UNITED STATES DEPARTMENT OF ENERGY
GRID DEPLOYMENT OFFICE

Coordination of Federal Authorizations for Electric Transmission Facilities
Docket No. DOE-HQ-2023-0050

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

Earthjustice, Natural Resources Defense Council, NW Energy Coalition, Southern Environmental Law Center, Sustainable FERC Project, and WEACT for Environmental Justice (collectively "Public Interest Organizations" or "PIOs") appreciate the opportunity to comment on the Department of Energy's ("DOE") Notice of Proposed Rulemaking regarding Coordination of Federal Authorizations for Electric Transmission Facilities.[1] Because the proposed rule will improve efficiency in federal permitting for transmission projects that are urgently needed to address the climate crisis, improve reliability, and reduce congestion, PIOs support DOE's proposal. PIOs also suggest ways to clarify and strengthen the proposed rule.

I. Introduction

DOE's proposed rule appropriately effectuates the congressional intent underlying section 216(h) of the Federal Power Act ("FPA").[2] As Congress intended, the proposed rule will improve efficiency of federal authorizations for transmission facilities, which will accelerate the development of infrastructure that will provide the foundation for a clean and equitable energy grid. Likewise, the rule properly preserves the robust analysis of impacts and alternatives that enables reasoned agency decision-making and serves as the bedrock of federal environmental law. Importantly, the proposed rule also promotes equitable participation in infrastructure planning and federal decision-making, which will enable transmission projects to avoid adverse

[1] DOE, *Coordination of Federal Authorizations for Electric Transmission Facilities* ("NOPR"), 88 Fed. Reg. 55,826 (Aug. 16, 2023).
[2] 16 U.S.C. § 824p(h).

impacts to affected communities, create benefits for communities that will host this infrastructure, and build popular support that will foster the timely and successful completion of these important projects.

PIOs' comments suggest measures that DOE should take to clarify and strengthen the proposed rule. For example, DOE should better explain the circumstances under which the agency may waive provisions of the rule, and should identify more specific and predictable criteria for when the agency will allow non-qualifying projects to participate in the proposed permitting process. DOE should also allow communities and organizations with relevant expertise to participate in the agency's proposed series of pre-permitting meetings. Additionally, because the rule's benefits are likely to be significant, PIOs suggest that DOE should generally allow a broader set of transmission projects to participate.

PIOs also respond to specific questions that DOE poses. For example, although many of the distances proposed as cut-offs for identifying affected areas are appropriate, some communities—or areas with protected characteristics that are sensitive to visual impacts—may be affected at greater distances than DOE proposes. Finally, while the proposed rule makes good progress toward equitable treatment of communities with environmental justice concerns, as well as appropriate consultation with Indian Tribes, PIOs suggest some measures that would further strengthen the rule's provisions that aim to improve the equity of agency decision-making.

II. The proposed rule appropriately effectuates congressional intent.

In section 216(h) of the FPA, Congress made federal permitting of transmission projects more efficient without limiting the rigor or protection of federal environmental laws. Additionally, section 216(h) aims to ensure that federal agency decision-making equitably solicits and incorporates input from affected members of the public. Under FPA 216(h), DOE

plays a key coordinating role in this permitting process. DOE's proposed rule appropriately implements FPA section 216(h).

A. DOE's proposed rule will promote efficiency.

The heart of DOE's proposed rule is an Integrated Interagency Preapplication ("IIP") process, followed by a Coordinated Interagency Transmission Authorization and Permits ("CITAP") program. The IIP process requires project proponents to meet with all relevant federal agencies to ensure that proponents provide all information and analyses necessary to support federal authorizations. Only after the agencies confirm the sufficiency of such information and analyses will project proponents be allowed to submit permit applications through the CITAP program, which features a predictable schedule and deadlines for federal agency action. Together, these measures will promote better interagency communication, clearer expectations for project proponents, and a more efficient process for considering, refining, and permitting transmission infrastructure, consistent with section 216(h) of the FPA.

As indicated in the proposed rule, the IIP process will help agencies coordinate on the information they need to fulfill their individual statutory mandates, avoid duplication of cost and effort for project proponents, and reduce the potential for unexpected delays later in the permitting process.

DOE's proposal to impose reasonable deadlines for federal agency reviews during the IIP process will also improve efficiency by keeping the process moving on a reasonably predictable schedule. Although the timelines for federal reviews of draft resource reports and other IIP materials following IIP meetings are ambitious, the IIP process also provides federal agencies with ample opportunities for other communication with project proponents. Because the IIP process allows federal agencies to frontload a significant portion of necessary reviews, the

proposed deadlines appropriately balance agencies' need for meaningful deliberation with project proponents' need for a consistent, predictable, and speedy schedule.

DOE's proposed rule also sensibly aims to coordinate review under the National Environmental Policy Act ("NEPA") for transmission projects with required reviews under other statues. For example, DOE states that it will coordinate NEPA review with analysis under the National Historic Preservation Act ("NHPA"). Likewise, DOE proposes to require the submission of information in resource reports that would support federal authorizations under other environmental laws such as the Endangered Species Act ("ESA") and the Clean Water Act ("CWA"). In these contexts, the proposed rule's efforts to improve interagency communication and coordination with non-federal entities such as State or Tribal Historic Preservation Officers will be especially helpful; because substantive duties vary under these laws, improved coordination will be essential to ensure that resource reports provide all the necessary analysis and information to enable project proponents to receive all relevant authorizations. By improving cooperation among federal agencies and non-federal regulators, as well as coordination of parallel reviews under various statutes, DOE's proposed rule promises to make the process of reviewing transmission projects significantly more efficient.

The page limits throughout DOE's proposed rule are another appropriate mechanism to improve the efficiency of the IIP/CITAP process. Having relatively brief project summaries or project participation plans would promote efficiency by limiting the volume of documents that project developers must prepare and agencies must review. Relatively brief page limits will also encourage project proponents to succinctly highlight the most relevant and probative information. Additionally, by allowing more detailed addenda and appendices,[3] DOE reasonably

[3] For example, a ten-page project summary may be accompanied by additional maps and studies, and a ten-page project participation plan may include a supplemental appendix.

balances the need for brevity in summaries with the need for more thorough information to support federal agency decision-making.

B. DOE's proposed rule appropriately preserves the independence and rigor of federal agency decision-making.

Section 216(h) of the FPA did not reduce the rigor of any federal environmental laws. In general, this section does not "affect[] any requirement of an environmental law of the United States."[4] Similarly, while section 216(h) allows the president to override a federal agency that denies an authorization for a transmission project, Congress specifically required the president to still comply with "applicable requirements of Federal law," including but not limited to various enumerated environmental laws such as NEPA and the ESA.[5] Hence, section 216(h) evinces a congressional intent to improve the efficiency of federal decision-making without relaxing the rigor of federal environmental laws.

DOE's proposed rule faithfully executes this congressional intent. For example, DOE makes clear that under the proposed rule, "Federal entities would remain responsible for completion of environmental reviews, for government-to-government consultation with Indian Tribes . . . and for any findings and determinations."[6] DOE's proposal to "better coordinate review of Federal authorizations for proposed interstate electric transmission facilities" without displacing federal agencies' substantive responsibilities is wholly consistent with section 216(h).[7] Likewise, DOE's proposal to require thirteen resource reports provides a strong foundation for DOE and all relevant federal agencies to make rational decisions that are based on a rigorous assessment of environmental impacts and reasonable alternatives.

[4] 16 U.S.C. § 824p(j)(1).
[5] *Id.* § 824p(h)(6)(D).
[6] NOPR, 88 Fed. Reg. at 55,826.
[7] *Id.* at 55,827.

DOE's proposed rule also appropriately effectuates the congressional intent to require a rigorous environmental review by requiring analysis of transmission projects' climate impacts. In particular, the proposed rule properly requires resource reports to account for "generation resources that are known or reasonably foreseen to be developed or interconnected as a result of the project."[8] Likewise, the proposed rule requires accounting of "the reasonably foreseeable change in greenhouse gas emissions from the existing, proposed, and reasonably foreseeable generation resources . . . that may connect to the project or interconnect as a result of the line."[9] By requiring an assessment of induced changes in the electricity generation resource mix and the resulting changes in greenhouse gas emissions, the proposed rule will ensure a rigorous environmental analysis that accounts for transmission projects' climate impacts.

The proposed rule's inclusion of a requirement to assess climate impacts is well-founded in NEPA's plain text, its implementing regulations, authoritative guidance, and judicial precedent. As PIOs previously explained, DOE has both the authority and the responsibility to require this assessment of reasonably foreseeable climate impacts.[10] For example, NEPA's plain text makes clear that agencies must assess "reasonably foreseeable environmental effects."[11] Likewise, NEPA expressly requires agencies to "ensure the professional integrity, including scientific integrity" of environmental analysis, use "reliable data and resources," and "recognize the worldwide and long-range character of environmental problems."[12] Climate change is exactly

[8] *Id.* at 55,847.
[9] *Id.* at 55,851.
[10] PIOs Comments on FERC Backstop NOPR, at 108–16, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf; PIOs Comments on DOE Notice of Intent and Request for Information: Designation of National Interest Electric Transmission Corridors, at 54–57, Docket No. DOE-HQ-2023-0039-0001, https://sustainableferc.org/wp-content/uploads/2023/07/Comments-of-Public-Interest-Organizations-on-NIETC-RFI.pdf.
[11] 42 U.S.C. § 4332(c)(i).
[12] *Id.* §§ 4332(D), (E), (I).

the type of worldwide and long-range environmental problem that NEPA requires agencies to assess, and the overwhelming scientific consensus regarding climate change is precisely the type of reliable data that agencies must incorporate into environmental analysis to demonstrate the scientific integrity the statute mandates. Hence, DOE's proposed requirement for an assessment of reasonably foreseeable climate impacts is well-founded in NEPA's plain text.

Authoritative guidance from the White House Council on Environmental Quality ("CEQ") similarly reinforces that "[c]limate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA's purview."[13] Federal actions such as the approval of major transmission lines "may result in substantial [greenhouse gas] emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis."[14] As CEQ further describes, assessing climate change impacts in the NEPA context requires not only consideration of direct emissions of greenhouse gases from the construction of a facility, but also net reasonably foreseeable emissions—or emissions reductions—"over the projected lifetime of the action."[15] Likewise, where a project "involves use or conveyance of a commodity or resource," such as electricity, "changes relating to the production or consumption of that resource" constitute indirect impacts that also require consideration.[16]

Finally, judicial precedent supports DOE's inclusion of a requirement to consider transmission projects' climate impacts. As the Court of Appeals for the D.C. Circuit has made clear, so long as impacts on greenhouse gas emissions are a reasonably foreseeable indirect

[13] CEQ, *National Environmental Policy Act on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1197 (Jan. 9, 2023).
[14] *Id.*
[15] *Id.* at 1201.
[16] *Id.* at 1204.

effect of a federal action that are feasibly quantifiable, agencies must evaluate those impacts.[17] PIOs recognize that quantifying reasonably foreseeable greenhouse gas emissions, or emissions reductions, may be challenging, and we encourage DOE to utilize existing regulatory and scientific tools that CEQ makes available to assist agencies with this legally required analysis.[18] PIOs also recognize that the resulting analysis of climate impacts does not require perfection and may be based on "reasonable forecasting" and "educated assumptions about an uncertain future."[19]

C. DOE's proposal to require a public participation plan has a solid legal foundation.

PIOs strongly support DOE's proposal to require submission of a project participation plan for projects utilizing the IIP/CITAP process. The proposed rule appropriately requires project proponents to submit a history of public engagement at the outset of the IIP process and an updated plan at the end of the process. Similarly, DOE is correct to require project proponents to furnish "specific information on the proponent's engagement with communities of interest and with Indian Tribes."[20] As DOE notes, furnishing this information at the start of, and throughout, the IIP process will provide federal agencies with valuable opportunities to assess whether projects are using best practices for public outreach that will assist agencies in obtaining communities' views on the impacts of, and alternatives to, proposed projects. DOE is correct to note that the project proponent's outreach efforts merely complement, and do not substitute for, federal agencies' own engagement with communities and government-to-government

[17] *Sierra Club v. FERC*, 867 F.3d 1357, 1374–75 (D.C. Cir. 2017).
[18] *See* 88 Fed. Reg at 1,201 ("CEQ maintains a GHG Accounting Tools website listing many such tools."). CEQ's regulations implementing NEPA also provide analytical tools to assist agencies making assessments based on incomplete or unavailable information. 40 C.F.R. § 1502.21.
[19] *Sierra Club v. FERC*, 867 F.3d at 1374; *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 70 (D.D.C. 2019) (noting that an agency "could have explained the uncertainties underlying the [emissions] forecasts, but it was not entitled to simply throw up its hands and ascribe any effort at quantification to a 'crystal ball inquiry'").
[20] NOPR, 88 Fed. Reg. at 55,832.

consultation requirements with Indian Tribes.[21] Nor should this outreach be construed as a substitute for project proponents' formal requirements under NEPA, the NHPA, or other laws which provide avenues for input from impacted communities and Tribal entities. In general, this measure provides an important opportunity for agencies to review the proponents' initial outreach efforts, which would assist agencies in determining what additional information they need to provide in subsequent communications and whether there is a need to correct any factual or legal errors when conducting their own outreach. Overall, this approach will promote a more equitable process of involving affected communities in project design and federal decision-making.

The proposed rule's provisions requiring a public participation plan are well-grounded in binding federal authorities. For example, the requirement in FPA section 216(h) to coordinate "to the maximum extent practicable" with Indian Tribes amply supports the requirement for a public participation plan to provide detail about outreach to Tribes and to allow agencies opportunities to review that outreach.[22] Likewise, section 216's mandate that DOE serve as a coordinator for environmental reviews,[23] together with NEPA's goal of facilitating informed public participation,[24] strongly support DOE's inclusion of provisions that aim to ensure that affected communities receive the information about transmission projects that is necessary for them to develop informed input, as well as meaningful opportunities to provide such input.

Finally, Executive Orders that are binding on DOE and its sister agencies also support this provision of the proposed rule. Executive Orders 12898, 14008, 13985, and 14096 support

---

[21] *Id.*
[22] 16 U.S.C. § 824p(h)(3).
[23] *Id.* § 824p(h)(5).
[24] *See, e.g.*, *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 424 (4th Cir. 2012) ("NEPA imposes procedural mandates for the purpose of ensuring informed decisionmaking and public participation . . . ."); 40 CFR § 1506.6(a) (requiring agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").

DOE's proposal by requiring agencies to identify and address actions with disproportionate adverse impacts on environmental justice communities;[25] to develop programs and policies that would address disproportionate health, climate, and related economic impacts on environmental justice communities;[26] to prepare Equity Assessments to assess and remove barriers to participation by community organizations;[27] and to "provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities."[28]

PIOs encourage DOE to make the public participation plan more accessible to members of affected communities by requiring separate plans for communities of interest and for Indian Tribes. Including separate plans would make it easier for members of affected communities to understand how project proponents plan to reach out to them and to assess whether that outreach is sufficient to identify their concerns and points-of-view. Requiring separate plans would also improve the coordination between DOE's proposed rule and FERC's analogous backstop permitting rule, which would require a separate participation plan for environmental justice communities.[29] Because the proposed rule would already require project proponents to explain the approach to outreach to these communities, requiring this information to be presented in separate plans would not meaningfully increase any regulatory burden.

PIOs also encourage DOE to include in its final rule some mechanism for members of the public to provide feedback to DOE, or other relevant federal agencies, about project proponents' compliance with their participation plans. Affected communities will likely be best situated to

[25] Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
[26] Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).
[27] Exec. Order No. 13985, 86 Fed. Reg. 7009, 7010–11 (Jan. 20, 2021).
[28] Exec. Order No. 14096, 88 Fed. Reg. 25251, 25254 (Apr. 21, 2023).
[29] FERC, *Applications for Permits to Site Interstate Electric Transmission Facilities*, 88 Fed. Reg. 2,770, 2,774 (Jan. 17, 2023). *See generally infra* § III (discussing the value of alignment between DOE and FERC regulations).

assess whether project proponents have furnished all necessary information, responded to communities' questions, accurately reflected community feedback in communications to agencies or other regulators, or made modifications to a proposed project to address community input. Likewise, if a project proponent interacts with an affected community in a manner that is aggressive, coercive, dishonest, or otherwise unethical, affected communities should have a mechanism to make such concerns known to DOE and other relevant federal regulators.

Likewise, PIOs recommend that DOE require project proponents to adhere to a rigorous ethical code of conduct when interacting with affected communities, and to circulate to affected communities a standardized document describing their rights during this process. DOE should look to FERC's proposed backstop permitting rule, and to PIOs comments on that proposed rule, for more specific information on how to implement this recommendation.[30]

D. DOE sufficiently explains its new approach to implementing section 216(h).

PIOs recognize that DOE's proposed rule will make significant changes to DOE's existing approach to implementing section 216(h) of the FPA. Most notably, the proposed rule makes participation in the IIP process mandatory for any project that wishes to participate in the CITAP process,[31] whereas the IIP process is optional under existing regulations.[32] Likewise, DOE proposes to serve consistently as the lead agency to prepare a single NEPA analysis,[33] whereas existing regulations do not specify what agency will serve as lead.[34]

---

[30] *See* FERC, *Applications to Permit To Site Interstate Electric Transmission Facilities*, 88 Fed. Reg. 2773 (Jan. 17, 2023); PIOs Comments on FERC Backstop NOPR, at 4, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf.
[31] NOPR, 88 Fed. Reg. at 55,828.
[32] 10 C.F.R. § 900.4(a) ("[T]he IIP Process is optional").
[33] NOPR, 88 Fed. Reg. at 55,830.
[34] 10 C.F.R. § 900.5.

DOE has sufficiently explained its proposed changes. As the Supreme Court has explained, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[35] To do so, an agency must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[36] DOE easily satisfies this standard. First, DOE has clearly demonstrated awareness that it is changing its policy.[37] Second, DOE has provided sound reasons for its new approaches. As to the proposal to make IIP participation mandatory, DOE persuasively explains that the IIP process is necessary for the agency to comply with important mandates in section 216(h), including the mandate to determine that an application includes all "data as the Secretary considers necessary" and the mandate to establish milestones and deadlines for federal permitting.[38] Likewise, as to the proposal to serve consistently as lead agency for NEPA reviews, DOE explains that this approach will "establish a transparent and consistent NEPA process for the project proponent."[39] Section 216(h) also mandates this approach.[40]

Moreover, although agencies do not need to demonstrate that "the reasons for the new policy are *better* than the reasons for the old one,"[41] PIOs believe DOE has done so in this instance. PIOs believe it is appropriate to make participation in the IIP process mandatory because we agree with DOE that the IIP process' benefits "are likely to significantly exceed the cost of participating in the IIP process."[42] The proposed rule improves coordination among

[35] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[36] *Id.* (quoting *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[37] *See* NOPR, 88 Fed. Reg. at 55,828 ("DOE recognizes that [mandatory participation in the IIP process] represents a departure from the IIP Process established by DOE's 2016 rule."); *id.* at 55,830 ("DOE recognizes that [serving as the lead agency for all NEPA reviews in the CITAP process] reflects a departure from the 2016 Rule.").
[38] NOPR, 88 Fed. Reg. at 55,828.
[39] *Id.* at 55,830.
[40] 16 U.S.C. § 824p(h)(2) ("The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility.").
[41] *Fox Television*, 556 U.S. at 515.
[42] NOPR, 88 Fed. Reg. at 55,828.

project proponents and regulators that would have to occur anyway, but which in the absence of the proposed rule would occur less efficiently in numerous separate processes. Similarly, the thirteen resource reports required under the proposed rule contain information that project proponents would have to furnish anyway—but the proposed rule improves the efficiency of collecting this information by ensuring that agencies make their informational needs clear upfront and reduces the risk of delays by allowing agencies to ensure that the reports are adequate before undertaking decisions on permit applications. Hence, the costs of participation in the IIP/CITAP process are largely costs that project developers would have to bear anyway, but the proposed rule both reduces those costs by making the permitting process more efficient and confers significant benefits in terms of transparency and predictability of agency decision-making.

PIOs also agree with DOE that by increasing the pace of transmission development, the proposed rule will confer significant public benefits.[43] A robust transmission grid will not only confer economic benefits such as the reduction of congestion costs, but will also serve as the backbone of a decarbonized energy grid that is critical to addressing the climate crisis.

III. DOE's proposed rule aligns with FERC's proposed backstop permitting rule.

PIOs support DOE establishing an implementation of FPA section 216 that is well-aligned with FERC's proposed implementation of its permitting and environmental review responsibilities for transmission facilities.[44] PIOs recently filed comments explaining that FERC's proposed rule has a strong legal foundation and will enable timely and effective federal

[43] NOPR, 88 Fed. Reg. at 55,837–88.
[44] *Applications for Permits to Site Interstate Elec. Transmission Facilities*, 88 Fed. Reg. 2770 (Jan. 17, 2023), 181 FERC ¶ 61,205 (2022).

backstop permitting for transmission projects.[45] Alignment between DOE and FERC's implementation of section 216 will create a consistent, predictable, and rigorous system for federal review and permitting of transmission facilities, which will remove uncertainty for project proponents regarding how to obtain necessary authorizations.

Additionally, alignment between DOE and FERC processes will enable project proponents to move relatively seamlessly between these agencies' processes if circumstances warrant. Such moves might be necessary if, for example, a project seeking a FERC permit also needs multiple additional federal authorizations and thus may benefit from the IIP process. Similarly, a project undertaking the IIP process may determine that it needs a permit from FERC if a state cannot issue a permit for the project. For these reasons, PIOs support how DOE's proposed IIP process plays a similar role to FERC's pre-filing process. The parallel nature of these processes preserves a project proponent's ability to seek a permit from FERC if necessary, or to request that FERC seek a project's inclusion in the IIP process, without unnecessary duplication of labor.

Likewise, PIOs support DOE requiring thirteen resource reports that are substantively similar to the resource reports that would be required under FERC's proposed rule. As described above, PIOs believe that these resource reports, or the similar reports that FERC would require, are a robust foundation for compliance with federal environmental laws. Although PIOs believe that DOE's proposed resource reports are well-aligned with FERC's, we encourage DOE to collaborate with FERC to ensure as much substantive alignment as possible. We also support DOE and FERC analyzing impacts to Tribes and communities of interest in separate resource

[45] PIOs Comments on FERC Backstop NOPR, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf.

reports; as we explained in comments to FERC, presenting these analyses in separate resource reports will better enable affected communities to identify the analyses that are most relevant to them and facilitate communities' ability to offer informed public comment.[46] Facilitating community participation in this manner will help promote equity, build support for projects, and enhance the legal durability of ultimate project approvals.[47]

We encourage DOE and FERC to consider aligning the numbering of their proposed resource reports; we see no particular reason for substantively aligned resource reports to be numbered differently in the agencies' parallel processes, whereas aligning the numbering of the resource reports in both processes could reduce the possibility of confusion for projects that participate in both processes or move between the two agency processes.

Finally, DOE's proposal to require a public engagement plan is well-aligned with FERC's proposed rule and will foster support for projects, promote equity, and improve legal durability. As discussed above, we encourage DOE to further improve alignment with FERC's process, and improve the equity of its own process, by requiring different engagement plans for Tribes and communities of interest.

IV. DOE should clarify aspects of its proposed rule.

While PIOs support DOE's proposed rule, we believe that the agency, regulated entities, and the public would benefit from greater clarity about several issues. The following comments explain why the current proposed rule contains important ambiguities and suggest clarifications.

[46] PIOs Comments on FERC Backstop NOPR, at 48–51, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf.

[47] *See* Lawrence Susskind et al., *Sources of opposition to renewable energy projects in the United States*, 165 Energy Policy, at 13 (June 2022), https://www.sciencedirect.com/science/article/pii/S0301421522001471#.

A. DOE should establish clear criteria for waiving provisions of the proposed rule and a process for appeal.

The proposed rule would allow the Director of the Grid Development Office ("GDO") to waive "any requirement" she determines are "unnecessary, duplicative, or impracticable."[48] However, the proposed rule does not provide any criteria to guide how the Director must make such determinations or any process for seeking reconsideration or review of such a determination. To provide a more predictable, accountable, and legally durable process, DOE should establish specific criteria that must be met before any requirement of the proposed rule can be waived. DOE should also allow administrative review of a waiver.

PIOs are concerned that unless DOE provides clear criteria for when a regulatory requirement can be determined "unnecessary, duplicative, or impracticable," the proposed waiver provisions could be applied inconsistently or arbitrarily. Moreover, poorly founded waivers could lead to legal challenges regarding transmission projects that were authorized after having a regulatory requirement waived—particularly if the waived requirement were one that is necessary for a rigorous environmental analysis, the identification of reasonable alternatives, or a reasoned final decision. For example, while the proposed rule correctly requires analysis of climate impacts, agencies have previously attempted to excuse the failure to consider such impacts by arguing that the analysis is impracticable.[49] If DOE were, at some point in the future, to waive a critical component of the proposed rule like the requirement for an assessment of climate impacts, PIOs believe that the waiver could lead to a poor environmental analysis and an infirm federal authorization that would be vulnerable to legal challenge.

[48] NOPR, 88 Fed. Reg. at 55,830.
[49] *See*, *e.g.*, *WildEarth Guardians*, 368 F. Supp. 3d at 69–70 (rejecting the argument that greenhouse gas emissions were "too difficult to forecast").

To correct this issue, PIOs suggest that DOE establish clear, specific criteria that must be satisfied before any regulatory provision can be waived and require that any waiver must explain in writing how such criteria are satisfied, with that written explanation to be included in the administrative record. First, for a determination that a provision of the rule is "unnecessary," the waiver should be required to explain why the information or analysis required by the waived provision is irrelevant to any federal authorization—i.e., why that information or analysis would not make any federal authorization more or less likely. Second, for a determination that a provision is "duplicative," the waiver should be required to explain what other law or regulation already requires the ostensibly duplicative analysis or information, as well as how that analysis or information will be incorporated into federal decision-making (such as through incorporation by reference). Third, for a determination that a provision is "impracticable," the waiver should be required to include a detailed explanation of: (a) whether the analysis or information is impossible to obtain; (b) whether the determination of impracticability is based on cost and, if so, what analogous but less costly options for acquiring the analysis or information have been considered as a substitute; and (c) whether and how the federal decision-making process will make use of existing tools for assessing impacts based on incomplete or unavailable information.[50] By requiring a written explanation of how these criteria are satisfied as a justification for any waiver, DOE can ensure the legitimacy of a waiver and can thus shield against poor agency decision-making and legal vulnerability.

Similarly, to improve accountability, the final rule should allow a waiver of the rule's requirements to be appealed to the Secretary of Energy. Any entity participating in the

[50] *See* 40 C.F.R. § 1502.21 ("Incomplete or unavailable information").

IIP/CITAP process, including any relevant federal agency or non-federal entity, and any member of any affected community, should be able to appeal a waiver.

Alternatively, if DOE is not willing to implement these recommendations, then the final rule should simply eliminate the proposed waiver provision.

B. DOE should clarify when non-qualifying projects may participate in the IIP/CITAP process.

Under the proposed rule, GDO's Director "may determine" that an otherwise non-qualifying project can nevertheless be deemed a "qualifying project" and allowed to participate in the IIP/CITAP process.[51] However, while the proposed rule defines a process by which a non-qualifying project can ask to participate, and a timeline by which DOE must respond, the proposed rule does not provide any criteria for determining when to allow participation in the IIP/CITAP process. While limited discretion is appropriate here, without any criteria, the determination appears to be wholly discretionary, which makes it difficult for project proponents, relevant regulators, and members of the public to understand what transmission projects will likely be eligible to participate in DOE's process. The absence of such criteria also makes it difficult for project proponents to understand how to prepare a request for participation that is likely to satisfy DOE. Similarly, DOE may have difficulty processing such participation requests in a timely manner, because it may receive requests that do not contain all the information the agency needs but still face a 30-day deadline for the agency's decision.[52]

To clarify this process, PIOs suggest that DOE establish criteria that will assist project proponents in making well-grounded requests for participation in the IIP/CITAP process and will assist DOE by guiding its determination as to when participation will further the purposes of the

[51] NOPR, 88 Fed. Reg. at 55,844.
[52] *Id.*

proposed rule and FPA section 216(h). In particular, the final rule should require requests for participation in the IIP/CITAP process to explain: (1) what, if any, portions of the definition of a "qualifying project" the non-qualifying project satisfies; and (2) how the IIP/CITAP process would facilitate federal authorizations or be otherwise beneficial. Similarly, the final rule should explain that DOE may allow an otherwise non-qualifying project to participate if: (a) coordination among federal and/or non-federal regulators would facilitate or expedite authorizations; (b) participation would provide benefits that exceed the costs of participation, including such benefits as cost-reductions for ratepayers, relief of congestion, or assistance with meeting state climate and clean energy targets; and (c) relevant federal and non-federal regulators have sufficient resources to dedicate to the project's participation in the IIP/CITAP process. DOE's determination should be made in writing and provide an explanation.

PIOs also recommend that if DOE rejects a request to participate in the IIP/CITAP process, the project proponent should be allowed to appeal that decision to the Secretary of Energy.

C. DOE should explain why the proposed rule would require each agency to issue a separate Record of Decision.

Under the proposed rule, all federal agencies issuing authorizations for a transmission project must make decisions based on the same environmental analysis but "shall execute their own records of decision."[53] The proposed rule does not specifically explain why each agency should issue a separate record of decision. This provision deviates somewhat from recent revisions to NEPA, which state that "[t]o the extent practicable, if a proposed agency action will require action by more than one Federal agency and the lead agency has determined that it requires preparation of an environmental document, the lead and cooperating agencies shall

[53] *Id.* at 55,855 (proposed 10 C.F.R. § 900.12(f)).

evaluate the proposal in a single environmental document."[54] It is also a departure from CEQ's NEPA regulations, which state that "[t]o the extent practicable, if a proposal will require action by more than one Federal agency . . . the lead and cooperating agencies shall . . . issue a joint record of decision."[55] In general, a joint record of decision would seem to further the proposed rule's overall purpose of promoting efficiency. A joint record of decision may also help remove confusion over how to seek judicial review.[56]

Because DOE's proposed rule departs from recent NEPA reforms and CEQ's regulations, PIOs recommend that DOE either alter the final rule to conform with CEQ's approach or better explain why it is departing from CEQ's regulations. Such an explanation should include reasoning for why a joint record of decision for transmission projects would be impractical, inappropriate, or inefficient.

D. DOE should clarify how to seek judicial review of federal authorizations.

Consistent with FPA section 216(h), DOE states that if an agency fails to act on an application within the deadline set by DOE, or denies an application, the project proponent or any state where the facility would be located may appeal to the President for review of the application.[57] However, DOE does not explain how this appeal to the President might work. The proposal also does not address how to seek judicial review of an order approving an application—either issued by DOE or subsequently by the President.

First, DOE must make clear to the public how the appeal to the President might work. This is an untested provision of law, and the public needs to understand how the process might

[54] 42 U.S.C. § 4336a(b).
[55] 40 C.F.R. § 1501.7(g). Upcoming revisions to CEQ's regulations will likely retain this principle. *See* CEQ, *National Env't Pol'y Act Implementing Reguls. Revisions Phase 2*, 88 Fed. Reg. 49,924, 49,971 (proposed 40 C.F.R. § 1501.7(g) stating that agencies "shall issue, except where inappropriate or inefficient, a joint record of decision").
[56] *See infra* § IV(D).
[57] *See* 16 U.S.C. 824p(h)(6)(A).

be carried out, including whether and how a project proponent might be able to appeal any decision made by the President.

Review under FPA section 313 has important consequences that may not be apparent to members of the public or project proponents. First, although most federal agency decisions are subject to review in district courts within six years, the FPA's judicial review provision is significantly different: challenges to covered decision-making must first be brought to the agency and then litigated in a court of appeals, under much shorter timelines.[58] Second, the FPA imposes more demanding exhaustion requirements, allowing courts to consider only claims that the petitioner specifically raised in a rehearing application.[59]

DOE should help project proponents and the public understand the FPA's judicial review requirements so that they can structure their participation appropriately. DOE should clearly explain—both in its guidelines and in publishing individual applications for comment—that the FPA's judicial review provisions require intervention before DOE, raising any substantive concerns during the DOE process even if those concerns are not issues with which DOE has expertise, seeking rehearing within thirty days, and seeking judicial review in a court of appeals within sixty days of a rehearing decision.[60] Similar to how it handled NIETC applications, DOE should follow its prior practice of granting party status to any party that submits a timely comment on a transmission application.[61] Last, consistent with important principles of early and meaningful stakeholder outreach, DOE should encourage applicants to provide this information in both pre- and post-application outreach, and establish model language for doing so.

---

[58] *See* 16 U.S.C. § 825l.
[59] *Id.* § 825l(b).
[60] *See Adorers of the Blood of Christ U.S. Province v. Transcon. Pipe Line Co., LLC*, 53 F.4th 56, 62–65 (3d Cir. 2022) (reviewing various circuits' precedents and concluding that Religious Freedom Restoration Act claim should have been brought before FERC even though FERC has no expertise regarding the issues).
[61] *See* DOE, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 57,025 (Oct. 5, 2007).

V. DOE should expand and strengthen its proposed rule.

Because the IIP/CITAP process will likely accelerate transmission permitting and development, which will have impacts on communities and the environment, DOE should allow for greater involvement in the IIP/CITAP process by members of the public that have relevant expertise regarding affected resources. Similarly, because the IIP/CITAP process will provide significant benefits in terms of bringing necessary transmission projects online more quickly, PIOs recommend that DOE broaden the proposed rule to make the IIP/CITAP process open to more types of transmission projects. Additionally, we propose measures to make the rule more efficient, more accurate in identifying impacts at appropriate distances from proposed transmission lines, and more protective of the rights of landowners.

A. DOE should allow members of the public to participate in the IIP/CITAP process if they can demonstrate special expertise.

Under the proposed rule, "relevant non-Federal entities" have an explicit role in the IIP/CITAP process. However, this definition does not include community groups or public interest organizations that may provide valuable input. The proposed rule defines "non-Federal entity" as "an Indian Tribe, multi-state governmental entity, state agency, or local government agency"[62] and defines "relevant non-Federal entity" as follows:

> *Relevant non-Federal entity* means a non-Federal entity with relevant expertise or jurisdiction within the project area, that is responsible for issuing an authorization for the qualifying project, that has special expertise with respect to environmental and other issues pertinent to or potentially affected by the qualifying project, or that provides funding for the qualifying project. The term includes an entity with either permitting or non-permitting authority, such as an Indian Tribe, Native Hawaiian Organization, or State or Tribal Historic Preservation Offices, with whom consultation must be completed in accordance with section 106 of the NHPA prior to approval of a permit, right-of-way, or other authorization required for a Federal authorization.[63]

[62] NOPR, 88 Fed. Reg. at 55,843.
[63] *Id.* at 55,843–44.

This definition excludes community and public interest groups because they are not regulators even if they have "special expertise with respect to environmental and other issues pertinent to or potentially affected by the qualifying project."[64] Instead, DOE considers such groups to be merely "stakeholders," which is a term with a significantly broader definition.[65]

Under the proposed rule, "relevant non-Federal entities" have a seat at the table during the IIP/CITAP process.[66] For example, "relevant non-Federal entities" may attend IIP meetings and review and comment on draft resource reports.[67] Likewise, DOE and any other co-lead agency must "[c]onsult with . . . relevant non-Federal entities" when preparing an environmental review.[68] In contrast, although the rule "seeks to promote thorough and consistent stakeholder engagement by a project proponent,"[69] stakeholders have significantly less access to the IIP process. While project proponents must create and execute plans for stakeholder engagement,[70] and must report to DOE and relevant Federal and non-Federal entities about how the proponent has solicited and responded to stakeholder feedback,[71] stakeholders themselves may not participate in IIP meetings or submit comments to DOE or other entities that are participating.

---

[64] *Id*.
[65] *See id.* at 55,844 ("*Stakeholder* means any relevant non-Federal entity, any non-governmental organization, affected landowner, or other person potentially affected by a proposed qualifying project.").
[66] *See*, *e.g.*, *id.* (proposed 10 C.F.R. § 900.4(c) describing the purpose of the IIP process as to "ensure[] early interaction between the project proponents, relevant Federal entities, and relevant non-Federal entities to enhance early understanding by those entities"); *see also id.* (proposed 10 C.F.R. § 900.4(f) requiring DOE to coordinate with non-Federal entities "to the maximum extent practicable").
[67] *See*, *e.g.*, *id.* at 55,846 (proposed § 900.5(h) stating that "DOE shall also invite relevant non-Federal entities to participate in the initial [IIP] meeting."); *id.* at 55,847 (proposed § 900.6(a) requiring project proponents to "revise resource reports in response to comments received from relevant Federal entities and relevant non-Federal entities during the [IIP] Process"); *id.* at 55,849 (proposed § 900.6(h)(9) noting that relevant non-Federal entities may have discussions or provide written correspondence "related to fish, wildlife, and vegetation resources").
[68] *Id.* at 55,855 (proposed § 900.12(b)(2)).
[69] *Id.* at 55,842 (proposed § 900.1(c)).
[70] *See, e.g., id.* at 55,845 (proposed § 900.5(d) describing the project participation plan).
[71] *See, e.g., id.* at 55,853 (proposed § 900.8(e)(3) requiring the IIP Process review meeting to include a discussion of "stakeholder outreach activities, resultant stakeholder input, and project proponent response to stakeholder input").

DOE should allow community and public interest groups to participate in the IIP process if they have some "special expertise with respect to environmental and other issues pertinent to or potentially affected by the qualifying project."[72] Allowing community and public interest groups with "special expertise" to participate in the IPP process would further the proposed rule's aim to create "an opportunity to identify as early as possible potential environmental and community impacts associated with a proposed project."[73] Groups representing affected communities are uniquely well suited to identify community impacts, and groups focused on environmental causes are similarly well-situated to identify environmental impacts. Likewise, such groups are also well-situated to help identify potential alterations to a project or mitigation measures. Similarly, these groups are uniquely well equipped to advise DOE and other agencies regarding public participation plans.

DOE should also better define "special expertise" to help project proponents, affected communities, and public interest organizations in better understanding what groups may meet this definition. Likewise, the final rule should allow community and public interest groups to request that they be permitted to participate in the IIP/CITAP process by explaining what "special expertise" they possess, and should define a time period by which DOE will respond to such requests.

Additionally, DOE should provide a mechanism for any stakeholder to submit input into the IIP/CITAP process. For example, affected landowners or members of affected communities should have an opportunity to inform DOE or other relevant federal and non-federal regulators if a project proponent communicates with them in a way that is coercive or dishonest. Likewise, if

[72] *Id.* at 55,843–44.
[73] *Id.* at 55,828.

communities disagree with a project proponent about the scope of a project's impacts, they should have an opportunity to air such concerns before the CITAP process begins.[74]

B. The proposed rule should include transmission projects analyzed in an Environmental Assessment.

The proposed rule would limit its application to "high voltage transmission projects that are expected to require preparation of an [Environmental Impact Statement ("EIS")]."[75] As such, the rule would not generally apply to transmission projects analyzed in an Environmental Assessment ("EA"). DOE intends to limit the rule in this manner "because the Federal coordination will be most impactful for such projects due to their complexity."[76] However, neither the proposed rule nor DOE's general NEPA regulations clarify when transmission projects will be "expected to require" an EIS.[77] FERC's regulations explain that transmission projects covered by section 216 of the FPA will generally require an EIS unless they are sited in a right-of-way with existing facilities,[78] but the proposed rule does not make clear whether DOE will take the same approach. To allow project proponents and members of the public to better understand what level of environmental review a project will require—and whether a project can expect to be able to participate in the IIP/CITAP process or whether the proponent will have to request participation—PIOs encourage DOE to use the Final Rule as an opportunity to define what transmission projects are "expected" to require an EIS and what transmission projects are expected to be analyzed in an EA.

---

[74] *See id.* at 55,829 (noting that the IIP process aims to collate relevant information early "to avoid time and resource-consuming pitfalls that would otherwise appear during the application process").
[75] *Id.* at 55,830.
[76] *Id.* at 55,831.
[77] DOE's general NEPA regulations contain appendices that describe classes of actions that typically require an EA and or an EIS, but these appendices do not address transmission projects. *See* 10 C.F.R. § 1021, App. D–E.
[78] *See* 18 C.F.R. §§ 380.5(b)(14), 380.6(a)(5).

PIOs also encourage DOE to expand the Final Rule to allow transmission projects analyzed in an EA to participate in the IIP/CITAP process. While PIOs agree with DOE that the IIP/CITAP process will be beneficial for complex transmission projects that require an EIS, the process will also be quite helpful for projects analyzed in an EA. One of the primary benefits of the IIP/CITAP process is improved coordination among federal agencies with permitting responsibilities, as well as improved coordination between regulators and project proponents. This benefit is as applicable to a transmission project analyzed in an EA as it is to a project analyzed in an EIS. For example, a project considered in an EA may require a similar number of federal authorizations from a similar array of federal agencies as a project considered in an EIS. Moreover, each federal agency will need to verify that the proposed project will not have any significant environmental impact, particularly with regard to resources with which agencies have special expertise. For these reasons, the need for coordination between project proponents and federal agencies, and among agencies, is not diminished simply because the project will be analyzed in an EA rather than an EIS. Indeed, CEQ's regulations and recent amendments to NEPA encourage coordination for projects analyzed in EAs.[79]

To the extent that DOE parallels FERC's regulations by specifying that transmission projects sited within existing rights-of-way will generally require only an EA, rather than an EIS, PIOs believe that the IIP/CITAP process will be especially helpful. Although PIOs agree that locating projects within existing rights-of-way may reduce their overall adverse impacts, this approach also risks concentrating impacts in areas such as communities with environmental justice concerns, which are already facing burdens associated with existing infrastructure. The

[79] 16 U.S.C. § 4336a(b) (requiring agencies to collaborate "[t]o the extent practicable" on the preparation of "a single environmental document"); 40 C.F.R. § 1501.7(g) (encouraging agencies to collaborate "[t]o the extent practicable" on "a single environmental assessment" and "a joint finding of no significant impact").

proposed rules' requirement for a public engagement plan would be of great assistance in such circumstances. Likewise, if DOE agrees to include affected community groups as "relevant non-federal entities," the IIP/CITAP process would provide means for representatives of affected communities to be directly included in conversations with project proponents and regulators.

C. DOE should allow transmission projects for offshore wind facilities to participate in the IIP/CITAP process.

The proposed rule would allow transmission projects that require authorization under the Outer Continental Shelf Lands Act ("OCSLA") to participate only if the transmission project is not tied to a generation project and all relevant federal agencies agree to allow the transmission project's participation.[80] The proposed rule explains that these restrictions on participation "reflect the terms of the 2023 [Memorandum of Understanding ("MOU")]" between DOE and other relevant federal agencies regarding the implementation of FPA section 216(h).[81]

PIOs are concerned that this provision of the proposed rule may significantly limit the IIP/CITAP process' utility for enabling development of offshore wind resources that are likely to be critical for the attainment of federal and state climate and clean energy goals.[82] For example, by allowing any agency that was an MOU signatory to make a wholly discretionary decision to forbid an offshore transmission line from participating in the process, the proposed rule would make it very difficult for project proponents to predict whether a project may be able to participate. Oddly, the proposed rule would require agreement by all MOU signatories to allow a project's participation, even if the agency has no jurisdiction or expertise over offshore issues; this would have the perverse result of allowing the Department of Agriculture to block an

[80] NOPR, 88 Fed. Reg. at 55,844 (proposed § 900.3(e)–(f)).
[81] *Id.* at 55,832.
[82] See DOE, *Offshore Wind Market Report: 2023 Edition*, Executive Summary, at 9 (2023), https://www.energy.gov/sites/default/files/2023-08/offshore-wind-market-report-2023-edition-executive-summary_0.pdf.

offshore transmission project's participation in the IIP despite the project having no impact on lands or resources administered by that agency.[83] Moreover, the proposed rule provides no recourse if an MOU-signatory agency declines to allow participation.

PIOs recommend that the final rule simply allow offshore transmission projects to participate in the IIP/CITAP process. Like other forms of transmission, offshore projects will likely require multiple federal authorizations, which makes the IIP/CITAP process as valuable offshore as it is onshore. Similarly, we recommend removing the limitation on offshore transmission projects that are tied to generation projects; given that such transmission lines will still require multiple federal authorizations, they would still benefit from the IIP/CITAP process. At the very least, DOE must better explain why it is limiting offshore transmission projects' participation in this manner. The only explanation in the proposed rule is that these limitations are consistent with a prior MOU; however, that MOU also fails to explain this limitation.

If DOE decides to continue to limit offshore transmission's participation in the final rule, PIOs recommend including a set of criteria for determining when projects will be allowed to participate and a means of administrative appeal, which would create a more transparent, predictable, and accountable system.

D. DOE should consider the use of joint lead agencies.

Under the proposed rule, DOE will serve as the lead agency for preparing NEPA documents and may share this responsibility with only one "co-lead agency."[84] DOE seeks comment on whether its use of the terms "lead" and "co-lead" agency is consistent with recent amendments to NEPA.[85] The relevant amendments to NEPA codified longstanding CEQ

[83] *See* NOPR, 88 Fed. Reg. at 55,832 (requiring that "all 2023 MOU signatories agree to the project's inclusion in the CITAP Program").
[84] *Id.* at 55,855 (proposed § 900.11).
[85] *Id.* at 55,828.

regulations regarding the roles of lead and joint lead agencies.[86] In general, DOE's proposed rule is well-aligned with the statute and CEQ regulations in the substantive and procedural expectations laid out for DOE as the lead agency, for a co-lead agency, and for other relevant federal agencies. However, the proposed rule's assumption that only one agency can serve as a "co-lead agency" departs from the statute and CEQ regulations, both of which clearly allow multiple agencies to serve as "joint lead agencies."[87] Although neither the statute nor CEQ regulations require DOE to allow multiple agencies to serve as "co-lead," PIOs encourage DOE to consider whether allowing multiple "co-lead" agencies could better comport with NEPA and CEQ regulations and could better effectuate the proposed rule's goal of improving efficiency in federal analysis and decision-making. If DOE opts to allow only one co-lead agency as in the proposed rule, PIOs encourage DOE to explain why.

E. DOE's proposed distances for defining project effects are appropriate for some affected resources but inappropriate for others.

DOE particularly seeks comment on whether the proposed rule specifies appropriate distances for identifying resources that a proposed project will affect.[88] For example, the proposed rule defines an "affected landowner" as one that is located within 0.25 miles of a proposed project's route,[89] and requires the identification of various types of federally protected resources within 0.25 miles of a proposed project.[90] Likewise, DOE specifically asks whether it

[86] *Compare* 42 U.S.C. § 4332a(a), *with* 40 C.F.R. §§ 1501.7–1501.8 (establishing substantively equivalent procedures for lead, joint lead, and cooperating agencies).
[87] 16 U.S.C. § 4336a(a)(1)(B) (stating that agencies "may appoint such State, Tribal, or local agencies as joint lead agencies as the involved Federal agencies shall determine appropriate"); 40 C.F.R. § 1501.7(b) ("Federal, State, Tribal, or local agencies, including at least one Federal agency, may act as joint lead agencies").
[88] NOPR, 88 Fed. Reg. at 55,833.
[89] *Id.* at 55,842 (proposed § 900.2).
[90] *Id.* at 55,850 (proposed § 900.6(m)(10)).

is sufficient to require the identification of various publicly or privately preserved areas within 0.25 miles of a proposed project facility.[91]

Whether 0.25 miles is a sufficient distance for identification of affected resources depends largely on the nature of the impacts that DOE is attempting to identify. Although some impacts may not be detectable more than 0.25 miles from a transmission project, visual impacts will likely be noticeable at much greater distances. Transmission projects are large projects with a substantial impact on surrounding landscapes and communities. Electric transmission projects' visual impacts are usually expected to extend five to ten miles from the project.[92] High-voltage transmission facilities (230 kV to 500 kV) "strongly attract visual attention" at distances ranging from 1.5 to 3 miles.[93]

Accordingly, DOE should use greater distances that are consistent with transmission projects' actual visual impacts to identify resources for which visual impacts may be significant. Wilderness areas, which are preserved precisely because of their wild, undeveloped nature, are a prime example of resources that are vulnerable to visual impacts from distances significantly greater than 0.25 miles. DOE should take similar care with any other resources that are protected due to undeveloped or historic characteristics, which may be harmed by changes to the visual landscape or by noise. DOE should require project proponents to identify any such resources that are particularly vulnerable to visual impacts within five to ten miles of a proposed project.

Similarly, certain areas preserved for wildlife habitat may be vulnerable to adverse impacts from transmission projects at distances greater than 0.25 miles. For example, many

---

[91] *Id.* at 55,833 (seeking comment on proposed § 900.6(m)(8)).
[92] Robert G. Sullivan et al., *Comparison of Visual Impact Analysis Under the National Environmental Policy Act and Section 106 of the National Historic Preservation Act*, U.S. Dep't of Agriculture, at 204 (2018), https://www.fs.usda.gov/research/treesearch/57547.
[93] Robert G. Sullivan et al., *Electric Transmission Visibility and Visual Contrast Threshold Distances in Western Landscapes*, at 1 (Apr. 2014), https://www.researchgate.net/publication/261557201_Electric_Transmission_Visibility_and_Visual_Contrast_Threshold_Distances_in_Western_Landscapes.

National Wildlife Refuges serve as important habitat for migratory birds, and the presence of a transmission line within those birds' migratory pathways could potentially diminish the degree to which a refuge serves as migratory stopover habitat. To identify an appropriate distance from areas preserved to be important wildlife habitat, DOE should consult with the U.S. Fish and Wildlife Service, state wildlife preservation agencies, and other organizations with relevant expertise. Generally, PIOs recommend that areas with valuable habitat for migratory birds, such as National Wildlife Refuges, should be identified no less than 10 miles from proposed transmission projects.

F. DOE should require a Landowner Bill of Rights.

FERC's proposed backstop permitting rule would require applicants to provide affected landowners with a Landowner Bill of Rights. Providing this document at the outset of the permitting process helps ensure that affected landowners are informed of their rights in dealings with the applicant, in FERC proceedings, and in eminent domain proceedings.[94] For these same reasons, we recommend that DOE require project proponents to provide a similar bill of rights in DOE-led transmission permitting processes. For reference, we include at Attachment A the draft revised Landowner Bill of Rights that PIOs submitted to FERC. We recognize that it may need to be modified to reflect the differences between DOE and FERC authority, but we believe it is a good starting point.

It is particularly important that landowners understand the effect that federal approval of a transmission line may have on their land—particularly with respect to eminent domain. It is imperative that the affected landowner understand that if the project is approved, the project proponent may need to take ownership of all or part of their land. It is also important for

[94] *See Applications for Permits to Site Interstate Elec. Transmission Facilities*, 181 FERC ¶ 61,205, at P 38 (2022).

stakeholders to know their rights to participate in DOE proceedings—at both the IIP stage and after the permit request has been filed, and this information should be as prominent as possible in the Landowner Bill of Rights. This should include any information on the need to obtain party status before appeal, and how to attain such status, and whether and how a party can participate in the Presidential appeal process.

VI. DOE should revise its definition of "communities of interest" to better reflect environmental justice issues.

DOE proposes to modify § 900.2 to define "communities of interest" to "include disadvantaged, fossil energy, rural, Tribal, indigenous, geographically proximate, or communities with environmental justice concerns that could be affected by the qualifying project."

Similar to our request to FERC,[95] we offer revisions to DOE's proposed definition of "communities of interest":

> "'*Communities of interest'* include any community that is historically marginalized and/or overburdened by pollution ~~disadvantaged~~, including but not limited to communities with significant representation of communities of Color, communities burdened by fossil energy, low-income or low-wealth communities, rural communities, Tribal communities, ~~I~~ndigenous communities, geographically proximate communities, or communities with environmental justice concerns that could be affected by the qualifying project."

For DOE's convenience, PIOs also present the same definition in a clean format:

> "'*Communities of interest'* include any community that is historically marginalized and/or overburdened by pollution, including but not limited to communities with significant representation of communities of Color, communities burdened by fossil energy, low-income or low-wealth communities, rural communities, Tribal communities, Indigenous communities, geographically proximate communities, or communities with environmental justice concerns that could be affected by the qualifying project."

[95] PIOs Comments on FERC Backstop NOPR, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf.

First, DOE must revise the definition to describe environmental justice communities adequately and respectfully. While environmental justice communities face disadvantages, they are communities, first and foremost. Leading with the term "disadvantaged" fails to adequately describe the full identity of residents within these communities. Despite factors prevailing against them, environmental justice communities are first and foremost, simply communities that are rich in culture, spirit, tenacity, courage, and so much more. Further, these communities were the explicit target of unjust social, economic, and environmental practices and policies that ultimately created inequities and perpetuated marginalization. Simply removing the term "disadvantaged" from the definition reflects the power and strength possessed by communities while still distinguishing them from other affected stakeholders. PIOs acknowledge that the term "disadvantaged communities" has regulatory and legal significance in other contexts within the federal landscape, such as the Justice40 Initiative (mandating that "40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities that are marginalized, underserved, and overburdened by pollution") and in various EPA regulations and guidance documents.[96] Within the particular context of DOE, PIOs do not believe the agency will potentially exclude affected communities if the term "disadvantaged" is excluded from the definition, because the terms "historically marginalized" and "overburdened" are included in the definition.

Similarly, DOE should clarify and equitably describe the communities included in the definition. First, DOE must include in the definition communities with significant representation

[96] White House, *Justice40: A Whole-of-Government Initiative*, https://www.whitehouse.gov/environmentaljustice/%20justice40/ (last accessed May 15, 2023).

of communities of Color and low-income or low-wealth communities.[97] PIOs also encourage the Commission to capitalize the term "Color" and "Indigenous" to respect the identities in each term.

Third, DOE must revise the definition to make clear what it means by "fossil energy." PIOs read that to mean communities that have historically been overburdened by fossil energy pollution. We ask DOE to make this clear in the final rule. "Historically marginalized" captures communities that have experienced social, political, and economic exclusion and discrimination.[98] Overburdened communities are characterized by "the concentration of pollution and other burdens that disproportionately harm local populations."[99] DOE should also include a definition of overburdened that aligns with the EPA Environmental Justice ("EJ") 2020 Glossary.[100] Finally, DOE proposes to require proponents to describe how they will reach out to communities of interest about mitigation, and to require the resource report to describe any proposed measures intended to avoid, minimize, or mitigate such impacts or community concerns. DOE should explicitly require project proponents to solicit community comments on what mitigation they desire and to respond to those comments—including the mitigation that the project proponent is proposing, if different than the community's desired form of mitigation. Community members are often in the best position to know what would mitigate their concerns. They should have a say in what happens in their community. We recognize that it may not

[97] *See* Katherine Schaeffer, *Pew Research Center: What's the difference between income and wealth?' and other common questions about economic concept*s, https://www.pewresearch.org/decoded/2021/07/23/whats-the-difference-between-income-and-wealth-and-other-common-questions-about-economic-concepts/ (July 23, 2021).
[98] Equitable & Just Nat'l Climate Platform, Approaches to Defining Environmental Justice Community for Mandatory Emissions Reductions Policy, at 4–6 (Sept. 2021), https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf.
[99] *Id.* at pdf p. 3.
[100] Env't Prot. Agency, *Environmental Justice: EJ 2020 Glossary* (Aug. 18, 2022), https://www.epa.gov/environmentaljustice/ej-2020-glossary (defining "Overburdened Community").

always be possible to mitigate concerns in exactly the way a community wants, but project proponents should be required to explain why they have chosen different mitigation.

VII. DOE should require rigorous standards for Tribal consultation.

In prior comments to DOE and FERC, PIOs have consistently stressed the critical importance of meaningful outreach and consultation with Tribes and Indigenous peoples that appropriately respects Tribal sovereignty.[101] For the sake of brevity, we incorporate those comments here, encourage DOE to review them in their entirety, and reiterate a few key points. As we have previously emphasized, although our comments provide advice about meaningful consultation with Tribes and Indigenous peoples, we do not represent a Tribal perspective, let alone the diverse views of the many Indian Tribes and Indigenous peoples that DOE must consider. As such, we respectfully encourage DOE to actively solicit and carefully review input from Tribes and Indigenous peoples on the proposed rule.

The proposed rule would define the term "Indian Tribe" consistently with the definition in the Indian Self-Determination and Education Assistance Act.[102] That definition is generally consistent with DOE's NEPA regulations and FERC's proposed backstop permitting rule.[103] PIOs believe that this definition is also consistent with DOE's obligations to conduct meaningful government-to-government consultations. Additionally, the proposed rule appropriately defines the term "communities of interest" more broadly to include Indigenous communities, which

[101] PIOs Comments on FERC Backstop NOPR, at 51–75, Docket No. RM22-7-000 (May 17, 2023), Accession No. 20230517-5046, https://sustainableferc.org/wp-content/uploads/2023/05/20230517-5046_Comments-of-Public-Interest-Organizations.pdf; PIOs Comments on DOE Notice of Intent and Request for Information: Designation of National Interest Electric Transmission Corridors, at 57–61, Docket No. DOE-HQ-2023-0039-0001, https://sustainableferc.org/wp-content/uploads/2023/07/Comments-of-Public-Interest-Organizations-on-NIETC-RFI.pdf.
[102] NOPR, 88 Fed. Reg. at 55,843 (proposed § 900.2).
[103] *Compare* 25 U.S.C. § 5304(e), *with* 10 C.F.R. § 1021.104, *and* proposed 18 C.F.R. § 50.1.

recognizes that DOE also has obligations to consider the views of Indigenous communities that are not federally recognized.

PIOs believe that the final rule should recognize the obligation to include free, prior, and informed consent as a critical element of Tribal consultation. The United Nations Declaration on the Rights of Indigenous Peoples, which the United States supports, mandates that nation states consult with Tribal Nations—or "Indian Tribes" under the proposed rule's definition—"in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[104] The obligation of governments to obtain free, prior, and informed consent allows Indigenous peoples to give or withhold consent to a project that *may* affect them or their territories. While consent must first be ascertained *prior* to an action, consent can also be withdrawn at any stage of a process. Moreover, the requirement for the federal government to attain free, prior, and informed consent enables Indigenous peoples to negotiate the conditions under which the project will be designed, implemented, monitored, and evaluated.

PIOs suggest that DOE should adopt language from the Washington State Attorney General's Centennial Accord Plan. That policy requires the Attorney General's Office to obtain free, prior, and informed consent before initiating a program or project that affects Tribes, Tribal rights, Tribal lands, or sacred sites.[105] Notably, the policy states what actions are subject to consent, how to request consent, defines consent, outlines how to emphasize that the office is

[104] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, at 23 (Sept. 13, 2007), https://www.un.org/development/desa/Indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[105] *See* Wash. State Office of the Attorney Gen., *Tribal Consent & Consultation Policy* found in the *Centennial Accord Plan* (May 10, 2019), https://www.atg.wa.gov/tribal-consent-consultation-policy.

always open to consultation at the request of Tribes, and states how the office will provide notice to Tribes.[106] This approach would ensure that DOE upholds its trust responsibility and respects Tribes' rights to self-determination.

Additionally, DOE must continue to implement the requirements of the Biden Memorandum on Uniform Consultation Standards ("Uniform Consultation Standards").[107] The Uniform Consultation Standards address several important requirements, including: agency staff training requirements; notice contents and timing minimums; and recordkeeping mandates, including a requirement for the agency to explain how consultation affected the ultimate decision.[108] DOE has already issued an action plan and progress updates in response to the Uniform Consultation Standards,[109] and should continue to solicit Tribal input as it works toward a final rule.

Finally, DOE should ensure that the final rule values and incorporates Indigenous Knowledge in environmental review and decision-making. CEQ and the Office of Science and Technology Policy formally recognize Indigenous Traditional Ecological Knowledge as an important body of knowledge that contributes to the scientific, technical, social, and economic advancements of the United States and our collective understanding of the natural world.[110] As a

[106] *See id.*at § IV(A)–(C), VI–VII.
[107] *See* White House, *Memorandum on Uniform Standards for Tribal Consultation* (Nov. 30, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/.
[108] *See id.* at §§ 5, 7, 8.
[109] *See* DOE, Tribal Consultation Plan of Actions – Progress Report (Mar. 2022), https://www.energy.gov/sites/default/files/2022-11/DOE%20Tribal%20Consultation%20Plan%20of%20Actions%20%E2%80%93%20Progress%20Report%2C%20March%202022.pdf.
[110] *See* Office of Sci. and Tech. Pol'y, Memorandum on Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.

2021 memorandum instructed other agency department heads, Indigenous Traditional Ecological Knowledge "can and should inform Federal decision making along with scientific inquiry."[111]

VIII. Conclusion

PIOs appreciate the opportunity to comment on the proposed rule, which is an important step toward developing transmission projects that are essential to mitigate climate change, meet the nation's climate and clean energy goals, reduce congestion, increase reliability and resilience, and protect consumers, communities, and the environment.

Respectfully submitted this 2nd day of October 2023,

/s/ Nick Lawton
Nick Lawton
Senior Attorney
Earthjustice
1001 G Street, NW Suite 1000
Washington, DC 20001
nlawton@earthjustice.org

/s/ Nicholas J. Guidi
Nicholas J. Guidi
Senior Attorney
Southern Environmental Law Center
122 C Street NW, Suite 325
Washington, DC 20001
nguidi@selcdc.org

/s/ Cullen Howe
Cullen Howe
Senior Attorney
Natural Resources Defense Council
40 West 20th Street
Eighth Floor
New York, NY 10011
chowe@nrdc.org

/s/ John Moore
John Moore
Director
Sustainable FERC Project
1125 15th Street NW
Suite 300
Washington DC 20005
Moore.fercproject@gmail.com

/s/ Fred Heutte
Fred Heutte
Senior Policy Associate
NW Energy Coalition
811 1st Ave., Suite 305
Seattle, WA 98104
fred@nwenergy.org

/s/ Jasmine Jennings
Jasmine Jennings
Federal Regulatory Affairs Manager
WE ACT for Environmental Justice
50 F. St., NW, Suite 550
Washington, DC 20001
jasmine.jennings@weact.org

[111] Office of Sci. and Tech. Pol'y, Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making, at pdf p. 2 (Nov. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf.

Attachment A: Draft Revised Landowner Bill of Rights (Blackline from NOPR Proposal)

Appendix

Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings

[NAME OF APPLICANT] has applied to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line on or near your property (applicant).

1. If the project identified in the notice provided to you is approved by the Federal Energy Regulatory Commission (Commission), your property, or part of it, may be necessary for the construction of modification of the project. If it is, the applicant will need to take ownership of the part of the property that is necessary for the construction or modification of the project. You have the right to receive compensation if your property is necessary for the construction or modification of an authorized project. The amount of such compensation would be determined through a negotiated easement agreement between you and the ~~entity applying to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line (~~applicant~~)~~ or through a~~n~~ ~~eminent domain~~ proceeding in the appropriate Federal or State court that would allow the applicant to acquire your land at a price set by the court, called an eminent domain proceeding. The applicant cannot seek to take a property by eminent domain unless it acts in good faith towards the landowner and until the Commission approves the application, unless otherwise provided by State or local law.

2. You have the right for the applicant to deal with you in good faith. This includes receiving factually correct communications and having inaccurate representations corrected within three business days. The applicant may also not misrepresent the status of discussions or negotiations between it and you or any other party. The applicant must communicate respectfully with you and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics. If you believe the applicant has violated any of these rights, you have the right to contact the Commission to explain any abuse or misconduct by the developer. For help reporting these issues, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

3. [Moved from original Point 4] You have the right to participate in the pre-filing process, including by filing comments and speaking with Commissioners or Commission staff. ~~and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply.~~ For more information about how to participate ~~and any relevant deadlines~~, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

4. Once the pre-filing is complete, the applicant may file an application for the Commission to consider the project. You will be notified when an application is filed. You may participate in the application process by intervening and providing written comments. If you do not intervene, you will not be able to file a lawsuit to challenge the Commission's decision on this project, including any determination that the applicant acted toward you in good faith. Instructions on how to intervene are in the notice provided. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

5. You have the right to ~~request~~ receive the full name, title, contact information including e-mail address and phone number, and employer of every representative of the applicant that contacts you about your property.

6. You have the right to access information about the proposed project through a variety of methods, including by accessing the project website that the applicant must maintain and keep current, by visiting a central location in your county designated by the applicant for review of project documents, or by accessing the Commission's eLibrary online document information system at www.ferc.gov.

~~7. You have the right to participate, including by filing comments and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).~~

8. When contacted by the applicant or a representative of the applicant either in person, by phone, or in writing, you have the right to communicate or not to communicate. You also have the right to hire counsel to represent you in your dealings with the applicant and to direct the applicant and its representatives to communicate with you only through your counsel.

9. The applicant may seek to negotiate a written easement agreement with you that would govern the applicant's and your rights to access and use the property that is at issue and describe other rights and responsibilities. You have the right to negotiate or to decline to negotiate an easement agreement with the applicant; however, if the Commission approves the proposed project and negotiations fail or you chose not to engage in negotiations, there is a possibility that your property could be taken through an eminent domain proceeding, in which case the appropriate Federal or State court would determine fair compensation.

10. You have the right to hire your own appraiser or other professional to appraise the value of your property or to assist you in any easement negotiations with the applicant or in an eminent domain proceeding before a court.

11. Except as otherwise provided by State or local law, you have the right to grant or deny access to your property by the applicant or its representatives for preliminary survey work or environmental assessments, and to limit any such grant in time and scope.

12. In addition to the above rights, you may have additional rights under Federal, State, or local laws.