

**ISSUE BRIEF** June 2022

# Streamlining Energy Infrastructure Permitting

## Summary

Reliable and affordable electricity is essential to the nation's economic and national security, as well as vital to the health and safety of all Americans. Providing this electricity requires ongoing investment in energy infrastructure, including electric generating facilities, transmission and distribution lines, and interstate natural gas pipelines. As the electric industry undergoes profound changes and faces significant challenges, public power utilities have a critical interest in federal policies that streamline the processes for permitting and siting the energy infrastructure necessary to allow them to serve their customers reliably and at the lowest reasonable cost, consistent with the policy preferences of the communities in which they operate. The American Public Power Association (APPA) supports federal policies, including policies for implementing the National Environmental Policy Act (NEPA), that avoid unwarranted regulatory impediments to building important energy infrastructure.

## Background

Providing reliable and affordable electricity to American consumers requires enormous amounts of infrastructure and the capital to plan, build, and maintain it. This infrastructure includes easily recognizable components of the electric system, such as power plants, hydroelectric dams, and transmission and distribution wires. The electric industry also relies on the infrastructure that delivers fuel to electric generators, such as interstate natural gas pipelines. The need for cost-effective infrastructure to support reliable and affordable electricity is particularly acute today given the significant changes in the industry, including a rapidly evolving generation resource mix characterized by growth in wind, solar, storage, and distributed energy resources. The process of electrification, in which technologies that formerly relied on fossil fuels shift to electricity (such as electric vehicles), may result in more demand on the grid. Severe weather in recent years has

presented challenges to grid reliability, as evidenced, for example, by the February 2021 cold weather event in Texas and the Midwest, and by ongoing drought conditions in the West.

Maintaining grid reliability at affordable rates while tackling the challenges presented by a rapidly changing industry will require significant investment in energy infrastructure. New or upgraded electric transmission facilities, for example, are necessary to replace aging transmission lines, accommodate growth in renewable resources, and enhance grid resilience. While state and local governments generally have authority over the siting and construction of electric power lines, federal policymakers can influence transmission, planning, permitting, and siting. On federal lands, for example, the many approvals needed from different federal entities can create very substantial delays.

Environmental reviews under NEPA play an integral role in ensuring that energy infrastructure projects move forward. NEPA is a procedural statute that requires federal agencies to consider the environmental impacts of proposed major federal actions as part of an agency's decision-making process. For example, the issuance of Clean Water Act (CWA) or Rivers and Harbor Act permits issued by the U.S. Army Corps of Engineers (Corps) and Incidental Take Permits issued under the Endangered Species Act are federal actions subject to review under NEPA. Environmental reviews and authorizations that involve multiple federal, state, and local agencies are common. However, historically agencies have not been resourced sufficiently to support timely interagency consultation or garner consensus regarding important NEPA elements, such as cumulative and indirect effects. This often results in a lengthy NEPA process with multiple setbacks and avoidable delays. Frequently, federal, state, and local agencies have complementary and/or different authorization and permitting requirements that can complicate the NEPA process. Executive Order 13807, which was issued on August 15, 2017, established a "One Federal Decision" policy for federal environmental reviews of major infrastructure projects to ease the often fragmented, inefficient, and costly process.

## Streamlining Energy Infrastructure Permitting

Electric generation resources needed to maintain grid reliability may also face significant permitting obstacles. Hydroelectric power makes up a large portion of the nation's source of emissions-free, renewable energy, accounting for 36 percent of domestic renewable generation and seven percent of total electricity generation according to the most recent Energy Information Administration (EIA) data from 2020. Yet the current federal licensing process for hydroelectric projects constitutes a significant impediment to the development of new hydroelectric facilities and the relicensing of existing facilities. The Federal Energy Regulatory Commission (FERC) has primary authority for licensing and relicensing non-federal hydroelectric projects pursuant to Part I the Federal Power Act (FPA). FERC's hydroelectric licensing process considers a number of factors dictated by the FPA, and project licensing must comply with NEPA. FERC must also consider the input of other federal resource agencies. While it is appropriate to consider the broad array of potential impacts of a hydropower project, FERC must be given more authority to weigh costs and benefits and to impose timelines for resource agencies to weigh in (for more information, see APPA's issue brief, "Hydropower").

Natural gas-fired electric generation also plays an important role in the nation's resource mix. EIA projects that natural gas resources will remain relatively constant as approximately one-third of the generation mix at least through 2050. These resources are expected to be critical to the overall reliability of the bulk electric system as the resource mix transitions to more intermittent renewable energy, a point that has been emphasized by the North American Electric Reliability Corporation. A reliable and affordable supply of natural gas depends on adequate interstate transportation infrastructure. Unlike interstate electric transmission lines, jurisdiction for siting and permitting interstate natural gas pipeline facilities resides primarily with FERC under the Natural Gas Act (NGA), and FERC must approve applications to construct or expand interstate natural gas pipeline facilities if it finds that the facilities are required by the public convenience and necessity. Pipeline certificate applications are also subject to NEPA review. While FERC's review of pipeline certificate applications has long resulted in needed infrastructure being evaluated and approved in a reasonably efficient manner, recent policy changes proposed by FERC have injected significant uncertainty into the process.

A clear definition of what constitutes "waters of the United States" (WOTUS) under the CWA also facilitates streamlining permitting for energy infrastructure projects. WOTUS is a key definitional term that defines the extent to which a project impacting WOTUS may need a federal CWA permit. A number of federal environmental reviews are triggered when a CWA permit is required for an energy infrastructure project. Electric utilities

routinely secure National Pollutant Discharge Elimination System permits under section 402 of the CWA for pollutant point source discharges to a WOTUS. Utilities use a variety of water features to manage, store, and treat water, such as stormwater runoff; contain spills; and manage and recycle wastewater. Any change in converting these industrial water features from non-jurisdictional to jurisdictional will alter the point of compliance at which any technology or water quality-based limit must be met. Such a change would create regulatory compliance issues and impose unwarranted new costs to public power utilities, other regulated entities, and to state and federal permit writers who will have to deal with the permitting implications.

Under Section 404(e) of the CWA, the Corps can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. The power sector relies extensively on these general nationwide permits (NWP) to provide timely and reliable installation of transmission and distribution powerlines to deliver essential electric supplies to homes, public institutions, defense critical facilities, infrastructure, and businesses—and to perform maintenance on those lines which are critical to their reliability. Issuance of an NWP is often necessary to build projects, such as transmission lines and pipelines crossing streams and wetlands. A streamlined NWP process supports a secure integration and delivery of a balanced mix of central and distributed energy resources.

## Congressional and Agency Action

The Infrastructure Investment and Jobs Act (IIJA) was signed into law in November 2021 and provides over \$70 billion in energy infrastructure investment. It also includes provisions to streamline the NEPA review process for "major projects" funded by the act. Specifically, it stipulates that one agency should lead the NEPA process for each project; the creation of a joint project schedule; the completion of the review process within two years; and the production of a "record of decision" within 90 days of the issuance of a final environmental impact statement. Finally, the IIJA reauthorizes and amends parts of the Fixing America's Surface Transportation Act to streamline the review of certain large infrastructure projects, including the Federal Permitting Improvement Steering Council.

The Trump administration substantially revised NEPA implementation regulations to streamline environmental reviews and expedite energy infrastructure permitting and other major projects. The Biden administration has sought to revoke these regulations. In April 2022, the Council on Environmental Quality finalized the first phase of this revocation, and a second phase is expected later this year.

## Streamlining Energy Infrastructure Permitting

Over the years, the courts, the Corps, and the Environmental Protection Agency (EPA) have sought to define WOTUS. Under the Trump administration, EPA and the Corps adopted a narrower WOTUS definition. As of this writing, the agencies are working to review and revise the prior administrations' WOTUS definition, reverting to the original 1986 definition as supplemented by guidance adopted in response to Supreme Court decisions, known as the Step 1 rule. The Step 1 proposed rule seeks a broader scope of jurisdiction. We expect the Step 1 proposed rule to be finalized in 2022. Additionally, EPA and the Corps have announced plans to issue another definition in the near future expanding on their Step 1 rule. This effort will inevitably impact the siting and permitting of energy infrastructure.

FERC has also undertaken a number of actions that are likely to impact siting and permitting of energy infrastructure. Most notably, FERC is currently considering changes to its policies for evaluating interstate natural gas pipeline certificate applications under the NGA. Among other proposed policy revisions, FERC has indicated that its evaluation of pipeline environmental effects under NEPA would include climate change impacts, including greenhouse gas (GHG) emissions directly attributable to a proposed project (pipeline leaks, for example), as well as indirect emissions, such as the emissions associated with burning transported gas to generate electricity. FERC's proposed policy changes have generated a great deal of uncertainty and opposition among natural gas companies and other key stakeholders.

FERC has also proposed changes to its rules for regional electric transmission planning and cost allocation. While not specifically applicable to transmission siting and permitting, the perceived reasonableness of FERC's rules governing transmission planning and cost allocation can have an impact on state and local decisions to permit and site new transmission facilities. FERC's proposed rule changes include a mechanism to encourage joint ownership of transmission facilities. APPA has long explained that some of the obstacles to transmission permitting and siting could be mitigated if new transmission lines were jointly owned, with some partial ownership by public power utilities where feasible. (See APPA's issue brief, "Electric Transmission Policies").

### APPA Position

To encourage the development of needed energy infrastructure, Congress and the federal agencies should take actions to streamline the federal permitting and siting process, eliminate excessive regulatory barriers, and ensure more timely decisions from

relevant federal agencies. FERC's gas pipeline certificate policies should provide clarity and regulatory certainty, in particular, with respect to its proposal to consider indirect GHG emissions in determining whether to authorize new interstate natural gas pipeline facilities. FERC can promote electric transmission siting and permitting by facilitating open and transparent transmission planning processes that prioritize reliably meeting the needs of public power utilities and other load-serving entities. FERC should also use its FPA authority to implement policies that encourage and promote joint transmission ownership opportunities for public power utilities.

APPA supports conducting environmental reviews and permitting processes in a concurrent, coordinated, consistent, predictable, and timely manner sufficient to support sound decisions regarding federal agency actions, such as approving new infrastructure projects. As established EO13807, the "One Federal Decision" policy provides guidance that the lead agency with the appropriate expertise and resources is selected at the earliest possible time following contact and notification to a federal agency of a proposed action.

### APPA Contacts

John McCaffrey, Senior Regulatory Counsel,  
202-467-2952 / [jmccaffrey@publicpower.org](mailto:jmccaffrey@publicpower.org)

Carolyn Slaughter, Environmental Policy Director  
202-467-2943/[cslaughter@publicpower.org](mailto:cslaughter@publicpower.org)

Corry Marshall, Senior Government Relations Director,  
202-467-2939/ [cmarshall@publicpower.org](mailto:cmarshall@publicpower.org)

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 96,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.