public engagement plans for communities that would be affected by the proposed project.
3. Require applicants to conduct robust engagement with all tribes and communities that would be affected by the proposed project.
4. Align and harmonize the IIP process and implementation of section 216(h) of the FPA with the process set forth in FAST-41, administered by FPISC.

FPISC and OMB are now signatories to the MOU, while FERC is not. The new MOU states that it does not *apply to or authorize* the siting of any electric transmission facility within the boundaries of any unit of the National Wildlife Refuge System, National Wilderness Preservation System, National Park System, or National Marine Sanctuary System. The prior MOU stated that it did not *authorize* siting in such areas. The new MOU also applies, at the discretion of the signatory agencies, to offshore transmission projects that are authorized under section 8(p) of the Outer Continental Shelf Lands Act and are independent of any generation project.

Next Steps

There are ambiguities in the new MOU. For example, the MOU can be read to narrow the scope of authority that Congress granted under FPA Section 216(h), which applies to all federal lands. The specific authority granted to the President under Subsection 216(h)(6) to make siting decisions under certain circumstances is constrained by Section 216(j) to a subset of federal lands. But Section 216(h) otherwise remains applicable to all federal lands. The MOU appears to extend the exemptions set by section 216(j) to apply to section 216(h), not just the presidential authority set by Subsection 216(h)(6). Certain categories of transmission facilities also are exempted from the MOU.

It remains unclear how those carve-outs might influence the actions of agencies with permitting authorities or jurisdictions that lie outside the scope of the MOU. For example, would the MOU be available to aid an otherwise qualified transmission project that proposes to use an existing private transmission easement or right-of-way across a category of federal land exempted from the MOU? What about a qualified project located entirely on federal land that would unavoidably cross a small strip of federal land that is in a category exempted from the MOU? If not, the MOU could discourage siting of new transmission in already developed corridors or create a significant challenge for the longest projects on federal lands that typically cross a variety of federal land categories. Affected parties may seek clarification and interpretation from the Administration or use congressional efforts to craft permitting reform legislation to address their concerns. In the longer term, affected stakeholders may see good reason to be active participants in the development of new regulations by DOE.

Conclusion

The Administration continues to move forward with efforts to address the climate crisis through actions to reform the permitting process for clean energy projects and electric transmission. Particularly notable is its focus on accelerating deployment of critical electric transmission through the announcement of the new interagency MOU to coordinate onshore planning and permitting activities across the federal government, including with FPISC under FAST-41. It remains to be seen, however, how these proposed reforms will ultimately be implemented to achieve its ultimate goal of reaching net zero by 2050.

Endnotes

[1] The full list of administration priorities includes these headings:

- Accelerate Energy Project Permitting on Federal Lands
- Modernize Mining Laws and Responsibly Develop Domestic Critical Minerals
- Deploy Hydrogen and Carbon Dioxide Infrastructure
- Incentivize Redevelopment for Clean Energy Deployment
- Improve Permitting Efficiency and Predictability
- Enhance Data Collection Needed for Effective Permitting
- Cut Duplicative and Burdensome Analysis and Reviews
- Improve Community Engagement
- Address Gaps in the Permitting Workforce
- Establish Clearer Requirements for Mitigating Environmental Harms
- Incentivize State and Local Permitting Reform and Standardization

[2] The nine federal agencies signing the MOU include the USDA, DOC, DOD, DOE, EPA, CEQ, Federal Permitting Improvement Steering Council (FPISC), DOI, and Office of Management and Budget (OMB).

[3] DOE has delegated its section 216(h) authority to FERC for transmission projects located within National Interest Electric Transmission Corridors as designated by the Secretary of Energy. That delegation has not changed.

[4] Through the MOU, DOE implemented its authority under section 216 to designate a lead agency to (1) serve as the point of contact for applicants, state agencies, Indian tribes, and others regarding proposed projects; (2) coordinate the preparation of unified environmental documentation that will serve as the basis for all federal decisions necessary to authorize the use of federal lands for qualifying projects as defined in Section III; (3) coordinate all federal agency reviews necessary for project development and siting under a wide range of statutes, including, among others, the Endangered Species Act (ESA), Clean Water Act (CWA), Clean Air Act (CAA), National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA); and 4) maintain a consolidated record of all actions taken.

[5] See 10 C.F.R. § 900 et seq.

[6] "Qualifying project" and "qualifying projects" mean high voltage electric transmission lines (generally though not necessarily 230 kV or above), and their attendant facilities that are expected to require the preparation of an EIS to inform an agency decision on a federal authorization. Qualifying projects will not include (1) transmission projects authorized under Section 8(p) of the Outer Continental Shelf Lands Act approved in conjunction with a generation resource authorized under that section, but may, at the discretion of all relevant Signatory Agencies, include transmission projects authorized under that section independent of any generation project; or (2) transmission projects granted a construction permit from the Federal Energy Regulatory Commission pursuant to section 216(b) of the FPA" MOU section III(f).

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