A Regulatory Reinterpretation to Blow Away Dirty Energy?

Seth Cox

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A Regulatory Reinterpretation to Blow Away Dirty Energy?

Seth Cox*
EDITOR'S PERSPECTIVE

Seth Cox authors our first article of this edition, *A Regulatory Reinterpretation to Blow Away Dirty Energy?*, which discusses wind energy and posits that various federal agencies' regulations prevent wind energy from becoming more than an "alternative" energy source by having redundant, time-consuming procedures. Cox reviews the requirements for constructing a new transmission facility under the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, and the National Historic Preservation Act and explains how some of these federal agencies' requirements overlap. He introduces the Federal Power Act’s § 824p(h) and explains that the purpose of this section was to streamline these agencies’ environmental requirements under a lead agency, the Department of Energy, but that the Department of Energy’s interpretation of this section falls short of this objective. Therefore, Cox offers a new regulation to solve these inadequacies and argues that the same environmental protection could be achieved at a much lower cost by streamlining these agencies’ functions and concludes his article by showing that this proposed regulation should withstand any judicial challenges.

Brandon M. Middleton authors our second article, *Restoring Tradition: The Inapplicability of TVA v. Hill’s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*. Middleton discusses numerous district courts' analyses and interpretations of the *TVA* analysis. He argues that courts have been interpreting *TVA*’s preliminary injunction relief standard too broadly and have been inappropriately applying this standard to non-federal actors. Middleton also discusses why the balancing of harms and consideration of the public interest for non-federal actors offers a more sensible approach for property owners as well as for endangered species. Further, Middleton argues that *TVA* should be limited to situations where the facts are closely analogous to *TVA*’s facts and not applied to non-federal actors, and demonstrates that both *TVA* itself as well as other recent Supreme Court precedent supports this view. Concluding, he urges courts to restore the traditional Endangered Species Act preliminary injunctive relief analysis for non-federal actors.
Our last article, *Regulating Climate Change Risk at the Local Level – the Denver Experience: Greenprint or Greenwash?*, authored by Rômulo Silveira da Rocha Sampaio discusses climate change and greenhouse gases in light of Denver’s experiences regulating climate change at the local level. In a one-week on-site study, Sampaio was able to interview members of the community and see personally the impacts of Denver’s policies. Ultimately, he concludes that there are both positive and negative initiatives in Denver’s plans. From these local experiences in Denver, Sampaio posits that, assuming science is not able to deliver with certainty the costs and benefits of local actions on a national scale, the better approach is ampler public participation because it increases legitimacy, reduces asymmetric information, spreads responsibilities over the final results of any policy, and tends to be more efficient procedurally from a burden sharing perspective.

Our first note, written by Michael A. Moorefield, examines *Center for Biological Diversity v. United States Department of Interior*, which discussed, among other things, the vital topic of environmental standing. Moorefield demonstrates that although the court was correct in not finding an actual injury on the particular facts of the case, the language of the court drew from the dissenting opinion of the United States Supreme Court’s *Massachusetts v. EPA* decision, rather than the majority opinion. Moorefield argues that this now leaves open the question of whether a shared, yet concrete injury will continue to be able to withstand standing scrutiny. This note concludes with questioning whether the court’s distinction from *Massachusetts* is legitimate and whether the court’s analysis is consistent with established standing jurisprudence.

Thomas C. Smith, in our second case note, analyzes *New Jersey Department of Environmental Protection v. NRC*. This case involved the Oyster Creek relicensing proceedings and the issue of whether the United States Nuclear Regulatory Commission (hereinafter “NRC”) was required under the National Environmental Policy Act to issue an Environmental Impact Statement concerning the threat of an airborne terrorist attack when relicensing a nuclear facility. The Third Circuit created a split in authority by holding that the NRC was not required to prepare an Environmental Impact Statement concerning terrorist attacks. Smith argues that the Third Circuit’s is the more logical holding in the split because there is not a reasonably close causal relationship between
relicensing and the environmental impact of terrorist attacks. Further Smith agrees with the court that under tort law, a third party terrorist would be a superceding cause cutting off liability.

In our third case note, Jessica Adams analyzes the important and potentially environmentally harmful Supreme Court decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*. Adams explains that the Supreme Court held that the effect of the Bush Administration substituting the word “waste” for “fill” in § 404 of the Clean Water Act effectively took the authority to issue a permit for the discharge of fill material away from the Environmental Protection Agency and divested all that authority in the Army Corps of Engineers. Adams argues that this decision not only has devastating effects on Lower Slate Lake because Coeur Alaska can now discharge 4.5 million tons of tailings into the lake, but also could have opened the door for many more environmental harms like this one to come.

Danielle Hoffman authors our final note of the edition which discusses the long and on-going debate over whether inventoried roadless areas in the National Forest System should be governed by one, overriding national rule that could create consistency, or several local rules that could take local differences into consideration. In *California ex rel. Lockyer v. USDA* the court held that the national Roadless Rule should be reinstated and that the State Petitions Rule allowing several local rules must fail because the National Environmental Policy Act and the Endangered Species Act were violated. Danielle argues that since the Ninth Circuit has the most land subjected to the Roadless Rule this decision will influence future circuits that handle this issue.

As always, this volume finishes with updates discussing recent court holdings throughout the country that impact environmental law.

Each one of our board members and associates deserve special recognition and thanks because, as everyone knows, this journal would not be possible without their hard work, passion, and dedication. Thanks also to Professor Lambert who has guided us through another edition as our faculty advisor and thanks to our board of advisors.

ERIN P. SEELE
EDITOR-IN-CHIEF
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I. INTRODUCTION: THE RENEWABLE ENERGY ECONOMY

The world is moving towards a renewable energy economy, motivated in part by the well-established impacts of conventional energy sources. Of these consequences, the most notorious is global warming. Global warming is a reality. Emissions of the notorious category of pollutants referred to as greenhouse gases (hereinafter "GHGs") are generated by combustion of conventional sources of energy and are widely cited as the chief source of human-induced warming.\(^1\) According to the World Health Organization, 150,000 deaths are presently attributable to climate change.\(^2\) And this situation will only worsen over the next several years as global temperatures continue to rise at unsustainable rates.\(^3\)

The stark environmental costs of conventional energy are much broader than merely global warming. Conventional energy facilities powered by oil, coal, natural gas, and nuclear fuel collectively account for forty percent of the United States’ (hereinafter “US”) freshwater withdrawals per annum, a figure slated to double within twenty years.\(^4\) Extraction and use of coal generates toxic waste in an amount equivalent to ten percent of that which is mined.\(^5\) The emission of airborne pollutants, such as sulfur oxides, nitrous oxides, and particulate matter, from conventional sources accounts for 50,000-70,000 American deaths each year.\(^6\) These environmental costs of electricity generation must be

\(^{1}\) Anita M. Halvorssen, UNFCCC, the Kyoto Protocol, and the WTO—Brewing Conflicts or Are They Mutually Supportive?, 36 DENV. J. INT’L L. & POL’Y 369 passim (2008).


\(^{6}\) Sovacool & Cooper, supra note 4, at 128-29 (citing Press Release, Harvard Sch. of Pub. Health, Air Pollution Deadlier Than Previously Thought (Mar. 2, 2000)).
mitigated. The world must shift to an economy powered by alternative sources of energy.

A. The Case for Wind Energy

Of the alternative energy sources, wind energy shows particular promise. "Wind energy is a converted form of solar energy."7 As the sun shines, the Earth heats unevenly. As warm air rises, cooler air from elsewhere is drawn in, resulting in wind.8 With the use of a turbine, the kinetic energy of the wind may be converted into mechanical energy.9

The US lags behind the curve in the transition to a renewable energy economy, but expansion of utility-scale wind facilities can provide the boost the struggling renewables sector sorely needs. In 2007, the US generated eleven percent of its energy from renewable sources, little more than half that of the world at large.10 Estimates suggest that the US could supply more than its current consumption, approximately 10,777 billion kilowatts (hereinafter "kWh"), from full exploitation of the nation’s good wind areas.11 The US could lead the world in wind energy generation through development of a mere six percent of the nation’s land area.12

The growth rate of new installed wind generation capacity in the US is accelerating. It took almost fifteen years for the US to double its installed capacity to 2000 megawatts (hereinafter “MW”) in 1999.13 Four years later, this figure soared to 5000 MW, and by 2007 reached 16,800 MW of installed capacity.14 The US is making significant progress; but it

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7 Rosenberg, supra note 5, at 517.
8 Id.
9 Id.
10 Id. at 515. In 2003 the world generated nineteen percent of its total energy usage from renewable sources. Id.
12 Id.
13 Id.
14 Rosenberg, supra note 5, at 520.
hardly leads the global community in the transition to a renewable energy economy.\textsuperscript{15} 

Growth of utility-scale wind power can support the American transition to a renewable energy economy. If properly incentivized, utility-scale wind will take off like wildfire. Increased demand for turbines will draw more suppliers into the market and spur investment and innovation, resulting in more efficient turbines.\textsuperscript{16} The more efficient the turbine, the cheaper the end cost of energy. The cost of wind generation now stands at $0.05 per kWh, down from an initial high of $0.81 per kWh.\textsuperscript{17} As installed capacity grows, the cost of wind-generated electricity will continue to fall.\textsuperscript{18} The spread of wind power will continue to reduce the cost of generation as wind becomes an increasingly viable option to transition America to a renewable energy economy.\textsuperscript{19} 

\textbf{B. The Benefits of Wind Energy}

Use of wind energy will address many of the more pressing environmental concerns associated with exploitation of conventional energy resources. Wind energy does not generate any toxic or hazardous wastes following construction.\textsuperscript{20} Wind facilities do not require evaporative cooling systems and thus do not have a significant impact upon water resources.\textsuperscript{21} Generation of electricity from wind power does not entail emissions of either traditional or GHG pollutants.\textsuperscript{22}

\begin{thebibliography}{99}
\bibitem{15} Dinnell & Russ, \textit{supra} note 11, at 566.
\bibitem{16} See Sovacool & Cooper, \textit{supra} note 4, at 95 (stating that as installed capacity grew over the last twenty years, the generation capacity of each turbine in MW grew from the low teens to the mid thirties).
\bibitem{17} \textit{Id.} at 99.
\bibitem{18} At current price levels, this cost compares favorably to that of a new natural gas-fired plant, which can generate electricity for at least $0.055 per kWh. Costs should continue to decline with the accumulation of experience and technological innovation. \textsc{Joseph P. Tomain} \& \textsc{Richard D. Cudahy}, \textit{Energy Law} 360 (2004).
\bibitem{19} Sovacool & Cooper, \textit{supra} note 4, at 99.
\bibitem{20} Rosenberg, \textit{supra} note 5, at 524.
\bibitem{21} Sovacool & Cooper, \textit{supra} note 4, at 128.
\bibitem{22} See \textit{id.} at 130.
\end{thebibliography}

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Displacement of conventional power sources with wind technology is an important tool to combat global warming as well as other major environmental concerns. Wind power is a viable option to assist the transition to a renewable energy economy.

Beyond the environmental benefits, the development of wind power also produces broad public welfare benefits. Due to the nature of the resource, generation facilities are frequently sited in depressed rural areas. The influx of the wind power industry will be a boon to these local economies. Assembly and construction of turbines and towers creates an average of 4.8 job years per MW of installed capacity, a substantial figure considering an average fifty MW facility requires 240 job years to construct. Following construction, the facilities also generate approximately ten positions for full-time service personnel. Royalties and leases will provide supplementary income to rural landowners, who may retain their land for uses compatible with the turbines, such as farming or ranching. The switch to a wind powered economy will result in broad environmental and welfare benefits.

Ninety percent of Americans support building more wind turbine farms. Public policy should reflect this broad mandate and support development of the nation’s wind capacity. Perhaps the simplest and cheapest way to create a policy environmentally conducive to wind is to take a step back. The easiest barriers for regulatory policy to overcome, are those self imposed. Policy should identify and surmount these barriers to the wider development of wind.

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23 Rosenberg, supra note 5, at 525-26.
24 See id. at 525.
25 Id. “Job years” is defined as time in years of “direct and indirect employment” required to complete construction of a specified project. Id.
26 Id. In California, by the year 2015 wind generation facilities will result in 2690 construction jobs and $121 million in total income. Id.
27 Id. at 525-26.
28 Sovacool & Cooper, supra note 4, at 99-100.
It is the purpose of this article to identify a feasible and sustainable policy mechanism to promote development of utility-scale wind energy. Discussion in this article proceeds in five parts. First, regulatory impediments to development of wind as a viable competitor to conventional energy sources are identified. Next, four of the major federal environmental regulatory mechanisms are examined in turn. Following this, I identify a suitable vehicle to streamline the federal authorization procedure, a relatively obscure provision of the Federal Power Act. I examine this section’s regulatory interpretation, concluding the current incarnation thereof cannot meet the challenges posed. I then propose a set of amended regulations to implement this statutory provision, and evaluate how this interpretation will interact with each permitting process individually, and the wider procedure as a whole. I finally assess the viability of the proposed regulations and conclude that the regulations are defensible. The proposed regulations are an effective mechanism to address the regulatory obstacles to federal authorization of wind energy.

II. OBSTACLES TO Viable, UTILITY-SCALE WIND

A. Transmission Infrastructure

The most significant barrier to development of wind as a viable, utility-scale, energy source is insufficient transmission infrastructure. The US' electricity transmission network is woefully inadequate on the whole, as increases in generation capacity far outstrip transmission gains. Wind facilities are especially vulnerable to transmission constraints because of the nature of the resource itself. The best wind resources are typically located on large, flat, open areas, far from

30 See id. at 101; Darrell Blakeway & Carol B. White, Tapping the Power of Wind: FERC Initiatives to Facilitate Transmission of Wind Power, 26 ENERGY L.J. 393 (2005) (quoting then-FERC Chairman Pat Wood III as stating that "the biggest barrier today that's preventing wide access to wind resources reaching customers is [the lack of] a robust transmission grid").

population centers and the ultimate consumer. These areas do not have any existing transmission infrastructure, so the network must be built from the ground up. A second barrier to wind is intermittency. Though it always blows somewhere, wind is inconsistent. Wind farms must interconnect with a regional transmission network so that if the wind is not blowing in one area, the energy supply may remain uninterrupted. Loss in load during these times may be replaced with that of other energy resources. Due to the interplay of these two unfortunate circumstances, robust transmission infrastructure is especially important for the development of wind power.

Public policy must promote development of new transmission capacity if wind is ever to shed that dogged "alternative" label. Investment in the renewable sector is contingent upon availability of transmission networks to accommodate the energy generated. Investors are reluctant to finance an undertaking unless they can be assured of a reasonable opportunity to profit. Lack of a transmission network sufficient to convey the product to the market will indeed give investors pause, and disincentivize investment. If public policy is to make a serious commitment to facilitate transition to a renewable economy, it must reflect a serious commitment to the development of a robust transmission infrastructure.

**B. The Federal Regulatory Environment**

Uncertainty in the federal regulatory environment is not conducive to investment in transmission infrastructure. Federal authorization of transmission projects requires compliance with numerous, complex review

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32 Blakeway & White, supra note 30, at 397.
33 See id.
34 Id.
35 Trahan, supra note 29, at 93.
and permitting procedures. The Los Angeles Department of Water and Power’s Greenpath North Transmission Line Project (hereinafter “Greenpath”) is telling of the challenge. Greenpath involves construction of an eighty-five mile overhead transmission line to carry electricity from renewable energy sources in the Imperial Valley to the Los Angeles Department of Water and Power’s transmission grid. A staggering total of seventeen federal, state, and local entities are involved in permitting the project. The environmental reviews of Greenpath will take years to complete.

C. Overcoming the Regulatory Impediments

Simplification of the federal authorization procedure for transmission infrastructure will mitigate excessive transactional and administrative costs borne by renewable projects. The major federal environmental authorization procedures should be integrated to streamline the federal permitting process. The single review process would be inclusive of all considerations of the many individual processes, and save through elimination of redundant costs both on the government’s and developer’s end. Consolidation of federal environmental reviews into a single process will expedite authorization decisions, realizing the same level of environmental protection at substantially lower administrative costs. Ascertaining prospective profits will be more certain, which will in turn placate nervous investors and draw capital investment into a robust transmission grid. Mitigating regulatory-imposed costs will also spur investment because the product will be less costly to get to the market. Facilitating investment in transmission infrastructure will cause the

38 See Rosenberg, supra note 5, at 535.
40 Id.
41 Id.
A REGULATORY REINTERPRETATION TO BLOW AWAY DIRTY ENERGY?

renewable sector to grow. If public policy supports a clear and predictable transmission agenda, the private sector will invest and efficiently improve the transmission infrastructure.  

A rudimentary understanding of the federal environmental authorization process is necessary to realize how this system may be improved upon. The following section outlines major environmental authorization procedures typically implicated in the construction and operation of new transmission infrastructure. The scope of the following analysis is limited to the federal environmental statutes and its regulatory interpretations most commonly encountered in development of new transmission facilities. This scope is broad enough to understand the interaction of the proposed regulations with existing regulatory regimes, while limited for the sake of some degree of brevity. The statutes examined include the National Environmental Policy Act (hereinafter “NEPA”), the Endangered Species Act (hereinafter “ESA”), the Clean Water Act (hereinafter “CWA”), and the National Historic Preservation Act (hereinafter “NHPA”).

III. HURDLES ON THE PATH TO A RENEWABLE ECONOMY

A. NEPA: The National Environmental Policy Act

The NEPA is the US’ most comprehensive environmental permitting statute. Section 101 outlines NEPA’s broad policy objectives, including “to create and maintain conditions under which man and nature can exist in productive harmony.” NEPA declares that in pursuit thereof, the federal government must “use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and

43 See Renewable Electricity, supra note 37, at 10.
resources."\textsuperscript{49} In spite of this sweeping language, contained within § 101, NEPA is fundamentally a procedural statute. NEPA uses procedural mechanisms to integrate consideration of the environmental consequences of major federal undertakings into executive decision-making.

1. The NEPA Process

NEPA requires preparation of an Environmental Impact Statement\textsuperscript{50} (hereinafter “EIS”) for “major Federal actions significantly affecting the quality of the human environment.”\textsuperscript{51} “Major federal actions” include “actions approved by permit or other regulatory decision,”\textsuperscript{52} and actions “significantly affecting the quality of the human environment,”\textsuperscript{53} when the actions result in physical alteration of the human environment.\textsuperscript{54} Agencies empowered to authorize such “actions” must engage in the NEPA process.

The first step in the NEPA process is the preparation of an Environmental Assessment (hereinafter “EA”).\textsuperscript{55} The EA determines whether the agency action will significantly affect the quality of the human environment.\textsuperscript{56} If environmental effects are not reasonably foreseeable, the action may proceed following the preparation of a Finding of No Significant Impact.\textsuperscript{57} Otherwise, the agency must prepare an EIS. The EIS evaluates potential adverse environmental impacts of the proposed action as well as potential impacts of reasonably available alternative actions.\textsuperscript{58} The authorizing agency must then detail measures to mitigate environmental impacts of the proposed action, though the agency

\textsuperscript{49} Id. subsec. (b).
\textsuperscript{50} 40 C.F.R. § 1508.11 (2009).
\textsuperscript{51} 42 U.S.C. § 4332(2)(C).
\textsuperscript{52} 40 C.F.R. § 1508.18(b)(4).
\textsuperscript{53} 42 U.S.C. § 4332(2)(C).
\textsuperscript{55} See 40 C.F.R. § 1501.3.
\textsuperscript{56} See 42 U.S.C. § 4332(2)(C).
\textsuperscript{57} 40 C.F.R. § 1501.4(e).
is not obliged to pursue any of these measures.\footnote{40 C.F.R. § 1502.14(f).} Preparation of a sufficient EIS satisfies the authorizing agency's statutory duties under § 102, and at this point, the agency may license the action.

There is no time limit for completion of the NEPA process.\footnote{See id. § 1501.8.} The several federal agencies have full and independent discretion to determine this matter.\footnote{Id. subsec. (a).} The only substantive durational requirement is that agencies must initiate preparation of the EIS early enough in the approval process as to permit inclusion of the Final EIS in any final recommendations regarding the proposed action.\footnote{Id. § 1502.5.} The NEPA regulations attempt to ensure that the environmental review serves an "important contribution to the decision-making process."\footnote{Id.} Yet, an agency may delay authorization of a proposed action indefinitely because no ultimate deadline for completion is specified.

2. NEPA and Transmission Line Siting

\ \ a. Triggering the NEPA Process

Proposed transmission projects that amount to "major federal actions" which "significantly affect the quality of the human environment" trigger the NEPA process.\footnote{See id. § 1502.4(c)(3).} Construction of new transmission facilities to serve a remote wind farm necessarily alter the physical environment and thus "significantly affect the quality of the human environment."\footnote{See Metro. Edison v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983).} Also, any transmission projects which require federal approval are "major federal action."\footnote{See 40 C.F.R. § 1508.18(b)(4).} Several statutes require federal approval for development of transmission infrastructure in certain contexts.\footnote{See, e.g., 16 U.S.C. §§ 1539, 470f (2006); 33 U.S.C. § 403 (2006); 43 U.S.C. § 1732 (2006).} Under

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\footnotetext[59]{40 C.F.R. § 1502.14(f).}
\footnotetext[60]{See id. § 1501.8.}
\footnotetext[61]{Id. subsec. (a).}
\footnotetext[62]{Id. § 1502.5.}
\footnotetext[63]{Id.}
\footnotetext[64]{See id. § 1502.4(c)(3).}
\footnotetext[65]{See Metro. Edison v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983).}
\footnotetext[66]{See 40 C.F.R. § 1508.18(b)(4).}
the Federal Land Policy and Management Act, proposed transmission
to traverse federal lands require a federal right-of-way
Accordingly, any proposed transmission project which is to
cross federal lands will trigger a NEPA review. And many such projects
do so qualify, especially in the expansive Western US.

b. NEPA and Transmission

Exposure to the NEPA process hampers development of new
transmission infrastructure. Agencies have discretion to determine the
duration of the NEPA review, and costly delays of an indefinite duration
may result. This uncertainty makes investors skittish, because
A rational individual will not invest a
substantial amount of capital if it is not reasonably certain whether the
undertaking may even be authorized. Each successive environmental
authorization requirement introduces further uncertainty. At some point,
the administrative costs imposed by the NEPA and other environmental
authorization procedures become prohibitive, inhibiting development of
new transmission infrastructure.

NEPA is the US’ “basic national charter for protection of the
environment.” This Act infuses federal agencies with the broad policy
objectives of § 101 by requiring consideration of adverse environmental
consequences which can result from agencies’ actions. NEPA serves a
vital purpose. But, at times, the administrative costs imposed by federal
environmental authorization procedures may become prohibitive, and

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(quotting 43 U.S.C. § 1761(a)).
69 See 40 C.F.R. § 1508.18.
70 See Renewable Energy, supra note 37, at 12.
71 40 C.F.R. § 1501.8; see also Green Path Application, supra note 42, at 16 (showing
that the LADWP allowed seventeen months to complete the NEPA review of the Green
Path project). Given the contentious nature of the Green Path project, review may well
drag on for years.
72 40 C.F.R. § 1500.1(a).
73 Id.
disincentivize socially-desirable undertakings. Where possible, NEPA and other environmental authorization procedures need to be viewed collectively, in order to identify and eliminate redundancy. Reducing administrative and transactional costs will reduce the real cost of transmission development and mitigate transmission barriers, the most substantial hurdle to an expanded wind sector.

B. ESA: The Endangered Species Act

The ESA is likely the most rigid and draconian federal environmental statute in the US Code. The statute functions as a virtual ban on development in areas where listed species or designated critical habitats are present. The ESA prohibits federal actions which may jeopardize the continued existence of listed species. Further, the ESA restricts any person subject to the jurisdiction of the US from harming any listed species. Therefore, developers of new transmission capacity are subject to the provisions of the ESA if any listed species or critical habitats are present in the area of the proposed development.

1. Procedural Requirements of the ESA

   a. Section 7: Jeopardy Findings and Consultation

Under § 7 of the ESA, “agency action” may not proceed if it will likely “jeopardize” any listed species or critical habitat. “Agency action” is any action of a federal agency “authorized, funded, or carried out by such agency.” Thus, similar to the threshold requirements of the NEPA, action that requires some sort of federal approval is subject to the §

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74 See Dinnell & Russ, supra note 11, at 553; Stop Green Path North LADWP, and Imperial Irrigation District, http://www.stopgreenpath.com (last visited April 12, 2010).
76 Id. § 1536(a)(2).
77 Id. § 1538(a).
78 Id. § 1536(a).
79 Id.
provisions of the ESA. Should a project require federal authorization, the responsible agency must consult with the Administrators of the ESA, the Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration (collectively, hereinafter “FWS”), to determine if listed species or critical habitat is present in the area of the proposed development.  

The consultation procedure outlined in the ESA implementing regulations is more complex and time consuming than the NEPA review. Prospective developers of transmission facilities must typically prepare a biological assessment (hereinafter “BA”) as the first step in the process. The preparation of a BA is necessary for “major construction activities” and must be completed before construction contracts are formed or construction activities commence. A “major construction activity” is a construction project that qualifies as a “major Federal action significantly affecting the quality of the human environment” within the definition of NEPA. The agency authorizing the “major construction activity” must prepare a BA for proposed transmission facilities.  

The purpose of a BA is to evaluate the effects of proposed actions on listed species and critical habitat present in the area. Following an applicant’s request and receipt of information about listed species or critical habitat present in the area of proposed construction, the applicant must complete the BA within 180 days. The BA details listed species or critical habitat and analyzes whether the proposed action will adversely affect these species or habitat. If the proposed action may adversely

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80 Id. subsec. (a)(3).
82 Id. subsec. (b).
84 50 C.F.R. § 402.12.
85 Id. subsec. (a).
86 Id. subsec. (i). The Director must respond to the request within thirty days. Id. subsec. (d).
87 Id. subsec. (f).
When so required, an agency must formally consult with the FWS. The agency forwards to the FWS the BA and other relevant information gleaned from the best scientific and commercial data available. The FWS reviews the pertinent information, estimates the current status of the species or habitat, evaluates the effects of the proposed action, and formulates a biological opinion (hereinafter “BO”) within ninety days. If the BO determines that the proposed action will not jeopardize listed species or adversely modify critical habitat, it may proceed. In all other cases, the action is mandatorily and prohibitively enjoined.

b. Sections 9 and 10: The Take Prohibition and Incidental Take Permits

Applicants are bound by the § 9 take prohibition regardless of whether the proposed undertaking is an “agency action.” Under § 9, all persons subject to the jurisdiction of the US are prohibited from “taking” of listed fish or wildlife species. “Take” is commensurate with “harm,” which is an act that “actually kills or injures wildlife.” Therefore, if, as a consequence of the proposed action, listed animal species may be “harmed,” the applicant may not proceed without further authorization.

88 Id. §§ 402.10, 402.14. The action may proceed if the BA concludes no listed species or critical habitat may be adversely affected by the proposed action. Id. § 402.12(k).
89 Id. § 402.14(a).
90 Id. subsecs. (c)-(d).
91 Id. subsecs. (g)(1)-(4), (l).
92 See id. subsec. (g).
95 Id. § 1532(19).
96 50 C.F.R. § 17.3 (“Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns . . . .”).
The FWS, at its discretion, may authorize actions which could result in takings which are "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." For authorization under an "incidental take permit," an applicant must submit a "conservation plan" to the FWS. The FWS may grant an incidental take permit if the conservation plan is sufficiently funded to adequately mitigate the impacts of the taking, and the taking will not result in jeopardizing the continued existence of the species. Thus, should a transmission project, which does not rise to the level of "agency action," be proposed upon land in which listed species or critical habitat is present and construction or operation may result in "harm" to listed fish and wildlife species, the action is only permissible pursuant to an incidental take permit.

2. The ESA and Transmission Infrastructure

a. "Agency Actions"

A proposal for new transmission infrastructure is subject to the § 7 jeopardy and consultation requirements of the ESA if the undertaking is commensurate with "agency action." A transmission project may therefore be considered if it constitutes "major federal action," or requires other permitting which does not trigger a NEPA review. Authorization of these actions is contingent upon compliance with the ESA mandate.

Compliance with the consultation provisions of the ESA externalizes significant administrative and transactional costs upon prospective transmission projects. Again, it all comes down to timing and

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98 Id. subsec. (2)(A) (specifying the impact of the taking, measures to mitigate these impacts, the alternative actions the applicant considered and the reasons such alternative measures were rejected).
99 Id. subsec. (B).
100 Id. § 1536(a)(2).
101 See 42 U.S.C. § 4332(2)(C) (2006); 40 C.F.R. § 1508.18 (2009); 50 C.F.R. § 402.12(b)(1). For an example of a permitting scheme that does not trigger NEPA review, see 16 U.S.C. § 1536(a)(2) where authorization of the undertaking will render it an "agency action" subject to the provisions of ESA § 7.
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administrative overlap. Should the action be permitted at all, the consultation procedure could take up to 405 days to complete.\textsuperscript{102} Consequences of delay are compounded when an undertaking requires additional federal environmental authorization under the NEPA or similar statutes. If these reviews are not conducted concurrently, the authorization process could last years.\textsuperscript{103} The ESA review should be conducted simultaneously and with other federal environmental authorization procedures. This will streamline the procedure at large and reduce administrative costs borne by prospective applicants, which in turn will incentivize the investment and development of new transmission capacity.

b. "Incidental Take Permits"

The incidental take provisions of ESA's §§ 9 and 10 impose relatively minor costs upon proposed transmission projects because the provisions do not call for a lengthy independent environmental review.\textsuperscript{104} If a proposed undertaking may "harm" listed fish and wildlife species in the area, the applicant must obtain an "incidental take permit" and prepare a "conservation plan" in order for the FWS to authorize the action.\textsuperscript{105} The process to apply for an "incidental take permit" is simpler and more expeditious than § 7 consultation. Accordingly, the "incidental take permit" procedure is a relatively immaterial impediment to authorization of proposed transmission undertakings.

It is more the interaction of the ESA with the wider federal authorization process which presents the most daunting obstacle to

\textsuperscript{102} See 50 C.F.R. § 402.12(d) (stating that the Director has thirty days to respond to a species list request and the applicant has 180 days following receipt in which to prepare the BA); id. § 402.14(e) (stating that FWS has ninety days for formal consultation, but this may be extended for sixty more with consent of the applicant, at conclusion of which, FWS has another forty-five days to deliver the BA).

\textsuperscript{103} See id. § 402.06(a) (suggesting that while the ESA regulations permit concurrent review, this is merely an acquiescence, not a compulsion).

\textsuperscript{104} See 16 U.S.C. 1539. Incidental take review does not involve preparation of a BA, BO, or other independent environmental reviews, all of which are time consuming and thus costly.

\textsuperscript{105} Id. subsec. (a).
construction of new transmission capacity. Both the NEPA’s and ESA’s § 7 reviews require an in-depth environmental review and analysis of the adverse environmental impacts of a proposed undertaking. Yet, these sophisticated reviews are considered in isolation rather than as constituent elements of a singular, integrated process. The NEPA and ESA review undoubtedly encompass some of the same functions. These innate redundancies impress unnecessary administrative and transactional costs upon prospective transmission development. The federal environmental authorization procedure would be more efficient if the NEPA and ESA review were integrated.

C. CWA: The Clean Water Act

The CWA is a permit-based system of technologically-determined effluent limitations on sources of water pollution. The CWA proscribes two fundamental authorization procedures. The National Pollution Discharge Elimination System (hereinafter “NPDES”), embodied in the provisions of CWA’s § 402, establishes a regulatory regime for all “point sources” of water pollution. Section 404 establishes a permitting process for the discharge of “dredged or fill material” into the “navigable waters.” Both are independently important for proposed transmission infrastructure projects.

1. NPDES: The National Pollution Elimination Discharge System

   a. The NPDES Permitting Process

The NPDES permit system is defederalized and administered at the state level in most areas of the country. State NPDES programs apply

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106 DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 648 (7th ed. 2006).
107 Id.

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for certification from the Environmental Protection Agency (hereinafter "EPA"), and if approved, the EPA delegates responsibility for permitting pollutant discharges to the appropriate state entity. Most states have an EPA-approved state NPDES permit program. Yet in five states and certain other areas, the EPA remains the permitting authority.

Section 301 of the CWA prohibits the discharge of any pollutant. “Discharge of a pollutant” means the addition of any “pollutant,” defined to include most everything conveyable by water, into the “navigable waters” from any “point source.” “Navigable waters” are those of the US and territorial seas, and a “point source” is any “discernible, confined and discrete conveyance.” Thus, the CWA is broad, forbidding the addition of any substance into any body of water anywhere in the nation from any discernible source. If a party wishes to engage in activity impermissible under § 301, they must obtain a NPDES permit.

CWA’s § 402(p) specifies that “stormwater” discharges associated with “industrial activity” require NPDES permitting. Construction activities are regulable “industrial activities.” Stormwater discharges from point sources associated with construction activities are impermissible unless specifically authorized by an NPDES permit. The NPDES permits specify the terms with which an applicant must comply to

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10 33 U.S.C. § 1342(b)
11 These individual state programs are excluded from this article’s scope of analysis, which focuses upon federal environmental permitting procedures.
14 Id. § 1362(6), (12).
15 Id. subsecs. (7), (14).
16 See Sierra Club v. Abston Const. Co., 620 F.2d 41, 44-45 (5th Cir. 1980) (defining “point source” to include any surface runoff directed or impeded by the effort to change the physical surface by any operator of the source).
18 40 C.F.R. § 122.26(b)(14)(x).
legally discharge a pollutant under § 301. The permits need not necessarily be attained individually; the EPA has authority to issue "general permits" for definable classes of activities, such as construction.

Construction activities which disturb more than one acre of land area are regulable under the Construction General Permit (hereinafter "CGP"). As a first step, applicants must complete authorization under the ESA and NHPA. The essence of CGP compliance is the formulation and implementation of a Stormwater Pollution Prevention Program (hereinafter "SWPPP"). The SWPPP describes the effluent control measures the applicant utilizes to meet CGP requirements. Effluent controls mandated by the CGP include: a sediment basin of at least 3600 cubic feet for every acre of construction area; erosive velocity dissipation devices to manage the hydrological regime of the receiving waters at each discharge location; preservation of original vegetation where possible; and mitigation of discharges from exposed and non-construction areas. After implementation of the SWPPP, an applicant must prepare and submit a Notice of Intent (hereinafter "NOI") by mail or online. Seven days after the EPA acknowledges receipt, the NOI is posted on the NPDES website, and construction of the permitted undertaking may proceed under the terms of the CGP in compliance with the CWA.

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119 See id. § 122.5.
120 See id. § 122.26(a)(6).
122 Id. pt. 5.5, at 17.
123 See id. pt. 5.1, at 15.
124 See id. pt. 3, at 9.
125 Id. pts. 3.1(A)(1), (C), (H)(1), (G), at 9-11.
126 Id. pts. 2.1-2.2, at 6-7. Late submission of a NOI is subject to civil penalty. Id. pt. 2.4(D), at 8.
127 Id. pt. 2.3, at 7; see also 40 C.F.R. § 122.5 (2009).
b. NPDES Permitting of New Transmission Capacity

i. CGP: The Construction General Permit

Construction of new transmission capacity must comply with the terms of the CGP where the EPA remains the NPDES permitting authority.\(^\text{128}\) Construction of a new transmission facility is a regulable "industrial activity" because construction disturbs more than one acre of land.\(^\text{129}\) Erosive stormwater discharges associated with this activity are prohibited absent NPDES certification.\(^\text{130}\) Applicants for new transmission infrastructure must comply with the terms of the CGP for NPDES authorization.\(^\text{131}\) As a first step, applicants must complete the ESA and NHPA authorization.\(^\text{132}\) Then, a SWPPP consistent with the specifications of the CGP needs to be prepared and implemented. The applicant must file a NOI, and seven days after the EPA posts acknowledgment of receipt, the construction activity may proceed within the CGP terms.

ii. Interagency Headaches

The NPDES authorization for new transmission capacity under a CGP is rather streamlined. Following the development and implementation of a SWPPP, the construction activity may conceivably proceed within weeks. No independent environmental review is required. The NPDES process for authorization under a CGP does not significantly further encumber proposed transmission facilities because it does not require an additional and independent environmental review. Yet, it is troublesome that the CGP stipulates that the ESA and NHPA review be

\(^{128}\) See 40 C.F.R. § 122.5.

\(^{129}\) See Green Path Application, supra note 42, at 1-2 (detailing the construction of two new overhead transmission lines, each approximately seven miles long, involving the disturbance of approximately 255 acres of temporary use areas for construction).


\(^{131}\) See 40 C.F.R. § 122.5(a)(1).

\(^{132}\) See PERMIT, supra note 121, pts. 1.3(B)(7), 5.5, at 6, 17.
completed first, where applicable, because this may result in unnecessary delay. Specifying that the NPDES review be undertaken concurrent with, rather than subsequent to, other authorization procedures will streamline the federal environmental authorization process.

2. Section 404: Wetlands Permitting

Under CWA's § 404, the discharge of "dredged or fill material" into the "navigable waters," otherwise prohibited under CWA's § 301, may be sanctioned at particular sites and for particular purposes. "Navigable waters" are the "waters of the United States," inclusive of most waters in the nation as well as all adjacent wetlands. In development of transmission capacity, prospective applicants should err on the side of caution in regards to § 404, less they leave themselves vulnerable to sanction. Developers should assume a § 404 permit is always required for development in a wetland area, because any structure constructed on a wetland area will require the placement of fill material.

The § 404 program is administered by the US Army Corps of Engineers (hereinafter "Corps"). The Corps has the discretion to authorize actions by either an individual or a Nationwide Permit (hereinafter "NWP"). In practice, the policies of the Corps are so strict that the issuance of an individual permit is unlikely for projects other than major public works or water-dependant undertakings. For authorization

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134 Id. § 1362(7).
135 See 33 C.F.R. 328.3(a) (2009). Much is made of courts' recent reluctance to find that a particular wetland falls within the scope of the CWA without a "substantial nexus" between it and a traditional interstate water body under Rapanos v. United States, 547 U.S. 715, 779 (2006). See generally Stephen L. Samuels, Digest of Significant Decisions Addressing Rapanos, SR026 A.L.I.-A.B.A. 279 (2009). This nebulous determination is of little practical import for the purpose of this article.
137 See id.; 33 U.S.C. § 1344(d).
139 McKinstry, supra note 136, at 345.
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under § 404, an applicant’s best hope is to characterize the proposed action within the scope of an NWP.

a. NWP: The Nationwide Permitting Process

If a NWP is applicable to a particular activity, the “applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary.” Permittees uncertain of their CWA § 404 obligations may request verification of compliance from local Corps officials. If the Corps officials determine the activity is not in compliance, they will inform the permittee of the proper procedures for authorization. If the officials find the activity in compliance with the terms of the particular NWP, the permittee may assume authorization and initiate the proposed action.

NWP Number Twelve (hereinafter “NWPl2”) is applicable to utility line activities. Authorization of utility line projects under § 404 is determined by compliance with the conditions of this permit. The conditions of NWPl2 include preconstruction notification, backfilling of trenches, and measures to ensure access roads and substations do not cause the loss of greater than one-half of an acre of a body of water of the US. Upon verification of compliance from a local ACE official, a permittee may assume NWPl2 authorization as well as compliance with CWA’s §§ 301 and 402, and move forward.

140 40 C.F.R. § 230.5(b) (2009).
141 33 C.F.R. § 330.6(a)(1)-(3) (2009) (stating that such officials are referred to as “District Engineers” or “DEs”).
142 Id. subsec. (2).
143 Id. § 330.2(c).
145 33 C.F.R. § 330.1(c).
146 Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,182.
b. NWP12 Permitting

CWA's § 404 permitting process is relatively efficient. Proposed undertakings which are to cross a body of water or an adjacent wetland should contact a local Corps official and inquire as to the necessity of a § 404 permit. If the area is within the Corps' CWA jurisdiction, the permittee must incorporate measures required by the NWP12 into the construction process. Timing delays should not be unreasonable because the NWP12 authorization does not require an in-depth environmental review. The conditions of the NWP12 are explicit and the process certain. So long as a construction process incorporates the measures required under the NWP12, the undertaking may proceed. In itself, this expedient and certain process does not threaten overwhelming administrative and transactional costs. Yet, considered alongside the NEPA and ESA, this procedure is but another hoop to jump through if an applicant desires for their project to ever break ground.

D. NHPA: The National Historic Preservation Act

The NHPA is the primary mechanism to preserve the "historical and cultural foundations of the Nation," and to "give a sense of orientation to the American people." The stated policy of the NHPA is to assure contemporary development and historic resources "exist in productive harmony." To so achieve, the NHPA infuses the mission of each federal agency with a concern for historic preservation.

1. Environmental Review and Permitting under the NHPA

The heart of the NHPA is § 106. Under this section, the head of

147 See 33 C.F.R. § 330.1(c).
149 See id. § 470-1(1).
150 See id. §§ 470 to 470x-6.
151 See id. § 470f.
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a federal agency responsible for the authorization of an "undertaking"152 must account for any effects the action may have upon historic properties listed or listable in the National Register of Historic Places (collectively, hereinafter "listed property").153 Agencies must exercise caution to ensure its activities do not threaten the physical integrity of the listed properties.154 Accordingly, for projects which require federal permitting, the permitting agency must initiate the § 106 process.

An undertaking may not be licensed until completion of the § 106 process.155 Before authorizing the proposed activity, the responsible agency must establish the area of the undertaking's potential environmental impact, and identify any listed property therein.156 If listed properties are present, the agency must appraise whether the undertaking has the potential to cause "effects"157 upon the listed properties.158 If there exist no potential effects, the § 106 duties of the agency terminate.159 But, if potential effects are found, the agency shall, in consultation with federal and state historic preservation officials (hereinafter "officials"), determine if the effects are "adverse."160 If not adverse, all involved parties are informed, and if the officials concur in the finding, the action may proceed.161

If the proposed course of action does entail adverse effects, the

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152 Id. § 470w(7) (defining "undertaking" as any project or activity that require federal permitting, licensing or approval of any sort).
153 Id. § 470f.
155 36 C.F.R. § 800.1(c) (2009).
156 Colo. River Indian Tribes, 605 F. Supp. at 1435 (citing 36 C.F.R. §§ 800.3(a)-(b), 800.4)).
157 36 C.F.R. § 800.16(d) (defining "effect" as alteration to the characteristics of a historic property qualifying it for inclusion in, or eligibility for, the National Register).
158 Id. § 800.3(a).
159 Id.
160 Id. § 800.5(a)(1) (“An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”).
161 Id. subsec. (c).
agency must continue the consultation process, developing and evaluating alternatives and modifications to mitigate the potential effects at issue. The agency and officials must formally resolve all adverse effects, and memorialize this accord in a Memorandum of Agreement. Conclusion of the Memorandum fulfills an agency’s § 106 obligations. Federal authorization of the action is contingent upon successful completion of the § 106 process.

2. “Historic” Hurdles to NHPA Permitting of Transmission Capacity

An obvious consequence of the § 106 environmental review process is unnecessary delay. The § 106 review and consultation procedure requires the authorizing agency to conduct an independent environmental review prior to authorization of the undertaking. The duration of these reviews is not statutorily bound and may continue indefinitely. The federal environmental authorization process could be streamlined through the coordination and integration of several independent environmental reviews into a comprehensive environmental review and authorization procedure.

E. Federal Environmental Authorization: A Model of Bureaucratic Inefficiency

The federal environmental authorization procedure for new transmission capacity is obtuse and redundant. Independently, each regulatory regime performs a necessary function to protect and preserve the global commons. The problem is that these procedures do not exist in isolation. A number of regulatory agencies use the same mechanism, the

162 Id. § 800.6(a).
163 Id. subsec. (c).
164 Id. Should the agency fail to honor any included term, the Memorandum is terminable by any signatory. Id.
165 See id. § 800.7(a) (stating that if the agency and the officials are unable to reach an agreement, consultation is terminated and the federal agency may not license the undertaking).
166 See id. § 800.1(c).
environmental review, to accomplish similar ends, the evaluation of "adverse effects." Yet, these agencies do not seize upon this connection to coordinate actions and pool resources; each agency is largely self-contained and operates ignorant of each other.

This patchwork framework results in needless delay and redundancy. Three statutes, the ESA, NEPA, and NHPA, require three distinct environmental reviews to examine similar "adverse effects." Sequentially, completion of these reviews may take years. Further, for environmental review under each of these statutes, an applicant must individually contact the agency, negotiate the particularities of each bureaucracy, determine what amounts to compliance within the guidelines of each, and only then may they take substantive steps to shape the proposed course of action in accordance with these regulatory requirements. Each application, review, set of guidelines, and agency contact beyond the first is redundant. The cost of this redundancy and inefficiency is borne by prospective developers in the form of excess administrative and transaction costs. These costs are in turn realized on the ground in every remote, open, good wind area which should house wind generation facilities, but do not because the lack of access to an existing transmission network renders those projects economically infeasible. A system less efficient can hardly be envisioned. The federal environmental permitting system, enacted to protect and preserve the global commons, is a principal obstacle in the path of transition to a renewable economy powered by the force of wind. This is patently absurd. The US is in dire need of a federal mandate to streamline the permitting process to develop a renewable economy.

IV. COORDINATING FEDERAL AUTHORIZATIONS TO PERMIT A RENEWABLE ENERGY ECONOMY

The barriers posed by the federal environmental permitting regime are plain. A mechanism to address the inefficiencies in the processes is most welcome. In 2005, Congress attempted to address the problems identified.

167 Should each regulatory procedure be conducted sequentially, the process would drag on almost indefinitely.
The product is § 824p(h) of the Federal Power Act (hereinafter “FPA”).¹⁶⁸ The seeds of a solution lie therein. This is a federal mandate to streamline the permitting process for new transmission facilities through coordination of the federal authorization processes.¹⁶⁹ But the agency at which this objective is primarily directed, the Department of Energy (hereinafter “DoE”), interprets the statute unnecessarily narrow.¹⁷⁰ The result is perpetuation of the status quo. A stricter reading of the statutory language will provide a vehicle for effective coordination to streamline the permitting process. The following details the direct language of § 824p(h), its current interpretation, my proffered interpretation, and the effects and viability of the proposed interpretation.

A. FPA: The Federal Power Act’s § 824p(h)

1. Statutory Language

The FPA is a sprawling piece of legislation. Buried seventy-nine printed pages deep is § 824p(h), which originated from the 2005 Energy Policy Act.¹⁷¹ Section 824p(h) stipulates that the DoE is to act as the lead agency for purposes of coordination of all applicable federal authorizations and associated environmental reviews of proposed transmission facilities.¹⁷² A strict timeline of one year for the completion of all permit decisions and related environmental reviews is imposed, and the DoE is directed to establish binding intermediate timelines.¹⁷³ Most significantly, as lead agency, the DoE is compelled to prepare a “[S]ingle [E]nvironnental [R]evie[w] [D]ocument,” (hereinafter, “Document”)

¹⁶⁹ See id.
¹⁷² Id.; 16 U.S.C. § 824p(h)(1)-(2).
¹⁷³ 16 U.S.C. § 824p(h)(4). However, this does not apply when a requirement of “Federal law does not permit compliance” with the one year timeline. Id. subsec. (B)(ii).
inclusive of all criteria applicable to each involved permitting procedure, to be used as a basis for all federal permitting decisions.\textsuperscript{174} The DoE's regulatory interpretation needlessly clouds this relatively straightforward language of § 824p(h).

2. Regulatory Interpretation of § 824p(h)

The regulations proffered by the DoE pursuant to FPA's § 824p(h) (hereinafter "existing regulations") significantly narrow the scope of this powerful tool. The existing regulations are problematic from the very start. The DoE lists the stated purpose as the "compilation," rather than "preparation," of a single environmental review document.\textsuperscript{175} This language subtly undermines the significance of the DoE's role and suggests it has little interest in shouldering the authority inherent therein. "Compilation" implies a more passive role for a position which demands strong, focused leadership. As informed from the entirety of the regulations, the manner in which the DoE chose to interpret § 824p(h) seems more attuned to the maintenance of the status quo rather than substantive procedural revision.

Applicability of § 824p(h) is consistent with § 824 as a whole, limiting jurisdiction to facilities "used for the transmission" of "electric energy in interstate commerce."\textsuperscript{176} The definition of "electric energy in interstate commerce" is imported from earlier provisions,\textsuperscript{177} but the specification "used for the transmission" without further elaboration is unnecessarily ambiguous. The degree to which a facility must be dedicated to the interstate conveyance of electricity for it to be deemed "used in the transmission" of electric energy is unclear. This may unjustifiably confine the authority of the DoE to transmission lines that solely exist to carry electricity among the several states.

The DoE defines "Single Environmental Review Document" in a
manner inapposite to the plain text of § 824p(h). This term is described as the "total material that the permitting entities develop" for which the "lead agency for preparing the NEPA document" is "primarily responsible." This interpretation is problematic for two reasons. First, description of the Document as the "total material" developed by the permitting agencies undermines the apparent nature of the Document." In so defining, the Document more resembles a collection of separate, self-contained permitting documents, assembled and bound, rather than a single, integrated work. A description of this sort does little to integrate the disparate, time consuming and often overlapping procedures, which is the very intention of § 824p(h). Second, designation of any agency other than the DoE as lead agency is contrary to the text of § 824p(h).  

The coordination procedure is outlined in 10 C.F.R. § 900.6. Upon receipt of a request for coordination, the DoE and all involved permitting entities jointly determine the "appropriate level of coordination required," and designate one of these entities as the lead agency for the preparation of the integrated environmental review Document. In "coordinating" the preparation of the Document, the DoE will rely upon the permitting entities to ensure compliance with all applicable federal law. Designation of the lead agency is done according to the established NEPA regulatory procedure. The language of 10 C.F.R. § 900.6 implicates the same issues as the definition of the Document, in that it discharges much of the authority bestowed upon it by § 824p(h) in favor of the continuation

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178 10 C.F.R. § 900.3.  
179 See 16 U.S.C. § 824p(h) (as derived from the repeated use and central significance of "coordination").  
180 Id. subsec. (h)(5)(A).  
181 10 C.F.R. § 900.6(a)(1).  
182 Id. subsec. (b)(3).  
183 See id. subsec. (a)(1).
of existing procedure. The Section specifically provides that the DoE is the lead agency responsible for the preparation of the integrated environmental review Document. The regulatory interpretation of the coordination procedure proffered by the DoE is substantially different and inconsistent with the text of § 824p(h).

In construing § 824p(h), the DoE goes to great lengths to avoid the assumption of any additional responsibility. In so doing, the DoE relies heavily upon the term “coordination.” As used in § 824p(h), the DoE is to “coordinat[e] all . . . Federal authorizations.” Yet, in interpreting this mandate, the DoE inappropriately applies this term to the preparation of the Document. The DoE is not to merely “coordinat[e] the preparation” of the Document; the DoE “shall prepare” the Document. The burden of preparation is solely the DoE’s. In crafting the existing regulations, the DoE shirks the central responsibility imposed by § 824p(h).

In the circular and over-application of “coordinate,” the DoE undermines its role as the coordinator of federal authorizations. Under § 824p(h) the DoE is the lead agency for purposes of coordination and is to establish binding intermediate timelines, ensure the timely completion of environmental reviews and authorizations, provide an “expeditious pre-application mechanism,” streamline the permitting process for developments on public lands, and prepare the Document. Yet, the DoE’s interpretation is far more constrained, deftly avoiding the assumption of any additional liability. As the DoE understands its responsibilities, the DoE is only to coordinate for the purposes of determining how much coordination is required. The DoE and the individual permitting entities carry on just as if § 824p(h) were never appended to the FPA.

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184 See 16 U.S.C. § 824p(h)(5)(A). As lead agency, the DoE should ensure each permitting agency’s compliance with their respective Federal mandates. See id.
185 Id. subsec. (h)(2).
186 See 10 C.F.R. § 900.6(b)(3).
189 10 C.F.R. § 900.6(a)(1).
190 See id. subsec. (b)(3).
B. Amending the Existing Regulations to Promote Growth of Renewable Capacity

Revision of the existing regulations would do much to foster the growth of significant renewable capacity. And, as it should, revision must start with purpose. The purpose section of the regulations here proposed would read as follows:191

§ 900.1 Purpose.

These regulations provide for the coordination of federal authorizations for transmission facilities and preparation of a Single Environmental Review Document. They also provide an opportunity for each non-federal entity to coordinate its own separate non-Federal permitting and environmental reviews with that of the permitting entities.192

In so stating, the language of the purpose section will reflect the direct language employed by § 824p(h), not a diluted substitute. Choice of the term “preparation” over “compilation,” emphasizes the singularity of the process. Revision of the existing regulations will craft an all-inclusive environmental review, addressing all requirements of federal authorizations.

The applicability section requires but slight elucidation. The proposed regulations add subpart (a)(1), which clarifies what it means for a facility to be “used for the transmission” of electric energy in interstate commerce.

191 Note that in this section I offer and evaluate alternative regulations. This language is exclusively the product of this article and not presently proposed.
192 The first sentence of this section will remain the same and for the sake of brevity was not included here. See id. § 900.1. This second sentence listed above is directly imported from that of the existing regulation. See id.
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§ 900.2 Applicability

(a) [Text shall remain the same].

(1) A facility is “used for the transmission” of “electric energy in interstate commerce” if a transmission network with which the facility is physically and functionally interconnected is able to convey “electric energy in interstate commerce.”

These facilities are regulable because the facilities are capable of conveying electric energy among the states and therefore are “channels of interstate commerce,” under United States v. Lopez. If the line at issue is connected to a larger, regional grid which crosses state lines, regardless of intermediate connections, the line will be able to convey “electric energy in interstate commerce.” No inquiry will be made as to the destination of its load. So long as the transmission facility is interconnected to an interstate network, the facility is regulable under § 824p(h) as “used for the transmission” of “electric energy in interstate commerce.”

The proposed regulations enhance the definitions section by the addition of two significant terms: “lead agency” and “Single Environmental Review Document.” Although, the meaning of these terms may appear rather clear upon the face of § 824p(h), the DoE’s interpretation, embodied by the existing regulations, suggests a need for more regulatory precision.

§ 900.3 Definitions

Lead agency means the Department of Energy (“DoE”) or its designee.

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193 See id. § 900.2(a).

Single Environmental Review Document means the integrated environmental review document, prepared by the lead agency, inclusive of all considerations relevant to federal authorization of the facility, which shall be used as the basis for all federal authorization decisions.\footnote{See 10 C.F.R. § 900.3. The remainder of this definition will remain as it is currently written.}


DoE means Department of Energy

These regulatory definitions closely track the language of § 824p(h). The definition of lead agency is supported by the direct language of § 824p(h)(2), and by the NEPA regulations.\footnote{See 16 U.S.C. § 824p(h)(2) (2006) (stating that "[t]he Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility"); 40 C.F.R. § 1501.5(c) (2009) (outlining a process for determining the lead agency in major federal actions which involve a number of federal agencies). Section 1501.5(c) supports the designation of the DoE as lead agency because its magnitude of involvement is the greatest, it acts first, and it controls the overall approval process pursuant to § 824p(h)(2). See id.}

The real essence of the coordination procedure is detailed in the following sections. The focus of § 900.6 will be the pre-authorization environmental review procedure. The protocol for federal authorization is outlined in § 900.7.
§ 900.6 Coordination of permitting and related environmental reviews.

(a)(1) Upon receipt of a request for coordination, the DoE as the lead agency for the preparation of the Single Environmental Review Document and coordinator of all federal authorizations, shall determine which federal permitting entities to involve in the consultation process.

(a)(2) [Text shall remain the same].

(a)(3) Each federal permitting entity shall designate a Senior Official responsible for implementation of the consultation process.

(a)(4) Following determinations pursuant to (a)(1), the DoE shall notify each Senior Official, as determined in (a)(3), of their involvement in the permitting process within seven days of receipt of the applicant’s request for coordination.

(a)(5) Each involved federal permitting entity shall immediately commence performance of its environmental review functions required for the issuance of federal authorization as specified by federal law. Each federal permitting entity shall submit the completed environmental reviews ("Findings") to the DoE.

(i) Completed Findings shall be submitted to the DoE within four months of notification of involvement, as provided in (a)(4), unless otherwise specified by federal law.

197 See 10 C.F.R. § 900.5.
198 See id. § 900.6(a)(2).
(a)(6) As lead agency, the DoE shall assemble the submitted Findings and prepare the NEPA compliance documents.

   (i) In preparation of the NEPA compliance documents, the DoE shall rely solely upon the submitted Findings to the extent permitted by federal law.

   (ii) The DoE shall perform any additional functions not performed by the involved federal permitting entities necessary for the preparation of the NEPA compliance documents.

(a)(7) From the Findings submitted by each federal permitting entity, and the NEPA compliance documents, the DoE shall prepare the Single Environmental Review Document.

   (i) The DoE shall complete preparation of the Single Environmental Review Document within eight months of receipt of an applicant's request for coordination, unless otherwise provided by federal law.

(a)(8) The DoE shall issue a copy of the Single Environmental Review Document to the designated Senior Official of each involved federal permitting entity.

§ 900.7 Issuance of Federal Authorizations.

(a) In making decisions regarding the issuance or denial of federal authorizations, each federal permitting entity shall rely solely upon the Single Environmental Review Document to the extent permitted by federal law.

(b) Each federal permitting entity shall submit its federal
authorization decisions to the DoE within eleven months of the date the DoE receives the applicant’s request for coordination, unless otherwise provided by another provision of federal law.

(c) The DoE shall convey all federal authorization decisions to the applicant within one year of the date the DoE receives the applicant’s request for coordination, unless otherwise provided applicable of federal law.

(d) Pursuant to 16 U.S.C. § 824p(h)(4)(A), the DoE shall have the authority to modify the intermediate timelines specified in these regulations as needed to comply with 16 U.S.C. § 824p(h) as well as all other applicable provisions of federal law.

§ 900.8 Appeals.

(a) If any federal permitting entity denies a federal authorization necessary for the construction of the proposed transmission facility, or has failed to act by the deadlines specified by 16 U.S.C. § 824p(h), as implemented by these regulations, the applicant may appeal to the President pursuant to 16 U.S.C. § 824p(h)(6).

The proposed regulations are one possible way to address deficiencies of the existing regulations. The proposed regulations unify the federal authorization process in a singular, yet attenuated, manner. As specified, the process is inclusive of all individual federal environmental permitting procedures, granting the DoE umbrella authority over the coordination of each with that of all others. Yet, where each process proves incongruous to the wider § 824p(h) procedure, such as in conflicting time allowances, the proposed regulations allow for appropriate exceptions, where the exceptions are necessary to comply with other applicable provisions of federal law.
The proposed regulations also simplify the existing regulatory interpretation of § 824p(h) and mitigate excessive administrative costs. Under the proposed regulations, a prospective applicant files a single request for coordination and files it with a single federal entity, the DoE. The applicant complies with but a single set of guidelines in the preparation and filing of this request. The request is forwarded to the DoE, at which point, the DoE steps into the shoes of the applicant, and will surmount the numerous administrative hurdles put in front of the applicant. Therefore, the proposed regulations internalize excessive administrative costs currently imposed upon prospective developers by the federal environmental permitting regime.

The proposed regulations streamline the federal environmental permitting process because together the regulations realize the same degree of environmental review and protection for a lesser overall cost, through full utilization of the coordinating authority bestowed upon the DoE by § 824p(h). Following the submission and approval of a request for coordination, the DoE contacts each federal permitting entity to be involved in the authorization process on behalf of the applicant. The involved federal permitting entities then work directly with the applicant. Each federal permitting entity retains control over its permitting functions as required by federal law, relying on its particular administrative expertise. Each agency submits its Findings to the DoE, and following the completion of the remaining procedures, the DoE communicates all authorization decisions to the applicant at one time. The proposed regulations integrate the several processes to the degree permissible under federal law. For the first time, these regulations proscribe various intermediate timelines, as mandated by 16 U.S.C. § 824p(h)(4)(A). This integration and coordination hopefully results in a more expedient and efficient federal authorization procedure, reducing administrative costs and spurring wider development of transmission capacity.

In the abstract, the proposed regulations fully implement the procedural mandate of § 824p(h), simplifying and streamlining the federal environmental permitting process. But the federal environmental permitting procedure is the sum of disparate and at times incongruous parts. To adequately examine the feasibility and viability of these proposed revisions, the application upon each permitting statute needs to
be briefly examined.

V. FEASIBILITY OF THE PROPOSED § 824p(h) REGULATIONS

A. NEPA

The proposed regulations under § 824p(h) streamline the NEPA process without an impact upon compliance with the NEPA regulations. Designating the DoE as the lead agency for the federal authorization of transmission infrastructure, in conformance with existing NEPA regulations, eliminates any possible administrative wrangling regarding which agency is to shoulder the responsibilities of the lead agency. The DoE is always to be the lead agency for purposes of the § 824p(h) coordination process. Pursuant to proposed 10 C.F.R. § 900.6(a)(5), the DoE must prepare the NEPA compliance documents in reliance upon the submitted Findings of the federal permitting entities. The DoE performs any remaining functions, including any additional investigatory work or identification of alternatives to mitigate environmental impacts necessary to complete the NEPA process, but not necessarily contemplated by ESA’s, CWA’s or NHPA’s review processes. The NEPA review will be more efficient, because the DoE can fulfill the procedural requirements of NEPA’s § 102 at a lower net cost. The DoE conserves resources through reliance upon relevant Findings of other federal permitting entities which the DoE would otherwise be required to investigate and analyze on its own. In so doing, the DoE may exploit the administrative expertise and accumulated knowledge of federal permitting entities, which may be lacking within the DoE. The NEPA review process is more efficient under the proposed regulations because the DoE can competently comply with the procedural mandates of the NEPA at a lower cost than may be imposed under the existing § 824p(h) regulations.

Finally, imposition of the intermediate timelines established in proposed 10 C.F.R. § 900.6(a)(9)(i) expedites an otherwise indefinite

199 See 40 C.F.R. § 1501.5 (outlining a loose factorial analysis which comports with the assignment of the DoE as lead agency).
process. Under current regulations, there is no deadline for completion of the NEPA documents. The proposed regulations oblige the DoE to complete the NEPA process within eight months of receipt of a request for coordination. The proposed intermediate timelines should drastically lower the administrative costs that a NEPA review imposes upon prospective developers. The proposed regulations streamline and expedite the NEPA process through more robust cooperation and consolidation of resources. A more efficient and expeditious process reduces the administrative costs of a NEPA review. Through cost mitigation, new transmission infrastructure will attract more private investments to develop a strong transmission network.

B. ESA

The ESA should prove hospitable to integration under the proposed regulations as well. The ESA regulations allow for consolidation of consultation procedures required by other federally-mandated environmental reviews, yet it is uncertain the degree to which this currently occurs. The proposed regulations mandate such interagency cooperation. As the lead agency, the DoE must always preliminary consult with the FWS to determine the presence of listed species or critical habitat in the proposed area of construction. If necessary, the DoE shall prepare a BA and, in formal consultation with the FWS, a BO to determine whether the proposed course of action may proceed. The DoE then integrates the BA, BO, and any relevant findings into the Document. In reliance upon this Document, the FWS must decide whether to authorize the action and issue any incidental take permits.

Unfortunately, the proposed regulations are not in themselves sufficient to tackle the central obstacle imposed by the ESA review, extensive delay. The ESA regulations allow for a regulatory process

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200 Id. § 1501.8.
201 50 C.F.R. § 402.06(a) (2009).
202 While this is true, it is conceded that authorization outcomes are readily apparent upon completion of a BO.
which may take upwards of 405 days to complete. Under the proposed regulations, the time allotted for individual agency environmental reviews is circumscribed to four months. Yet, the proposed regulations yield to the ESA regulations, and thus, the ESA review may still consume an excessive amount of time. Hopefully, the proposed regulations hasten the ESA process by association, but this assertion is speculative at best. Despite the mandated timelines, the proposed regulations will make the ESA and the entire coordination process more efficient, because federal environmental reviews shall be conducted concurrently and in consultation with other agencies which may have expertise with which to aid the FWS.

C. CWA

1. NPDES Permitting

The effects of the proposed regulations upon NPDES permitting will only be realized in the five states and certain other areas where the EPA remains the NPDES permitting authority. The effect of the streamlined regulations is concededly minimal, because compliance with the NPDES for purposes of siting new transmission facilities merely entails conformity with the conditions of a CGP. Compliance with the terms of the CGP, inclusive of authorization under the ESA and NHPA, is determinative of conformity with the CWA's NPDES program. No separate application is required.

Under the proposed regulations, upon receipt and acceptance of a request for coordination, the DoE must consult with the EPA and, as necessary, the EPA shall work with the applicant. The applicant need not worry that the ESA and NHPA processes will string out authorization indefinitely, as these review processes are conducted concurrently and authorization decisions must be communicated within the outlined time frames. In the intervening time, the applicant prepares the SWPPP and files the NOI. The proposed regulations allow prospective developers to

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203 See supra note 102.
204 40 C.F.R. § 124.3(a)(1).
prepare the proposed construction sites for authorization under a CGP as the DoE, EPA, ESA, Corps, and other involved federal permitting entities work together to authorize the project. While the EPA’s NPDES process may not be significantly affected, cooperation of federal permitting entities streamlines the federal environmental permitting process as a whole because it reduces delay while increasing certainty and predictability. These pressures will reduce administrative costs and attract investors to efficiently develop the robust transmission structure necessary to support utility-scale wind.

2. CWA § 404: Dredge and Fill Discharge Permits

Authorization under a CWA’s § 404 permit is the least burdensome procedure outlined in this article. Utility line activities are regulated under the NWP12, so the “applicant needs merely to comply with [the] terms [of this permit], and no further action by the permitting authority is necessary.”205 The proposed regulations will not significantly affect a process already so efficiently abridged. Yet, in coordination and consolidation of the other permitting processes explored herein, the regulations make the overall federal environmental permitting process more attuned to the way in which the Corps’ § 404 program is conducted.

D. *NHPA*

Under the NHPA, should prospective transmission infrastructure require any type of federal authorization, the licensing agency must initiate the § 106 review process.206 Under the proposed regulations, the DoE, as the lead agency responsible for coordination of all applicable federal authorizations and preparation of the Document, must itself engage in the § 106 process according to the NHPA implementing regulations.207 The DoE determines the existence of any listed properties in the proposed

205 *Id.* § 230.5(b).
207 *Id.* § 824p(h)(2), (5)(A); 36 C.F.R. § 800.2(a)(2) (2009).
A REGULATORY REINTERPRETATION TO BLOW AWAY DIRTY ENERGY?

area of construction. If any listed properties are present in the area, the DoE shall determine whether the properties may be adversely affected by the proposed action, and if so, consult with the Officials and attempt to resolve these adverse effects. Upon successful completion of this process, the parties embody their understanding in a Memorandum of Agreement, which the DoE is then to include in the Document. The proposed regulations do not affect compliance with the NHPA, because the internal operation of the § 106 process remains as it is currently, but with the DoE at the helm.

As currently interpreted, the NHPA process can extend indefinitely, because the implementing regulations do not provide for a hard timeline for completion. Different groups driven by divergent interests in the project could fight endlessly about the proper manner in which to mitigate adverse effects upon listed properties, delaying resolution of identified effects, should any resolution ever be reached. The proposed regulations confine the § 106 consultation process to the duration of one year. The DoE is directed to complete this process within the four month deadline applicable to the Findings in the proposed regulations. This limitation is perfectly congruent with the regulatory interpretation of § 106, which has no substantive time constraints. Should the officials at interest in § 106 consultation fail to reach an accord within the time allotted by the proposed regulations, the action may not be authorized. But this restriction should not prevent development of transmission facilities that are economically desirable to applicants. Rather, this limitation will induce applicants to be more flexible to the demands of officials and other interested parties concerned with hazards to historic properties while also providing an enforcement mechanisms to secure greater concessions from applicants. The proposed regulations comport with the purpose of § 106 because economically-advantageous development will still proceed and listed properties will remain protected. Expedition of a NHPA review under the proposed regulations makes the

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208 36 C.F.R. § 800.4.
209 Id. §§ 800.5-.6.
210 Id. § 800.6(c).
211 Id. § 800.7.
entire environmental review process more efficient.


Through streamlining and coordinating constituent environmental review processes and federal reviews, the proposed regulations will enhance the efficiency of federal environmental authorization. The same level of environmental benefit will be realized at a lower cost to applicants. The possibility of sequential rather than simultaneous reviews will be averted. Socially desirable transmission projects, necessary for the proliferation of wind power as a viable alternative energy source, will no longer be hamstrung by an incessant and often redundant review process. By consolidating the separate environmental review procedures under a single regulatory umbrella, the proposed regulations will mitigate oppressive administrative costs. Reduced administrative costs will incentivize development of new transmission capacity. Development of wider transmission capacity will surmount the major obstacle to the expansion of wind as a more viable, alternative source of energy. And, as the demand for turbines and wind power grows, capital will be drawn to the renewable energy sector. Thus, each generation facility will be more efficient, producing more energy at a lower price per kWh.

Ultimately, the spread of wind turbine farms and cost-effective transmission infrastructure will benefit the environment, consumers, and the public welfare at large. With more research and developmental dollars flowing into wind technology, reducing the cost per KwH of electricity generated, both the cost borne by each consumer and the real cost of energy generation will plummet. Consumers will obtain energy without externalizing the cost of pollution upon the global commons. Through elimination of this externalized cost, the real cost of electricity will fall more in line with the market cost. Further, displacement of conventional sources of energy with wind-generated electricity will aid in the GHG mitigation. The contribution of wind energy to this end may not be in itself sufficient to address climate change issues. But, conversion to a renewable economy is a step in the right direction which, if successful, will enhance social welfare and spare lives worldwide. While not
dispositive of such broad aspirations, the effective consolidation and coordination of federal transmission authorizations is efficacious towards this end.

Lofty ambitions aside, if implemented, the proposed regulations must be sustainable to make any difference at all. The proposed regulations must prove viable and legally defensible because there will undoubtedly be opposition to the regulatory modifications. Resistance is inherent in any type of change, but especially one which implicates delicate political considerations. The proposed regulations must rebuff legal challenges. The following section explores two possibilities for defending the proposed regulations.

VI. VIABILITY OF THE PROPOSED AMENDMENTS TO § 824P(H) REGULATIONS

There are two attractive options to defend any anticipated legal challenges to the proposed regulations. The first, agency deference under *Chevron*\(^\text{212}\) ("Chevron deference"), is the classic bastion to insulate regulatory interpretation of federal law from legal challenge. Chevron deference is oft-litigated and there exists an extensive reservoir of precedent to draw upon. The second option to defend the proposed regulations lies within the text of NEPA’s § 102.\(^\text{213}\) This section provides a cannon of construction (hereinafter “NEPA Cannon”), according to which, federal legislation must be interpreted in concert with the objectives of NEPA’s § 101.\(^\text{214}\) This issue is far less litigated, and therefore less certain, but can buffer the proposed regulatory interpretation of § 824p(h). In the text that follows, these defenses are outlined, developed, and analyzed in turn.


\(\text{213}\) *See 42 U.S.C. § 4332(1) (2006).*

\(\text{214}\) *Id.*
A. Chevron Deference

1. The Chevron Two-Step

The Court in *Chevron* outlined a two-step test to determine whether an agency’s regulatory interpretation of a statute comports with the scope of their authority. The first step (hereinafter “Chevron step one”) is an inquiry into legislative intent. If the language of the statute is clear and facially unambiguous, courts must give effect to this expression of Congressional intent. If implementing regulations conflict with this unambiguous intent, the regulations are invalid and will be stricken by a court as a matter of law.

Should a court find statutory language ambiguous, legislative intent is therefore uncertain, and the inquiry moves onto the second step (hereinafter “Chevron step two”). If a statute is silent or ambiguous concerning a particular matter, courts defer to an agency’s reasonable construction thereof. An agency’s interpretation is controlling unless it is “arbitrary, capricious, or manifestly contrary to the statute.” Modifications of existing agency interpretations are subject to the same arbitrary and capricious standard which governs initial regulatory offerings. Generally, regulations will meet this highly deferential standard if each is reasonably related to the purpose of the underlying statute. Agency regulations would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider,

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215 *See Chevron*, 467 U.S. at 842-43.
216 *Id.* at 842.
217 *Id.* at 842-43.
218 *Id.* at 843.
219 *Id.*
220 *Id.* at 844.
entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.\textsuperscript{223}

The reviewing court need not agree with the particular construction of the statute, so long as the agency’s interpretation is a reasonable construction, it is entitled to deference.\textsuperscript{224}

In defending construction of a statute, an agency will typically attempt to cast the legislation as ambiguous, so as to shield its interpretation under the deferential Chevron step two standard. Conversely, parties challenging agency interpretation often attempt to portray the language of the statute as clear and unambiguous, subjecting the interpretation to a far stiffer review standard. Therefore, if an agency’s interpretation survives the stricter Chevron step one analysis, it shall plausibly survive the more deferential Chevron step two review standard.

Chevron deference is premised upon a theory that ambiguity in a statute is intentional, and therefore serves as an implicit delegation of authority to the responsible agency to fill in the gaps in a reasonable manner.\textsuperscript{225} In recognition of this principle, courts quite often defer to the administrative expertise of the responsible agency.\textsuperscript{226} Regulatory agencies that specialize in highly complex matters are comparatively more competent to carry statutory mandates into effect according to the conditions on the ground.

2. The Proposed Regulations are in Rhythm with \textit{Chevron}

The proposed regulations should survive scrutiny under either level of the \textit{Chevron} analysis. Many alterations merely involve replacing language in the existing regulations, inconsistent with § 824p(h), with

\begin{itemize}
  \item \textsuperscript{223} \textit{Motor Vehicle Mfrs. Ass’n}, 463 U.S. at 43.
  \item \textsuperscript{224} Jackson, 961 F.2d at 585.
  \item \textsuperscript{225} FDA v. Brown \textsc{v.} Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
  \item \textsuperscript{226} See, \textit{e.g.}, \textit{id.}
\end{itemize}
terms pulled directly from the statutory text.227 These modifications are reasonably related to the purpose of § 824p(h), because the modifications incorporate the express text thereof, absent any interpretive twist. Statutory provisions, including the definition of lead agency are directly imported into the proposed regulations, giving unequivocal effect to express Congressional intent. Incorporation of these statutory provisions into the proposed regulations will survive scrutiny under Chevron step one analysis because it reflects Congressional intent. Therefore, these proposed regulations are valid interpretations of § 824p(h).

Proposed regulations which involve interpretation of a degree of ambiguity are also legitimate, according to the appropriate Chevron step two analysis. These regulations concern the coordinated review process and the issuance of federal authorizations.228 These provisions flesh out the general process outlined in § 824p(h)(4)-(5). Said sections deal with the establishment of binding intermediate deadlines, an overall timeline, an expeditious pre-application mechanism, and the creation and utilization of the Document. The proposed regulations do not alter the pre-application mechanism detailed in the existing regulations.229 The emphasis of the proposed regulations is on timelines as well as preparation and use of the Document.

a. Mandated Timelines

Section 824p(h)(4) addresses implementation of binding intermediate timelines and the overall deadline for completion of the federal authorization process.230 Under § 824p(h)(4)(A), the DoE, as lead agency, must establish “prompt and binding intermediate milestones and ultimate deadlines for the review of, and federal authorization decisions


228 See proposed regulations §§ 900.6 and 900.7, respectively, listed supra Part IV.B.

229 See 10 C.F.R. § 900.4.

relating to, the proposed facility.” The following section, § 824p(h)(4)(B), requires that the DoE shall “ensure” the completion of the entire authorization process within one year of receipt of the request for coordination. The existing regulations proffered by the DoE do not provide for any deadlines which are clearly inconsistent with its obligations under § 824p(h)(4)(A)-(B). The proposed regulations fill these gaps left by Congress and provide intermediate and comprehensive timelines for completion of the federal authorization process.\textsuperscript{231}

i. Binding Intermediate Timelines

The language of § 824p(h)(4)(A) does not specify the length of the “binding intermediate milestones.”\textsuperscript{232} The statute is silent. Because the statute is silent as to this particular question, the appropriate review standard is the deferential Chevron step two analysis.\textsuperscript{233} The regulations will be upheld if each is reasonably related to the statutory objectives.\textsuperscript{234} The proposed regulations will survive this test because the regulations are reasonably related to the objectives of § 824p(h)(4)(A).\textsuperscript{235}

Section 824p(h)(4)(A) simply obliges the DoE to establish intermediate timelines.\textsuperscript{236} The proposed regulations are reasonable in the establishment of such timelines, consistent with legislative intent. Intermediate milestones are provided to ensure that the authorization process as a whole will close within one year, in compliance with the § 824p(h)(4)(B). The timeline provisions consider this factor along with

\textsuperscript{231} See proposed regulations §§ 900.6(a)(5)(i) and 900.6(a)(7)(i) listed supra Part IV.B.
\textsuperscript{234} \textit{Id.} at 844 (explaining that they will be overturned if they are “arbitrary, capricious or manifestly contrary to the statute”).
\textsuperscript{236} 16 U.S.C. § 824p(h)(4)(A). This part also requires the DoE to consult with each participating federal permitting entity, and other actors where appropriate, concerning the deadlines. \textit{Id.} Such “consultation” is inherent in the wider coordination process. The DoE shall allow the participating entities to voice their opinion on the matter, satisfying this condition.
agency capability and input derived from "consultation" of other authorizing agencies. The timelines are "plausible" in that the timelines have an exception for procedures which, under existing federal law, may not meet the deadlines. In light of these relevant factors, the timeline provisions do not represent a "clear error of judgment." Therefore, the timeline provisions of the proposed regulations are reasonable and thus legitimate interpretations of federal law.

ii. Time for Completion of All Authorization Decisions

Section 824p(h)(4)(B) calls upon the DoE to ensure that the entire federal authorization procedure, inclusive of all necessary environmental reviews, is completed within one year of submission of a completed request for coordination, unless otherwise provided by federal law. The language of § 824p(h)(4)(B) does not provide a particular means to "ensure" compliance with this overall deadline for completion. Surely there are many reasonable ways in which the DoE may "ensure" the federal authorization process closes within one year. This provision is subject to more than one meaning and therefore ambiguous, because there exists a number of alternatives in which the DoE may "ensure" compliance with this provision. Because the term is ambiguous, a court will defer to a reasonable interpretation of the DoE.

In addition to the binding intermediate timelines, the proposed regulations require all federal permitting entities to deliver its respective permitting decisions to the DoE within eleven months. Following submission, the DoE must then convey the federal authorization decisions to the applicant within one month. Accordingly, all permitting decisions are conveyed to the applicant within one year, unless compliance is frustrated by another provision of applicable federal law. The proposed regulations "ensure" compliance with § 824p(h)(4)(B). The proposed

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237 See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.
239 See id.
240 See Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 342 (9th Cir. 1990).
regulations are not the sole option to achieve compliance, but one of many reasonable options designed to assure the authorization process closes within a year of its inception. The regulations consider the appropriate factors, completion within a year and exception for certain procedures, in a "plausible" manner. The regulations at issue reasonably relate to the purpose of the underlying legislation, are valid, and will withstand scrutiny under Chevron step two analysis.

The central motivation of Congress in passing § 824p(h) was to make the review and authorization process for transmission lines more efficient. Providing strict, binding deadlines is a particular mechanism which Congress selected to realize this broad objective. Section 824p(h)(4) specifies that binding deadlines are to be established. The silence and ambiguity of this section grants the DoE the necessary authority to fill in the gaps. The existing regulations fail to recognize the DoE's obligations under § 824p(h)(4)(A)-(B) and make no mention of intermediate or final deadlines. The proposed regulations address this deficiency, and establish these milestones. The intent of the proposed regulations is harmonious with that of § 824p(h)(4)(A)-(B). Because the intentions of both are reasonably aligned, the regulations will withstand analysis under the Chevron two-step analysis.

b. Coordination: The Single Environmental Review Document

The coordination procedure is not detailed to any degree in § 824p(h). Yet, the Document appears central to this process. As lead agency for the coordination of federal authorizations, the DoE must compose the Document, in consultation with all affected federal permitting entities. This Document is inclusive of all necessary considerations of individual applicable permits and shall be used as the

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242 See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.
244 See 16 U.S.C. § 824p(h)(5).
245 Id. subsecs. (2), (5)(A).
basis for all federal authorization decisions. The language of § 824p(h) provides a rough procedural framework. But, composition of the process is unspecified. Under the Chevron analysis, this silence is an implicit grant of authority to the DoE, which is to fill in the gaps consistent with the intent of § 824p(h). The DoE is charged with devising and implementing an integrated, streamlined, and efficient process for federal authorization of new transmission infrastructure, to be completed within the timelines discussed in the prior section.

The offering in the current regulations is a feeble attempt to streamline the federal authorization process. Coordination under the present regulations only requires designation of a lead agency and the establishment of a record keeping platform. Beyond this, the procedure for authorization is unaltered. The DoE, when presented with vast potential authority by Congress' silence and ambiguity, chose to maintain the status quo. The source of current inefficiency, administrative overlap and delay, is unaddressed. The proposed regulations speak to the inadequacies of the current regime, fleshing out a comprehensive and integrated federal authorization procedure.

Both § 824p(h) and the proposed regulations intend to coordinate, if not integrate, the anomalous procedures that compose the federal environmental review and authorization process. The proposed regulations give effect to this clear expression of congressional intent. To briefly recapitulate, the various regulatory procedures are to be synchronized with the DoE at the helm. A designee of each implicated federal permitting entity shall have a seat at the table and each is to conduct its reviews both immediately and simultaneously as the DoE prepares the NEPA compliance documents. Each will perform its review functions and feed the results to the DoE which weaves it all into a coherent Document. Then, each agency is to make its respective authorization decisions in reliance upon the Document.

As outlined, the coordinated authorization procedure is consistent with the broad intentions of § 824p(h) and those of §§ 2 and 5 in

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246 Id. subsecs. (5)(A), (C).
247 See Chevron, 467 U.S. at 842-43.
248 See 10 C.F.R. § 900.6 (2009).
particular. Under the proposed regulations, the DoE initiates the process. From here, the federal permitting entities proceed normally and direct completed reviews to the DoE. Each review is integrated into the Document, upon which the authorizing agencies must then rely to determine whether the action may proceed. Authority for these procedural alterations lies within § 824p(h)(2), (5)(A), and (C). From these sections, it may be reasonably extrapolated that Congress intended the DoE to head the coordinated authorization-by-committee process. From this point, one may infer that to lead the process, the DoE must be directly involved at the crucial points therein. The DoE must start the process, compose the all-important Document, and direct authorization outcomes to the applicant. The proposed regulations embody this intent in “consideration of [these] relevant factors.” These provisions all directly, rather than merely reasonably, relate to the implementation of the integrated review process, as envisioned by § 824p(h). This interpretation is far from arbitrary, capricious or manifestly contrary to the statute. The coordination procedure and the proposed regulations rationally relate to the statutory objective and are valid under a Chevron step two analysis.

c. A Brief Note on Ambiguity and Reasonableness

An agency’s interpretation of an ambiguous statute is typically accorded substantial deference. While substantial, this deference remains bounded. It is only afforded when it appears that Congress intended to delegate authority to the implementing agency and an agency

249 See 16 U.S.C. § 824p(h)(2), (5)(A), (C) (referring to the DoE as “lead agency,” and directing the DoE to prepare the Single Environmental Review Document which is the authoritative review for authorization purposes carrying forward).
251 See Chevron, 467 U.S. at 842-43.
252 See id.
253 Id. at 843-44.
exercises its legal authority pursuant to that delegation. 254 Outside such a finding, the agency interpretation merely carries persuasive force.255 Further, courts may only defer to reasonable interpretations, unreasonable interpretations are held arbitrary or capricious.256

Reviewing courts have significant discretion to determine whether implementing regulations will stand. Courts are the final arbiters of "reason." The viability of the proposed regulations, or any other regulation for that matter, is never a certainty. That the intent of the agency in interpreting a statute is the same as was that of the statute's drafters is, in itself, insufficient. Regulatory interpretation must not only be objectively reasonable to an agency head, but also to the particular reviewing court which hears the challenges. Thus, the proposed regulations, while objectively reasonable according to the preceding analysis, may still prove vulnerable.

B. The NEPA Cannon of Environmentalist Construction

A second means to defend the amended regulations presented is by resort to the underdeveloped NEPA Cannon of statutory construction. This cannon lies within NEPA's §102(1) and provides that, "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA § 101]."257 Litigation of the NEPA Cannon is sparse, yet consistent.258 Where a conflict as to the interpretation of a statutory provision exists, it shall be "resolved in favor of the policies expressed in NEPA."259 This is a "Congressionally-mandated rule of construction, addressed to all agencies of the Executive Branch and to the

255 Id. at 227.
256 Id. at 229 (citing Chevron, 467 U.S. at 842-45).
258 See Hale v. Norton, 476 F.3d 694 (9th Cir. 2007); Pub. Citizen v. Dept. of Transp., 316 F.3d 1002 (9th Cir. 2003), rev'd, 541 U.S. 752 (2004); Romer v. Carlucci, 847 F.2d 445 (8th Cir. 1988).
259 Romer, 847 F.2d at 468.
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courts.” All other considerations equal, the NEPA Cannon means that the interpretation of a statute most conducive to the realization of the policies specified within the NEPA should be upheld.

The NEPA Cannon is bounded where a statutory interpretation presents a clear conflict with existing federal law. NEPA was not intended to overturn an existing statute, and courts circumscribe its interpretive influence in this respect. Therefore, because courts do not read NEPA to trump existing law, the NEPA Cannon may not be used to justify statutory interpretations which frustrate existing federal law.

One policy elucidated in the NEPA is to “enhance the quality of renewable resources.” According to the analysis of this article, the proposed regulatory interpretation of § 824p(h) is better suited toward realization of this end than the existing regulations. Streamlined transmission permitting enhances the viability of wind as a renewable resource by addressing a significant impediment to its development as a practical, utility-scale power source. In promoting the development of utility-scale wind, a streamlined authorization process will work towards displacement of conventional power sources and plants, consistent with the NEPA objective of “attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” There exists a conflict of interpretation of § 824p(h). Competing interpretations are embodied in the existing and proposed regulations respectively. Because the proposed regulations promote the NEPA objectives more than the existing regulations, and in a manner consistent with other applicable federal law, this reading of § 824p(h) is justifiably valid.

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260 Id.
261 Id. at 469-70.
263 Id. (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 694 (1973)).
265 Id. subsec. (3).
C. The Proposed Regulations are a Justifiable Interpretation of § 824p(h)

The proposed regulations modify the existing regulations in a manner more consistent with the intent of § 824p(h) and more adept to address the obstacles inhibiting development of utility-scale wind. The substantive regulatory alterations, those involving a deeper degree of interpretation, concern the process of "coordination." The remainder of the changes are mostly definitional, closely written to the statute, and should not necessitate much in the way of interpretive justification. The provisions relating to the coordination process fill gaps left by congressional silence and ambiguity. Fleshing out the consultation procedure is properly within the authority of the DoE. The preferred regulations should withstand judicial scrutiny. Because the regulations seek to further streamline federal authorization for permitting new transmission capacity, the regulations reasonably relate to the intent of the statute.\(^2\)\(^6\) The proposed regulations also further the policies expressed in the NEPA more than the existing regulations, and under the NEPA Cannon, this regulatory interpretation must prevail.\(^2\)\(^6\)\(^7\) Therefore, the regulations are a justifiable interpretation of § 824p(h), sufficient to withstand the *Chevron* two-step analysis, especially when bolstered by the force of the NEPA Cannon of construction.

VII. CONCLUSION

America is beginning to embrace, albeit begrudgingly, that alternative energy sources will fuel the economy of tomorrow. Anything short thereof is simply infeasible in light of the environmental costs of conventional energy sources. One alternative source that is gaining traction is wind. Wind energy is increasingly competitive with conventional energy sources and alone could more than satisfy current levels of energy consumption.

The biggest obstacle to proliferation of utility-scale wind is inadequate


\(^{2\text{67}}\) See Romer v. Carlucci, 847 F.2d 445, 468 (8th Cir. 1988).
transmission infrastructure. Lack of a robust transmission network discourages investment in wind facilities because the realization of profit is less certain absent a viable means to convey the product to the market. Public policy should attempt to mitigate this problem through both direct and indirect means. Yet, US public policy, or at least regulatory policy, obstructs more than abets.

The federal environmental review and authorization procedure is needlessly complex, redundant, and time consuming. One way to facilitate development of new transmission infrastructure, and thus utility-scale wind, is to smooth some of the bumps from the federal authorization procedure. Consolidation of the common functions of environmental review and authorization procedures addressed in this article will simplify and expedite the process while conserving the resources of both the applicant and the federal government. Further, the consolidated review process will realize the same level of environmental protection by addressing each area currently targeted to the same extent but at a lower cost. Therefore, the consolidated review process detailed in the proposed regulations will efficiently streamline federal authorization of transmission lines to service wind power facilities.

The proffered vehicle to enhance the efficiency of the federal environmental authorization process is an amendment to the § 824p(h) implementing regulations. The proposed regulations are a viable and effective mechanism to streamline the federal permitting process for new transmission capacity. These regulations pool the resources of the permitting entities under the leadership of the DoE, both coordinating and expediting the authorization procedure. Applicants will benefit from shorter delay, reduced interaction with federal permitting entities, and a simpler process in which the DoE internalizes the costs of initiating proceedings with each involved permitting entity. The federal permitting entities would conserve resources through reliance upon common findings of other entities.

The proposed regulations are fully defensible under the Chevron two-step analysis and the NEPA Cannon. Many of the alterations merely involve directly importing provisions from § 824p(h) into the proposed regulations and are thus permissible under Chevron step one. Proposed regulations, which involve more interpretation, such as those concerning
the coordination procedure, are reasonable and therefore permissible under the Chevron step two. Further, should the proposed regulations face a stiffer challenge than anticipated, the NEPA Cannon will plug the holes, because the proposed regulations are more conducive to the NEPA policy objectives than the existing regulations. Accordingly, the proposed regulations should withstand challenge.

The proposed regulations are effective and viable, yet the regulations are but a step in a longer process to shape public policy in a manner supportive of the coming alternative energy economy. The most important contribution of the proposed regulations is expedition of the entire review and authorization process. The regulations mandate that many procedures be conducted simultaneously and concluded within one year, where permissible under relevant federal law. But the regulations are alone insufficient to surmount all the regulatory hurdles to the development of a robust transmission infrastructure. Notably, similar action must be taken on the state and local level. The most effective, yet least probable, solution would be to consolidate all permitting authority under a single entity. Yet, this is beyond the scope of this article and merely offered as a rhetorical point. If America is serious about the switch to a renewable economy, coordinated action needs to be taken upon all levels of policy making. The biggest hurdle to utility-scale wind is the lack of adequate transmission capacity. All stakeholders, including the public at large, must come together and ensure that if we’re not willing to construct it ourselves, we at least need to get out of the way of those that are.