

In terms of the energy transition, the most important question about the recent NEPA amendments is whether they streamline permitting for transmission projects. The answer is complicated.

We can divide transmission projects into two groups. The first group consists of transmission projects where federal involvement is limited to specific segments, such as stream crossings requiring approval by the Army Corps or transit across public lands. The NEPA amendments apply with full force to these projects. Section 107 could provide some help in moving these projects forward, although that's likely to be fairly incremental.

In particular, the new provisions in section 107 allowing the project applicant (the transmission owners) to draft the environmental impact statement and the deadlines in the statute could accelerate the environmental review. The deadlines will be most important to the extent that they motivate the agencies themselves to move more quickly. Even though the statute provides for judicial enforcement, it is difficult for courts to do much in cases where agencies claim they are moving as fast as their resources allow. Another provision that may be helpful requires agencies to take into account the environmental benefits of a project, such as reducing carbon emissions by getting renewable energy to users.

The other group of projects may be the most important. They involve transmission projects along designated corridors of national interest, where the federal government has prioritized transmission. Those projects are governed by section 216 of the Federal Power Act (16 USC §824p), which provides for a much more robust federal role unless state cooperate with building the project. Amendments to section 216 in the 2021 infrastructure bill were designed to overcome some previous obstacles created by the courts, and hopefully they will make the provision more robust.

The situation is more complex for transmission projects in designated national interest corridors. The complication is that section 216 of the Federal Power Act deals with environmental reviews for these projects. Its provisions differ from NEPA § 107 in important ways:

1. NEPA § 107 provides a specific process for picking a lead agency, but FPA § 216 designates the Department of Energy as the lead agency for all section 216 projects.
2. Section 107 has a two year deadline for completing environmental reviews, but § 216 allows only one year.
3. Both provisions call for the lead agency to do the environmental review, but § 216 makes it clear that this will be the only federal environmental review.
4. Under section 107, the project applicant can prepare the document. Section 216

allows delegation only to FERC-approved regional transmission organizations, which also have the right to issue permits except on federal lands.

5. Unlike the NEPA provision, § 216 deals not only deals with environmental impact statements but with substantive decisions regarding the project such permit issuance.
6. Section 107 contains other provisions, such as page limits for environmental review documents, relating to matters not covered by § 217.

The NEPA Amendments came later, so you might think they supplant the Federal Power Act provision. Under what's called the canon against implied repeals, however, there's a presumption that later statutes aren't meant to repeal provisions in earlier ones. It's not always clear how the presumption applies in particular cases.

The simplest cases are where the statutes cover different subjects. There's no conflict between the statutes about project approvals, which are really only covered in the FPA, or about document lengths, which are only covered by NEPA. NEPA § 108 has a provision about programmatic environmental impact statements that might be very useful if applied to cover issues applying across the transmission corridor, which could then make it easier to do reviews for individual projects. This isn't covered in FPA section 216, so there's no conflict.

Where the FPA is stricter than NEPA, such as the one year time limit, my guess is that the FPA continues to apply. Since the NEPA amendments are intended to streamline permitting, there's no real conflict with a statute like section 216, which does even more to speed particular types of projects.

For projects subject to § 216, it's less clear whether NEPA will allow delegation of the environmental impact statement to transmission owners or designation of lead agencies other than the Energy Department. The environmental review document under the FPA has a substantive impact in a way that isn't normally true under NEPA, because section 216 provides that it shall be "shall be used as the basis for all decisions on the proposed project under Federal law." That argues for limiting the potential authors of the document more strictly than is usually the case under NEPA.

What does seem clear is that, if Congress returns to the transmission area, the more rigorous requirements of § 216 will be a better model than the NEPA reforms of § 107. Ideally, Congress would make section 216 apply to all major transmission projects. Failing that, the § 216 provisions could apply to all segments involving federal lands or subject to Army Corps jurisdiction.

