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GENERAL COUNSEL

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RE: Comments on Directives in Chapter 80 of the FSH 2709.11 on Operating Plans and Agreements for Powerline Facilities, #ORMS-2718

Dear Mr. Smith and Mr. Woodruff,

The Bonneville Power Administration (BPA) appreciates the opportunity to comment on the Chapter 80 Directives. It looks forward to working with the USFS to make sure that the directives comport with the congressional objectives in Section 512 of the Federal Land Policy and Management Act (FLPMA) enacted in March 2018 and respect the unique nature of federal utilities.

BPA is one of four federal power marketing administrations in the U.S. Department of Energy whose primary role is to market and transmit wholesale electricity from multi-use water projects. BPA is a not for profit federal entity which has more than 15,000 circuit miles of transmission lines and is responsible for three quarters of the high voltage electric transmission service in the Pacific Northwest. BPA currently has approximately 1,530 miles of rights-of-way ("ROWs") for 149 transmission lines and approximately 1,300 miles of access roads crossing National Forest System (NFS) land in 23 forests located in four U.S. Forest Service (USFS) regions. BPA values is relationship with the USFS which has spanned more than 80 years.

As you know, in 2017, BPA and the USFS executed a new Memorandum of Understanding (2017 MOU) that details how the two federal agencies coordinate projects and activities, avoids duplication of effort given BPA's federal agency obligation to comply with environmental laws, and recognizes how FLPMA authorizes special terms and conditions for federal agencies to coordinate uses on federal land.

It is wonderful to see how the USFS used a great deal of the negotiated MOU products in the directives. BPA readily acknowledges the success of the now time tested MOU and believe that it achieves the objectives Congress articulated in the 2018 amendment to FLPMA. BPA is proud to see that the directive's Sample Operating Plan (OP) is based on the one in the MOU. Indeed, the categories and procedures in the MOU's Activities Coordination chart are also similar to the Class I to IV categories in the directives. This is all a testament to the hard work the agencies put into assuring each agency could continue to effectively accomplish its mission while eliminating duplication of efforts on environmental compliance through effective coordination.

BPA values its relationship with the USFS and the collaborative framework that we have developed together and as laid out in the MOU.

BPA has grave concerns that the directive will undermine the MOU and the balance of each agencies interests and responsibilities that it achieved. Given the situation outlined above, BPA respectfully requests the USFS revise the directives as discussed below.

First and foremost, BPA respectfully requests that the USFS revise the directives to recognize that an Authorized Officer (AO) may utilize a Memorandum of Understanding to govern coordination on powerline authorizations issued to federal agencies, document the federal roles and responsibility needed for the requisite environmental review and describe other agency coordination protocols and definitions.

As a federal agency, BPA is legally required to evaluate and comply with federal environmental laws on its own federal actions along the entire transmission line and associated facilities, not just on NFS land. Per the MOU, BPA is the lead on compliance with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA) for BPA's projects and activities, with a few exceptions (hereinafter "environmental compliance"). BPA needs to be assured this recognition of its federal agency status is not adversely impacted by these directives as it will result in unnecessary duplication of environmental compliance efforts and increased costs to BPA's ratepayers.

The 2017 MOU also outlines the way the parties have agreed to address authorizations that predate FLPMA and to update these arrangements with new FLPMA permits as resources to conduct the conversions are available. This includes incorporating an OP designed for a federal utility, into a FLPMA permit, both of which were already approved by four regional foresters and the DC office.

Nothing in the new Section 512 overrides the fact that the USFS can apply special terms and conditions to other federal agencies as the USFS did when it agreed established the federal permit included in the 2017 BPA/ FS MOU. Congress has recognized the many differences between federal utilities and non-federal utilities. Section 512 does not repeal 43 USC §1767; basic statutory interpretation principles require that the provisions of the same statute be read together. FSH provides for MOUs to document coordination protocols necessary to differentiate between general FLPMA requirements and federal utility ones.

BPA proposes language be added to the directives to preserve the recognized benefits of this federal to federal 2017 MOU. The proposed language is:

> Pursuant to 43 USC §1767 and FSH 1509.11_60 and in lieu of FSH 2709.11_80, the USFS may allow a Memorandum of Understanding to govern coordination on powerline authorizations issued to federal agencies and to document the roles and responsibilities for the requisite environmental review, definitions and coordination protocols.

Furthermore, four Regional Foresters approved BPA's Operating Plan and the MOU. The MOU allows for the development of site specific appendices to the Operating Plans during the process to convert BPA's federal historical permits to FLPMA permits. This process should continue to be honored given nothing in the Section 512 makes Operating Plans mandatory. Section 512 states that:

> (c)(1) Development and submission.--Consistent with subsection (b), the Secretary concerned shall provide owners and operators of electric transmission or distribution facilities located on public lands and National Forest System land, as applicable, ***with the option*** to develop and submit a plan.
> (Emphasis added).

While Congress told the USFS to adopt guidance for these optional plans, there is no rational basis to use this direction to interpret the statute to MANDATE all utilities adopt OPs. If that were the case Congress would not have chosen the word "optional" and the word mandatory would appear in the statute. Statutory interpretation principles note that Congress means what it says. If the USFS believes that OPs need to be required, that should be applied prospectively when the USFS is granting, issuing or renewing authorizations per 43 USC §1761. This is discussed in more detail in B. Operating Plans of BPA's comments.

The additional comments listed below are offered in an effort to constructively clarify the directives.

There are several critical aspects that bear noting upfront. The first is whether this directive is intended to be guidance for the AOs that should generally be followed unless there are good reason to deviate or if it is intended to be as prescriptive as it appears. Throughout the document it often says “the AO shall” which is what could be interpreted to limit the AO discretion in ways not usually done in directives. (e.g. Section 84.1 and Section 87). It would be consistent with Section 512 only if it is stated as guidance. Then the engagement and communication between the utilities and the USFS staff can be flexible when needed to address the needs of the local utility, community, and NFS unit. The directives should be revised to make the guidance intent clear.

The second is the need for the USFS to acknowledge that utilities will need to continue to do maintenance between now and when an OP is approved. The USFS needs to provide guidance to make sure these directives do not inadvertently delay or prevent maintenance as there cannot be a pause on maintenance during this time without severely impacting reliability and public health and safety. Section 83 suggests that the utility can only “operate” without an OP, we assume that is an oversight and it should state “operate and maintain." See Section 83.1.b. and 83.2.

A. Basics of Powerline Maintenance and Definitions

Overarching Comments

1. Several definitions use the same term as those defined by NERC but are not aligned. This misalignment could result in confusion and misuse or improper interpretation. (e.g. Section 80.5 - MVCD, ERO, Bulk power system, reliability standard).
2. Assure the definitions of routine maintenance and non-routine maintenance are non-exclusive lists and that other types of work that is not specifically mentioned but is categorically similar can be included in that definition and in the similar class for purposes of advance notification, acknowledgement and approval purposes. (Section 80.5)
3. Recognize the purpose of inspections – utilities perform annual or routine infrastructure and vegetation inspections for a variety of purposes but a primary reason is to identify issues that require it to do preventative maintenance or make emergency repairs. These inspections are done by different staff and during different times of the year so it is extremely unlikely there will be one compiled annual work plan for the segment of the line that happens to cross NFS land. (Section 86)

Specific objections/suggestions

Page 8 of Directives

a. Powerline Facility Emergency Maintenance – The description of an emergency in the Sample Operating Plan captures the essence of an emergency better than the definition. Having two definitions is confusing. Moreover, a definition cannot capture or identify every type of possible emergency. Moreover, powerline maintenance depends on having an open and clear road which is an essential a component for an emergency response so roads needs to be identified as part of the emergency needs. (Section 80.5, page 8 of Directives)

   If the USFS does not want to delete the definition on page 8, BPA would request that the USFS revise it with the bolded phrase:

   > Emergency Maintenance. Immediate repair or replacement of any component of a powerline facility that is necessary to prevent imminent loss, **assure safe operations** or to redress the loss, of electrical service due to equipment failure in accordance with applicable reliability and safety standards and as identified in an approved operating plan or agreement.

   The phrase “safe operations” assures the utility can identify unique circumstances that safety issues dictate are an emergency, such as discovery of a line over a public highway that needs immediate repair for safety reasons, repairs identified that cannot wait due to an impending storm that would increase the likelihood of failure of the line/equipment needing repair or discovery of electrical clearance issues that present immediate risks to the public.

b. Non-routine Maintenance - this definition is missing references to electrical impairments and refurbishments as common examples of non-routine projects. However, as noted above, the definition should clearly be one that is non-exclusive in nature as utilities take various approaches to repair and maintenance. (Section 80.5, page 8 of Directives) The USFS could consider adding a definition for electrical impairment that could serve as a guide as follows:

   > Electrical Impairment Removal. An activity needed to achieve the regulatory requirements for electrical clearance between a conductor and the ground or other objects, which may include raising or adding structures, ground excavation, or requesting third parties to move or remove buildings or other improvements under their control.

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c. Emergency Vegetation Maintenance – The definition does not address the fact vegetation does not need to actually be in contact with the line to be a risk. Finally, the use of the word “immediate” should be removed as the time horizon is based on the reference to the imminent threat. (Section 80.5, page 9 of Directives) See further comments in Section D below.

B. Operating Plans

Nothing in Section 512 makes Operating Plans mandatory. BPA noted this in its November 25, 2019 comments on the draft regulations, but the USFS failed to address BPA’s comments in the final regulations. The USFS included detailed information explaining why it believes it is “authorized” to require plans. That was not the point of BPA’s comment; the right to do something and the requirement to do something are entirely different.

Section 512 also did not require that OPs be incorporated by reference in authorizations and certainly did not require this to be done to existing authorizations or mandate timelines for requiring plans / incorporating plans into authorizations as required by the regulations and the directives.

BPA acknowledges that FLPMA allows the USFS to require applicants (i.e. not permit holders) to provide plans and other information needed to determine if a ROW will be granted, issued or renewed. See 43 USC §1761(b)(1)). However, the plain language of that statute does not address the application of new mandatory terms once a permit is issued and the determination has already been made to allow the use. The references to USFS authority included in the final regulations relies on this section in error as it suggests that this provision authorizes the USFS to require plans after a permit has been issued.

The mere fact that this new chapter in the directive is needed and the regulations and the directives address the need for utilities “without a plan” is evidence that there was no requirement for an OP for powerlines before 2018. The changes Congress made to FLPMA in 2018 did not add such a requirement or in any way suggest a mandate was desirable or needed. Prior to these regulations and directives, it was up to the AO to decide what was required. BPA strongly urges the FS to reconsider its position on this mandate.

Additionally, Congress merely directed the USFS to adopt “guidance” to assist utilities if they decided to adopt optional operating plans. This reference to adopt guidance is not a mandate to apply the guidance to all utilities. In the description of what the USFS should undertake when crafting content for optional OPs in Section 512(b)(1), Congress uses the word “guidance.” In Section 512(j), Congress refers to “regulations” that the USFS may need to adopt. The only other reference to regulations in the section is related to NEPA and categorical exclusions. When Congress uses two different terms then courts opine that it intentionally made that distinction.[1] It selected the word “guidance” to indicate a non-binding document; thus, the USFS should clarify that it is how it will interpret the directives.

Even if the USFS persists in asserting that it has the authority to require utilities with current permits to adopt an OP, BPA urges the FS to reconsider if this exercise of authority is advisable. Congress made it clear that the utility should have the “option” to submit a plan if they thought a plan would expedite work. See Section 512(c)(1). The USFS’ discretionary choice should not unnecessarily add mandates and burden the industry with a prescriptive approach to OP development and adoption.

This choice has many unintended consequences including having the opposite effect of what Congress intended in 2018. Congress intended to make it easier for utilities to get their work done. Instead, the regulations and this directive which make OPs mandatory and require incorporation of these plans into existing authorizations creates more work not only for utilities, but more importantly for USFS staff who are already stretched thin. This is likely to have the effect of delaying, rather than expediting work as Congress intended as USFS staff who could otherwise be working with utilities to expedite real work will be busy jumping through bureaucratic hoops to meet the timelines in the directive. Another unfortunate consequence given the lack of USFS staff to dedicate to this effort, is utilities may well be left to fend for themselves to try to figure out how to get a plan developed and complete the requisite environmental review in time to submit plans or plan revisions by the timelines in the directive. To mandate all utilities adopt new OPs within an unworkable 3 year timeframe needs to be revisited and the final rules need to be revised accordingly. Utilities need to budget resources to pay for the advance environmental review and find adequate staff to work with the USFS to comply.

[1] Black's Law Dictionary (11th ed. 2019) Presumption of consistent usage (2012): The doctrine that a word or phrase is presumed to bear the same meaning throughout a text, esp. a statute, unless a material variation in terms suggests a variation in meaning.

As noted earlier, nothing in Section 512 requires a mandatory implementation period; this again was a choice by the USFS. The USFS leadership should confirm there are adequate numbers of trained staff to achieve this outcome; if not, then we respectfully ask the USFS to reconsider the mandatory requirement. To think that the regions and forests in the west can absorb this work while also addressing significant wildfire work on their plates seems naive. BPA can and should be allowed to operate and maintain its high voltage transmission grid and rely upon the good faith negotiated agreement it reached with the USFS in 2017 to efficiently get its work done on NFS lands. Federal utilities should be allowed to focus on getting the reliability maintenance work done after doing their own environmental compliance work and not be taken off task to complete unnecessary paperwork mandated by this directive.

In Region 6, there are nearly 300 powerline authorizations and BPA understands that there are a similar number in Region 1. That is an immense amount of work to complete in a relatively short amount of time by staff that are already having difficulty managing the current workload (because of turnover, wildfire response and the shear amount of work on their plates).

If the USFS persists in the mandatory approach, it needs to provide a much longer period to achieve compliance (such as 5 to 7 years) for several reasons. An extended compliance period would allow the USFS time to complete necessary programmatic environmental and cultural agreements. It would allow utilities with resources to conduct their own “requisite” programmatic environmental review now and recognize there are other cash strapped utilities in the current Covid world that cannot do programmatic advance work now, and would be better off addressing these more slowly after the environmental compliance foundation is already built.

BPA respectfully requests that the proposed directives be revised to address the following concerns:

1. The requirement that all existing OPs conform to Section 512, the regulations and the directives combined with very prescriptive requirements in the regulations and directives that go beyond what was required in Section 512 has the effect of negating the Congressional direction to recognize or “save” pre-existing operating plans consistent with Section 512.

2. The lack of recognition of the unique status of federal utilities and the need for the two federal agencies involved to work together to assure that work is done efficiently without unnecessary duplication. The directives should allow for this

coordination including the ability to meet environmental compliance requirements on a project by project basis, as legally appropriate. The federal Constitution provides Congress with the authority to regulate federal property. MOUs are a longstanding tool used by federal agencies to address management and cooperation of federal assets on federal lands.

3. The requirement for unnecessary detail that provide no value such as citing to the 2016 nonbinding EEI MOU serves no legal purpose, particularly when not all utilities are members of EEI or otherwise parties to the MOU. This is arguably an unlawful delegation of authority to a private organization.

4. The requirement to place facility authorization information in the OPs is unnecessary and creates an opportunity to create inconsistent information about what is authorized. n. If this is required for some reason, it must recognize that many existing right-of-ways are variable in width and maps provide a less expensive way to depict the scope and scale of these details (for example plan and profile maps or geospatial representation of the ROW) and the directives should expressly allow the use of digital maps to meet this requirement. See Section 84.2, Items 2.

5. The requirement to inventory all access roads and trails and NFS roads and trails that may be used creates work that adds little value as any necessary information about roads that the utility may use should be in the authorizations, not in the OP. Further, BPA has not identified every NFS road that BPA uses to access its transmission lines. NFS roads that are open for vehicle use are not always identified as it is assumed that BPA can use them and will only need to work with the USFS if it is planning to use them in a way that would otherwise be prohibited (haul heavy loads, etc). This type of use is identified on a case-by-case basis as work is planned and road use permits are attained when needed. Therefore, BPA does not have the information readily available that would be required by the directive and it would take considerable expense and staff resources to gather this information given our large footprint on NFS lands. Further, it implies that without this authorization utilities are not allowed to use NFS roads unless those roads are identified in the OP. Again, if this is required for some reason which should be described in the commentary response to the directives, it must recognize maps provide a less expensive way to depict the scope and scale of these details and the directives should expressly allow the use of digital maps to meet this requirement. See Section 84, Item 14.

6. The requirement that the AO use the process in Exhibit 1 in Section 86.2. If the utility does not wish to consult with the AO in the way in which the exhibit prescribes or the AO is too busy and the OP compliance clock is ticking, the utility may wish to proceed on its own. The utility is charged with developing the OP and should be given more discretion on how that will be done. Perhaps the directive should be considered a suggested mechanism or guidance that an AO should support to the extent the utility chooses to take all or some of the steps outlined. Additionally, this process totals 540 days or about 1.5 years. It is difficult to see how that can occur concurrently for all lines with hundreds, if not thousands, of powerline OPs across the country and especially the hundreds of authorizations in Regions 1, 4, 5 and 6.

7. The need to clarify how the USFS is coordinating with the BLM in Section 86.3 and how the compliance clock which is already ticking can possible start before the industry knows what the BLM is going to require and how the two agencies will coordinate on the approval of a plan for a powerline that crosses land managed both agencies.

Specific objections/suggestions

a. Consistency and Savings Clause

Savings Clause

i. Nothing in Section 512 states the USFS should override existing OPs; to the contrary Section 512(k) has a specific savings clause that grandfathers pre-existing plans in place. A provision that BPA supported the proposed legislation with lawmakers to assure its work with the USFS prior to 2018 would be recognized.

Exceeding the Scope of USFS Authority

a. Section 512(k) is clear and unambiguous. In a Clean Air Act case, the D.C. Circuit Court analyzed the phrase “consistent with,” explaining that this “flexible statutory language” requires not “exact correspondence ... but only congruity or compatibility.”[2]

[2] Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 457 (D.C.Cir.) (per curiam) as amended, 92 F.3d 1209 (D.C.Cir.1996).

b. The USFS needs to explain why it has not directly contradicted Section 512(k) when it disallows utilities to grandfather in a pre-existing OP that is consistent with Section 512. It is difficult to see how Section 83.1 of the USFS directives does not exceed the scope of the USFS authority when it declares that an OP is only consistent if it meets all of the optional 512 requirements plus the mandatory regulations and the very prescriptive directives which are supposed to be "guidance." This interpretation forces a utility to amend a pre-existing plan that meets the objectives of Section 512 despite Congress' clear intent to the contrary.

c. The plain meaning of "consistent with" is "compatible with" or something that furthers or does not contradict the objectives, goals, and policies. Meriam Webster defines "consistency" as "agreement or harmony of parts or features to one another or a whole." Meriam Webster defines "compatible" as "capable of existing together in harmony."

d. An agency cannot interpret "consistent" to mean "exact" or "identical" (which Meriam Webster defines as "having such close resemblance as to be essentially the same"). Section 512(k) is not ambiguous so it needs no interpretation and even if it is ambiguous, the USFS' interpretation is not within the limits of reason. [3] Even if a court was to find Section 512(k) ambiguous, the agency's action completely diverges from any realistic interpretation and would not survive challenge under the Chevron test. [4] As the United States Court of Appeals for the District of Columbia noted when rejecting an agency's interpretation of consistent with, that "only in a world where consistent

[3] Kisor v. Wilkie, -- U.S. --, 139 S.Ct. 2400, 2415, 204 L.Ed.2d 841 (2019)(If uncertainty does not exist, there is no plausible reason for deference and if a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction (citing Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (adopting the same approach for ambiguous statutes).

[4] Nuclear Energy Institute, Inc. v. Environmental Protection Agency, 373 F.3d 1251, 1269, 58 ERC 1865, 362 U.S.App.D.C. 204 (2004) (The 10,000-year compliance period selected by EPA violates section 801 of the Energy Policy Act (EnPA) because it is not, as EnPA requires, "based upon and consistent with" the findings and recommendations of the National Academy of Sciences); see also Massachusetts v. Dep't of Transp., 93 F.3d 890, 893 (D.C.Cir.1996)) (rejecting an interpretation "that diverges from any realistic meaning of the statute,"); Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C.Cir.2000) ("[t]his case presents a situation in which the [agency's action] so completely diverges from any realistic meaning of the [statute] that it cannot survive scrutiny under Chevron Step Two.")

with meant inconsistent with could this be a permissible construction of a statute." [5]

e. Congress clearly did not want a utility to have to adopt anything new when the FS and utility had already agreed upon a plan that met the needs of both parties and addressed the issues that Congress was intending to remedy, as is the case in BPA's circumstance. In fact, it seems likely that no existing OP will meet the exact specifications in this proposed directive. Sections 81, 83.1 and 84.

ii. Alternatively, or in addition to, the USFS should give guidance on the definition of consistent and distinguish it from having to be identical or exactly the same and containing all the administrative provisions in the directives that were not mandated by Congress. USFS directives would make it impossible to "save" a utility from having to adopt something different than it currently has in place.

b. Constitutional Authority of Congress to Address Federal Property and USFS Should Recognize Use of Federal Agency MOUs Supporting That Authority

Article IV, Section 3, Clause 2 of the United States Constitution gives Congress the authority to regulate property belonging to the United States. Congress has exercised this regulatory in many federal statutes. The power of Congress over public lands, conferred by this Constitutional section, is without limitations. In exercising this authority in many ways, including passage of FLPMA, Congress gave the Secretaries of the Agriculture and Interior the responsibility to issue terms and conditions in its permits that protect federal property.[6]
Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein, and it may deal with such lands precisely as an ordinary individual might deal with his own property.[7] The ability to deal with federal property on federal lands is a fundamental right of the federal government. This is bolstered by the historical MOUs between BPA and the USFS as well as MOUs between BPA and BLM and BPA and Reclamation.

[5] Nuclear Energy Institute, Inc. v. Environmental Protection Agency, 373 F.3d 1251, 1269 (D.C. Cir. 2004).
[6] 43 USC § 1765(b)(i) (refers to protecting federal property) and in 43 USC §1767 (recognizes ability to set special terms for federal uses and occupancy and specifies that it cannot terminate or otherwise limit a federal use without consent of the agency head). Indeed, when FLPMA was enacted in 1976, Bonneville Power Administration was indeed under the jurisdiction of Department of the Interior so its federal property was under that Secretary's jurisdiction.
[7] See State of Alabama v. State of Texas, U.S.1954, 74 S.Ct. 481, 347 U.S. 272, 98 L.Ed. 689, rehearing denied 74 S.Ct. 674, 347 U.S. 950, 98 L.Ed. 1096, rehearing denied 74 S.Ct. 674, 347 U.S. 950, 98 L.Ed. 1097.

Congress intends agencies addressing both real and personal federal property on federal lands to coordinate in a fashion to address mutual federal responsibilities and benefits. Congress need not reiterate this in the language of every new law it passes.

Accordingly, per basic statutory construction canons, sections of statutes are read together. Section 512, now 43 USC §1772, is read together with §1761(b)(1) and §1767. The lack of a specific reference to a federal Power Marketing Agency in Section 512 does not in any way undermine the USFS' authority to treat federal utilities differently. Thus, nothing in Section 512 prohibits the USFS from continuing to recognize its MOU with BPA and to set unique terms and conditions specific to a federal agency.

c. *Equipment Usage – Section 84., #11*

It is difficult to predict what equipment a utility would use for all activities particularly for non-routine activities. If the intent is for this to address equipment used for routine work then that should be made clear. But more importantly, it seems the goal is to make sure that whatever equipment is used does not have effects not disclosed and considered in the in the environmental review of the actions. The directives should clarify this.

d. Clarify Methods in Section 84.9 – this long, run on sentence is very confusing and needs to be split into segments to clarify the drafter's intent. If it is intended to have the utility describe methods that may be used for: vegetation management, then that is doable. Methods used for inspections – then that is doable. Methods used for operations is not something that relates to a FLPMA permit so unclear what is intended here. Methods for routine actions can likely be briefly described. Methods for non-routine powerline facility maintenance cannot be described in advance and generally fall into Class III and, therefore, would be outlined when the utility submits a SF 299 and the ensuing environmental review; thus, that is where the details and methods of these future non-routine actions should be addressed. Methods for road and trail construction, reconstruction or maintenance can be addressed. However, it is difficult to appreciate what is meant by how these methods comply with NERC reliability standards as utilities have dozens of standards and internal documents that assist them in addressing compliance. It is unclear why the USFS needs that information for an OP. This information could be provided as part of the training the USFS staff receive. In regards to the reference to relevant land management plans, the USFS can certainly assist the utility in identifying any restrictions that might arise due to the plans. As these are pre-existing lines, this type of work should have already been completed. However, the land

management plans are often outdated and difficult to overlay on a powerline that can cross multiple zones in the plan. Here again a map that depicts the powerline in relation to the plan zones would be more instructive then a list and this could be incorporated by reference. This would enable a 21st century way to apply these plans to resources and environmental compliance within them.

e. Class I Should Not Require Advance Notice

For Class I Activities, requiring prior acknowledgment by an authorized officer before proceeding could result in delays to BPA's ability to proceed with these activities and is inconsistent with BPA's MOU with the FS which does not require advance notice for these activities (See MOU Section E.6) and such a requirement does not provide commensurate benefit to the NFS land or the USFS. The USFS should not finalize this prior acknowledgment requirement. If USFS chooses to disregard this proposal, the USFS should provide an exception to the prior acknowledgment requirement—identical to what is allowed in Class II Activities—that allows the owner/operator to proceed if the authorized officer has failed to respond by telephone or email to the prior notice in accordance with the specified timeframe in the approved operating plan or agreement.

C. Environmental Review

Overarching Comments

1. Federal utilities are already legally required to perform their own environmental review and compliance of their projects. BPA already leads and performs the requisite environmental compliance and gives the USFS the opportunity to provide input per the 2017 MOU as outlined above.

2. Assuming the AO is the Forest Supervisor and is therefore responsible for determining the proper extent of the environmental compliance for all utility actions in the OPs, BPA is concerned that this approach does not provide consistency for utilities. Programmatic agreements done at the regional level could be beneficial to meet the requirements at Section 84.8.

3. The sequence or timing of consultations that are part of the environmental compliance processes that meet the "requisite" environmental analysis is not clear in the directive and may be unnecessary as other chapters of the FS handbook already address environmental compliance. See FSM 1950 and FSH 1909.15.

4. The directives should allow an OP to include the process required to facilitate timely environmental review and compliance for actions on a case-by-case basis at least until the USFS has completed more programmatic reviews. Note these programmatic reviews were called for in the EEI MOU and until they are done it is going to be very difficult for the USFS to fully realize the changes that 512 calls for. While the USFS efforts to include the requirement to complete environmental reviews before OPs are put in place and a timeline to drive that is admirable, simply stating that it shall be done without providing reasonable guidance to help staff navigate the issues and adequate resources to do the work does little to actually achieve the desired outcome. On the contrary, it creates a perception that progress can be made when in fact these directives introduce new requirements and confuse requirements such that maintenance work is likely to be further delayed.

   Specific objections/suggestions

a. *Federal holder status*

   If the owner or operator is a Federal agency, the directives should allow the AO to recognize or develop an MOU with a federal utility that addresses which agency will take the lead on environmental compliance and other matters necessary to assure that the agencies are able to efficiently meet compliance responsibilities and avoid wasteful duplication of Federal efforts. The AO should also consider the extent that the Federal agency owner or operator does case-by-case environmental compliance of its proposed activities on NFS land and acknowledge that meets the definition of “requisite” environmental analysis (as identified in Section 86.3.a.).

b. *Requisite Environmental Review and Consultations Prior to USFS Approving a Plan*

   Inclusion in this directive of information about what environmental review and consultation is needed may be unnecessary as other portions of the FSH already provide guidance on what environmental review is needed.

   At a minimum, the directive should clarify what is required in the OP for the AO to determine what constitutes the “requisite” environmental analysis. Section 86 para 1 through 3 - exhibit 01 seems to require that consultations on ESA and NHPA are done prior to the OP being submitted for approval by the AO. But in other areas of the directive, it would appear to suggest that the OPs merely

specify the steps utilities would take to comply with ESA and NHPA consultation obligations. For instance, in some locations of the directive, the directive suggests that the NHPA consultations are required prior to taking action, but that advance consultations are not required. Similarly for ESA, in some locations, the directive suggests that if the utility lists the usual mitigations for certain species in the area of the powerline then that appears to be sufficient for routine actions. As further specified below using the NHPA as an example, consultations conducted to support environmental compliance may vary depending on the situation and lead agency.

c. NHPA

For Section 106 purposes, Bonneville initiates consultation when there is a proposed undertaking and this is consistent with the Section 106 regulations. However, the NHPA Section 106 steps in the Forest Service Directive, Section 86, paragraphs 1 through 3 instead appear to require any utility to go through the Section 106 consultation steps (initiation, identification, assessment of effect, and resolution) for an operating plan prior to having a defined undertaking. As a federal agency, BPA generally consults on specific activities and projects when they are actually proposed to be implemented, not just with the creation of the operating plan. See 36 C.F.R. § 800.1(c).

Notably, on page 59, Appendix C of the Sample Plan states that the USFS is working on:

> "A National Phasing Programmatic Agreement" that can be used agency wide and that will cover large corridor projects, including powerline facilities. When it is completed, the National Phasing Programmatic Agreement will be added as Appendix C to the sample operating plan or agreement in the directive.

This sounds promising but it would apparently not cover BPA's activities as it states that the Programmatic Agreement[8] applies to U.S. Forest Service undertakings on Forest Service lands when the Forest Service is identified as the lead agency for an undertaking. BPA has an agreement with the USFS that it

[8] The Section 106 regulations allow for the development of program alternatives (a programmatic agreement is a type of program alternative under 36 C.F.R. § 800.14) that can substitute them for all or part of the individual Section 106 consultations. The regulations allow a programmatic agreement "to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b).

take the lead on NHPA for its projects and it considers an undertaking the entire project and not just the impacts on NFS land. As the NPPA is optional, BPA would want to confirm that it continues to be the NHPA lead and will continue its individualized approach to undertakings per its 2017 MOU with the USFS.

D. Vegetation Management

Overarching Comments

1. Minimum Vegetation Clearance Distance (MVCD)

The definition in the regulation and directive is not the same as the NERC definition so the USFS should rename this term to avoid confusion. "MVCD" is used by NERC as the distance required to prevent flash overs. Vegetation should never be allowed to get this close to the line and there is zero tolerance and big fines for utilities that allow vegetation to encroach on the NERC defined MVCD. Utilities are to prevent encroachments into the NERC defined MVCD in all operating conditions. [9]

Utilities conduct routine vegetation maintenance using a much greater clearance distance as a preventative management strategy. NERC recognizes this important distinction in its FAC 003-4 footnote 17. NERC MVCD is defined as: "The calculated minimum distance stated in feet (meters) to prevent flash-over between conductors and vegetation, for various altitudes and operating voltages."

BPA suggests relabeling the term to make it consistent with the distance the utility uses in its programmatic, proactive and preventative management for vegetation (such as "routine management clearance distance" – aka RMCD).

A utility routinely sets a clearance distance it will use that triggers immediate removal for vegetation and another that it manages to on a cyclical basis. The directives do not properly differentiate between these distances. A FLPMA permit or the OP should authorize emergency removal when vegetation poses an imminent threat. A utility can define imminent threat by reference to a specified number of feet; for instance, BPA specifies any vegetation that can come within 10 feet for below 200

[9] NERC FAC 003-4, Section B. Requirements and Measurements, R1, states that:
Each applicable Transmission Owner and applicable Generator Owner shall manage vegetation to prevent encroachments into the Minimum Vegetation Clearance Distance (MVCD) of its applicable line(s) which are either an element of an IROL, or an element of a Major WECC Transfer Path; operating within their Rating and all Rated Electrical Operating Conditions of the types shown below.

kV or 15 feet for 200 kV or higher can be immediately removed. In contrast, the utility will set a general routine vegetation management clearance distance based on its vegetation management program (based on utility size, miles of lines, vegetation growth rates, etc.) as described in FAC-003. The utility program is overseen by NERC and routinely audited to make sure the program complies with the standards. It is not up to the USFS to decide what clearance distance is used as long as the environmental impact has been analyzed and any environmental laws requiring mitigation measures are applied/addressed. See Sections 84.10.

2. Emergency vegetation management

It is important to focus on the threat to the facilities themselves and to public safety, fire prevention and reliability. The USFS definition only addresses danger of contacting or presenting an imminent danger of contacting the powerline to avoid disruption of power. There are threats which don't require actual physical "contact" with the line to be an imminent threat such as flashovers, which can start fires! These need to be recognized because USFS staff do not always appreciate these safety risks. The USFS staff need to be trained to appreciate that the NERC MVCD concept is not what the utility manages to; it is only a regulatory distance every utility seeks to avoid or face penalty. Utilities manage vegetation to prevent it from ever reaching MVCD.

3. Routine Vegetation Management Clarification

Please clarify what USFS response is required for routine vegetation management activities (a class II activity). If a utility proposes to conduct routine vegetation management activities in accordance with an approved OP, please explain why that action must be approved, when all other class II activities only require acknowledgement unless a road use permit is required? (Section 87)

There are inconsistencies on this matter in the proposed directives with some parts implying that approval is needed and other that approval is not needed.[10] If the proposed activity is in accordance with an approved OP, including any required resource protection measures, it is unclear on what basis the AO would deny the utility the ability to take these actions. It would be helpful to clarify what the AO is

[10] Section 84, para 2 includes routine vegetation management in the list of other actions that OPs should address "while minimizing the need for case-by-case" approvals. Section 85.3 also implies that case-by-case approval is not necessary when it directs the AO to conduct only the environmental. analysis necessary to "authorize routine vegetation management and routine powerline facility maintenance and inspection for the term of the powerline facility permit or easement without requiring case by case environmental analysis and approval."

reviewing only to assure that appropriate resource protections, for example timing restrictions to avoid disturbing nesting endangered birds known to be in the vicinity, are in place. It is important that the AO is not able to second guess qualified utility vegetation managers' determination that vegetation must be removed.

There is nothing in Section 512(f) that requires "approval" of vegetation management. Congress merely noted that:

> ….the owner or operator of an electric transmission or distribution facility may conduct vegetation management activities that *require* approval of the Secretary concerned in accordance with a plan approved…
>
> (emphasis added).

This language does not mean Congress intended the USFS mandate that all routine vegetation management needs approval. It merely states that IF the plan does require approval, then there needs to be a way to proceed if the USFS fails to follow through and issue such an approval. This was an escape clause, not a mandate.

4. Use of Integrated Vegetation Management (IVM) – Section 85.6

This Section requires an OP to provide for IVM that specifically addresses pollinator habitat. It would be helpful to clarify that the use of IVM is encouraged, but not required. The language states that the AO has to ensure that the OP "provides for IVM" and this is what appears to make it mandatory.

BPA does not think this is the USFS' intent because section 512(i)(3) directs the USFS to:

> *…encourage* and assist willing owners and operators of electric transmission and distribution facilities to incorporate on a *voluntary basis* vegetation management practices to enhance habitats and forage for pollinators and for other wildlife if the practices are compatible with the integrated vegetation management practices necessary for reliability and safety.
>
> (*Emphases added*)

Further it would be good to note that IVM is not a single vegetation management tool but rather, a combination of management approaches. Each IVM program is designed around specific utility right-of-way goals, needs, and resources in the context of a specific environment or setting. Consequently, every IVM program is

unique. BPA, like most utilities, incorporates IVM principles into its vegetation management programs. BPA's use of IVM principles and appropriate application of best practices does preserve and protect pollinator habitat. Notably, the sample plan says the holder will selectively employ IVM as described in ANSI A300 part 7. This language is directly from BPA's Master OP.

Specific objections/suggestions

5. Major hazard tree removal – this activity should not be called out as a separate category of hazard tree removal. This term will undoubtedly create disagreement on scope and scale and what is "major" to one person will not be to others. As you consider this, also consider that the determination of what is "major" cannot be based on something like volume or board feet. The board footage of a tree has no correlation with its ability to contact, or come within MVCD of a conductor. In addition, grasses, cacti, and other non-woody vegetation can also grow in sufficient to contact a conductor, or come within MVCD. The growth characteristics of the vegetation, position on the landscape, and proximity to the conductor are what impact vegetation's ability to come in contact with, or come within MVCD. If what is meant by major is the environmental impact then that analysis can be handled when undertaking the environmental review. If there is a fire which results in thousands of danger trees over hundreds of acres, a utility does not want to be debating whether it is major and therefore requires different treatment. Even if there are numerous hazard trees that pose an imminent threat, they need to come down. Even if this is meant to be hazard trees as part of routine maintenance, it still has the same definitional problem. It should be the impact that matters, not the subjective definition of what is major or minor. If the USFS intended this to address the situations where a utility would need to realign a line or remove trees that do not meet the definition of hazard trees, this would be a non-routine action and a definition should be adopted that does NOT refer to hazard trees.

E. Roads

1. Definition of Road - Section 82.5

This definition is too confusing and restrictive. It suggests that all roads are adjacent to the powerline ROW. An access road leads to a powerline ROW but it is not fully "adjacent" to it except for perhaps one tract. Checkerboard ownership by the USFS can mean an access road crosses miles of land and some segments the utility may have acquired from private landowners due to land transfers and swaps. A simpler definition

would avoid reference to adjacency such as “A road or trail other than a NFS road or NFS trail that is necessary to access a powerline facility ROW.” If there is a need to state that the roads is on NFS land that could be added.

F. Federal Agency Liability

Section 89 is not applicable to federal agencies. This is yet another example of why federal utilities need to be treated differently and cannot be force to comply with certain aspects of the directives and that a MOU should be used to address these situations. BPA commented on this issue in its November 25, 2019 response to the proposed regulations. The USFS did not respond to this concern in its final commentary. BPA is an agency of the United States government so its operations and liability are governed by other federal laws and statutes and liability which cannot be overridden by USFS regulations. There is also absolutely no indication Congress intended to override sovereign immunity and tort claim statutes by the passage of Section 512 of FLPMA. Given that, BPA’s negotiated federal holder powerline permit has its own federal agency liability provisions.

Conclusion

BPA also renews the objections it made in the November 25, 2019 comments to the draft proposed regulations which the USFS now brings forward into the directives. It incorporates those prior comments by reference here, particularly BPA’s comments in Sections V through IX.

It would be a travesty to see the MOU that BPA and the USFS executed in 2017 honoring a longstanding federal to federal partnership and designed to address unique federal agency matters, avoid duplication and promote efficiency be ruined by these regulations and directives. This would be particularly ironic when the USFS elected to base the directives on the very materials BPA and the USFS developed during that process. As the directives should be focused on implementing congressional legislation aimed at a solving problems for nonfederal utilities primarily, it would be a shame if they unintentionally create a host of new problems for BPA, unnecessarily increase costs to ratepayers and interfere with the agency’s timely completion of reliability work.

BPA requests that the USFS respect the 2017 MOU federal agency solution, revise the directives to allow a MOU to govern use of a federal OP and not require USFS Field staff to devote scarce resources to fixing something that is not broken.

Sincerely,

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