

Fast-Tracking Electric Transmission Infrastructure

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In the coming weeks, the [U.S. Department of Energy](#) is expected to undertake its fourth triennial congestion study. Depending on the outcome of that study, the DOE may then designate one or more National Interest Electric Transmission Corridors.

Electric transmission projects proposed within NIETCs may benefit from fast-tracked approval, as the [Federal Energy Regulatory Commission](#) may step in if states hold back their permitting decisions for more than a year. In addition, project developers may exercise eminent domain power for FERC-permitted projects in NIETCs.

While no new NIETCs have been designated in more than a decade, the current political climate may make new designations more likely, given the Trump administration's focus on infrastructure, streamlined permitting and domestic energy development. There will be significant opportunities for stakeholder involvement in this process, and entities with interests in transmission projects should be prepared to engage. The process will augment other requirements to fast-track approval of electric transmission projects.

National Interest Electric Transmission Corridors

The Energy Policy Act of 2005 (EPAc 2005) was a comprehensive energy reform bill that expanded the powers of the DOE and FERC with regard to interstate electric transmission projects. Specifically, Section 1221 of the act:

- required the DOE to undertake a transmission congestion study every three years;
- authorized the DOE to designate NIETCs, based on congestion studies, in “any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers”; and
- created a fast-track approval process for electric transmission projects by (a) giving FERC “backstop authority” to issue construction permits for projects in NIETCs if states withhold approval for more than a year; and (b) giving project developers eminent domain rights for FERC-permitted projects in NIETCs.

The DOE's most recent congestion study was completed in 2015. The DOE expects to begin the next congestion study in the coming weeks.

The congestion study will need to be prepared “in consultation with affected States,” as required by EPAc 2005. Previous



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NIETC designations have been invalidated due to inadequate consultation in that regard, so the DOE is expected to engage in a robust consultation process while the congestion study is underway.[1]

The upcoming study process will launch with a public comment period, during which stakeholders will have the opportunity to provide input on electric transmission needs and related issues. In addition, affected entities can expect further opportunities to comment on any future NIETC designation, which is a major federal action under the National Environmental Policy Act (NEPA).

Steps for Developers to Use Eminent Domain Authority

There are several steps that must be taken in order for project developers to exercise eminent domain authority for electric transmission projects under Section 1221.

First, the DOE's upcoming congestion study must identify an area where congestion is considered to be a problem of national concern. Second, based on the congestion study, the DOE must designate an NIETC covering the project developer's site. (Only two NIETCs have ever been designated, and both of those were vacated in California Wilderness Coalition.) Then, the project developer must obtain a construction permit from FERC, which would be available only if state authorization is held back for more than a year.

After obtaining that permit, if negotiations with landowners are not successful, the project developer would be able to acquire necessary rights-of-way for construction or modification by exercising eminent domain in the relevant federal district court or state court.

In light of the steps that must occur, any use of eminent domain for electric transmission projects is likely to be at least two years away. Designation of a new NIETC is unlikely to occur before 2019, following the DOE's 2018 congestion study and the required NEPA process.

Other Fast-Tracking Provisions of EPOA 2005

In addition to NIETC-specific provisions, Section 1221 of EPOA 2005 created several requirements for streamlined permitting that have been echoed in recent Trump administration initiatives. For example, like President Trump's Aug. 15, 2017, executive order and Feb. 12, 2018, infrastructure plan, which call for "one agency, one decision," Section 1221 requires the DOE to serve as the lead agency for coordinating all federal authorizations required to site electric transmission projects, "to ensure timely and efficient review and permit decisions."

Section 1221 also requires all federal permitting for transmission facility siting to be completed within one year, as a general rule. That is even more aggressive than recent Trump administration calls for two-year deadlines for infrastructure project permitting.

Under Section 1221, the president has authority to hear appeals from project proponents (as well as affected states) if a federal agency (1) denies an authorization needed for a project, or (2) misses a deadline during the permitting process. After reviewing the appeal, the president, in consultation with the affected federal agency, may (1) issue an authorization (which may include “any appropriate conditions”) or (2) deny the application within 90 days of the appeal having been filed.

While this authority has never been invoked, project proponents and states may be more inclined to pursue appeals during the Trump administration, given the administration’s efforts to promote streamlined permitting.

Takeaways

- The DOE is preparing to undertake its fourth triennial national congestion study. Stakeholders will have opportunities to provide input during the public comment period for the congestion study and any subsequent NEPA process triggered by a proposed NIETC designation.
- While NIETCs have not yet been used effectively to streamline permitting for electric transmission projects, the DOE could designate new NIETCs that are less vulnerable to challenge by ensuring that states are adequately consulted in the upcoming congestion study.
- Any use of eminent domain authority under Section 1221 of EPC Act 2005 will require a multi-step process that includes DOE designation of a new NIETC, FERC approval for transmission projects, negotiations with landowners and relevant court proceedings.
- If a new NIETC is designated, it may take two years or longer before eminent domain power can be exercised, based on the milestones set forth in Section 1221.
- Several provisions of EPC Act 2005 provide for fast-tracked approval of transmission projects. Those provisions, and the Trump administration’s reform priorities, give project developers a strong basis to advocate for well-coordinated review and permitting processes.

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[1] See *California Wilderness Coalition v. U.S. Dep’t of Energy*, 631 F.3d 1072 (9th Cir. 2011).