



Energy Policy Act of 2005 Implementation

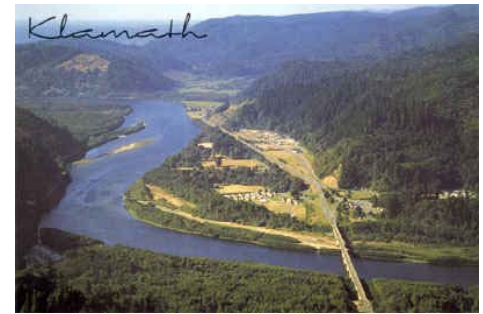
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NHA Legal Issue
Roundtable

Energy Policy Act of 2005 Implementation



Section 241 of EPO Act 2005:

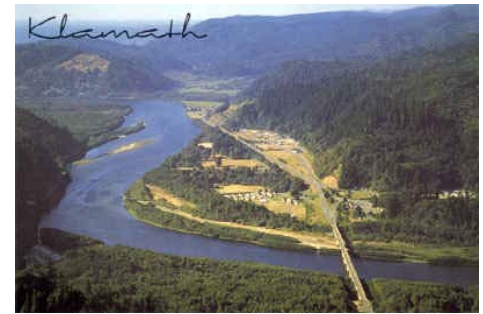
Federal agencies with FPA Section 4(e) conditioning authority are required to accept a more cost-effective or energy-saving alternative if it provides for “the adequate protection and utilization of the reservation.”

If an alternative to a fishway is “no less protective than the fishway initially prescribed” and the alternative will be more economical or energy efficient, the prescribing agency *must* accept that alternative.

In mandating a FPA Section 4(e) condition or a fishway under FPA Section 18, agencies must now document that they gave “equal consideration” to factors such as:

- **Water supply**
- **Flood control**
- **Navigation**
- **Energy Supply and Cost**

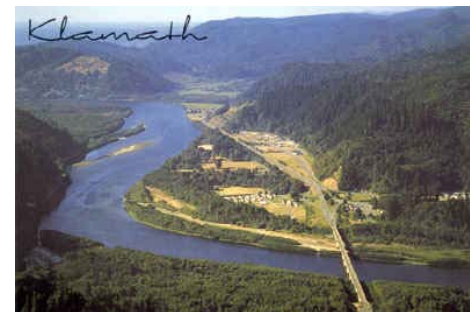
Trial-Type Hearings



Where there are disputed issues of fact such as disagreements over study results, data, or scientific questions, the applicant and other parties are entitled to an evidentiary, trial-type hearing, including discovery and cross-examination, pursuant to a joint agency rule to be issued within 90 days of enactment.

If FERC finds a final mandatory condition to be inconsistent with requirement of the FPA or other applicable law, the ACT provides for a non-binding dispute resolution process.

Interim Rules for Trial-Type Hearings



Interim Rules issued by Departments of the Interior, Commerce, and Agriculture on November 17, 2005.

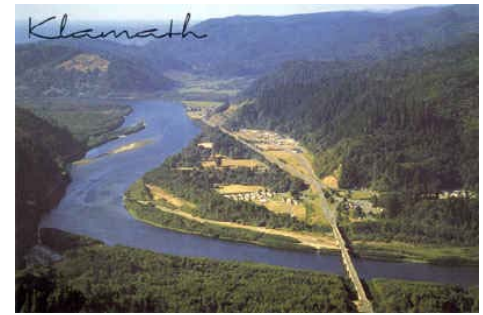
Rules give licensees and other parties to the FERC proceeding the opportunity to challenge the factual basis of mandatory terms and conditions imposed by federal agencies, and to propose alternatives.

Interim Rules immediately effective but invited public comment.

Commenters included: EEI/NHA, Hydropower Reform Coalition, APPA, *et al.*, and others.

Final Rule was due within 18 months. It has been almost 28 months.

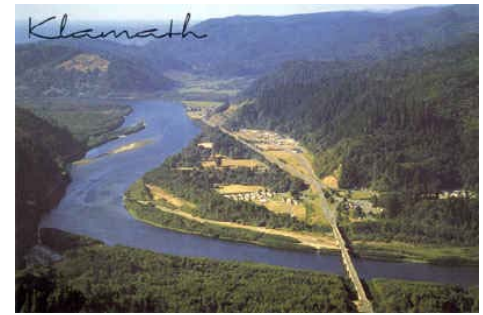
Trial-Type Hearings To Date



Past Trial-type hearings:

- Avista Corporation's Post Falls Hydroelectric Project (hearing)
- Idaho Power Company's Hell's Canyon Project (settled)
- PacifiCorp's Klamath Project (hearing)
- Progress Energy's Yadkin – Pee Dee Project (settled)
- Public Service Co. of New Hampshire's Merrimack Project (settled)
- South Carolina Public Service Authority's Santee Cooper Project (settled)

Avista Corporation's Post Falls Trial-Type Hearing



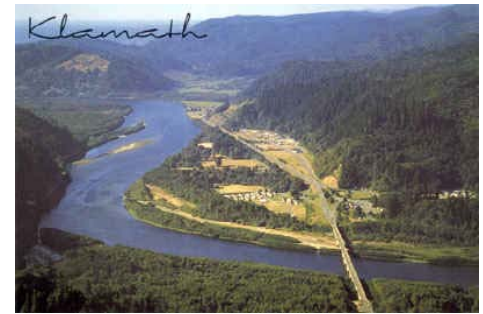
Trial-type hearing involved disputed issues of material fact relating to the Bureau of Indian Affairs' section 4(e) conditions. The BIA sought to impose license conditions relating to the summer level of the lake at the project, which BIA claimed had impacts on fish, erosion, water quality, cultural resources and wetlands.

The ALJ rejected BIA's claim that maintaining the summer lake level harmed native fish or increased the level of metals in the lake.

The ALJ agreed with BIA that the summer lake level has impaired the functioning of wetlands and has potential impacts on tribal cultural sites.

Following the ALJ's decision, the BIA issued revised conditions, which were modified to reflect the ALJ's decision, new information, evidence and supporting material, Avista's proposed alternatives, FERC's draft environmental impact statement and other information related to BIA's preliminary conditions.

Hell's Canyon Trial-Type Hearing



Idaho Power sought hearing on ten disputed issues of material fact with respect to the U.S. Forest Service's preliminary conditions, and six disputed issues of material fact with respect to the BLM's preliminary conditions.

Licensee ultimately reached separate settlements with BLM and USFS on all of the disputed issues before the hearings commenced.

The agencies subsequently submitted revised conditions to FERC which reflected the settlement. FERC has not yet issued a new license for the project.

PacifiCorp's Klamath Trial-Type Hearing



35 disputed issues filed, 4 issues settled, 1 dismissed, 16 issues reserved for FERC proceeding, 14 went to hearing.

Agencies filed 16 pre-hearing motions including 13 Motions to Dismiss and/or Motions to Narrow, Clarify, and More Clearly Define all but 3 of the 35 disputed issues of material fact.

PacifiCorp advocated for proposed findings of fact and ultimate findings of fact for each issue. Agencies argued for one finding of fact for each issue. ALJ adopted PacifiCorp's proposed format.

Although the ALJ found that PacifiCorp proved its version of the facts with respect to certain section 4(e) issues, the ALJ found that the licensee proved its version of the facts for only one of the eight fishway issues. In making the decision, the ALJ found that the federal fishery managers were entitled to decide that restoring fisheries did not require a showing that the resulting efforts would produce self-sustaining populations.

Public Service Co. of New Hampshire's Merrimack Project Trial-Type Hearing



The request sought hearing on seven disputed issues of material fact relating to the agency's preliminary fishway prescriptions.

Licensee was able to negotiate a settlement with the U.S. Fish and Wildlife Service and ultimately withdraw its hearing request before the hearing was scheduled.

USFWS filed modified prescriptions consistent with the settlement.

S.C. Public Service Authority's Santee Cooper Project Trial-Type Hearing



Licensee filed a request for trial-type hearing on six disputed issues of material fact with respect to USFWS and NMFS's section 18 prescriptions.

The ALJ dismissed 4 issues.

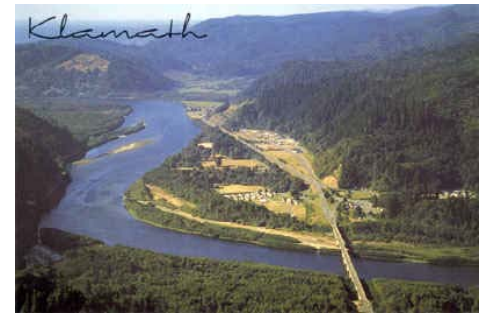
Parties stipulated on 2 issues with the agencies.

Licensee reached settlement with USFWS, but not with NMFS.

Final prescriptions filed by USFWS and NMFS conflict such that SCPSA's compliance with one set of prescriptions would cause it to violate the other set of prescriptions.

FERC has not yet ruled on which set of prescriptions will be imposed in the new license.

Progress Energy's Yadkin – Pee Dee Project Trial-Type Hearing



Progress Energy filed requests for trial-type hearing with respect to 10 disputed issues of material fact regarding USFWS and NMFS's section 18 prescriptions.

Two hearings were consolidated. ALJ dismissed 4 issues as not being fact issues.

Prior to hearing and through a negotiated settlement, the parties reached agreement on an acceptable fish passage prescription.

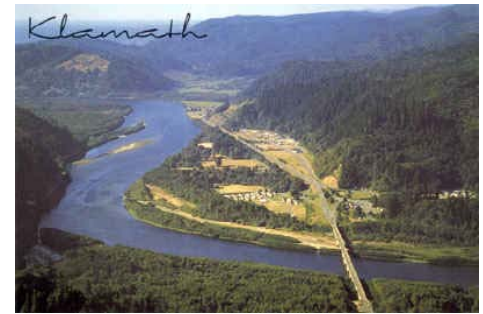
Licensee withdrew its alternative prescriptions and hearing requests.

ALJ issued an Order Granting Motions to Dismiss.

The Yadkin-Pee Dee River Diadromous Fish Passage Plan Agreement was approved by the parties and filed with FERC in January 2008.

Agencies filed modified prescriptions in February 2008.

Lessons Learned from Trial-Type Hearings



Prepare early – 30 days is insufficient to write a hearing request, unless there are very limited issues.

Be precise in defining disputed issues – no second chances to reframe an issue.

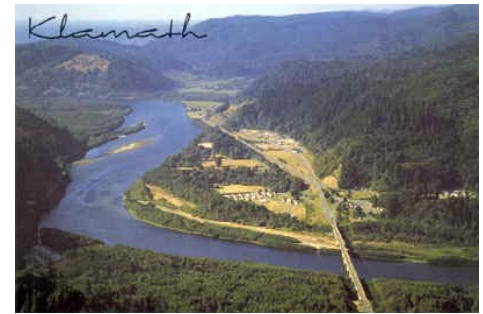
Be comprehensive in identifying disputed issues but not over-inclusive – stick to factual issues.

Avoid procedural and scheduling disputes if possible: there is no time for them. Collaborate with other parties.

Settle as many issues as possible. Don't attempt to go to trial on everything because the limited time won't allow it and the ALJ will be overwhelmed.

Keep it as simple as possible.

Challenges to Interim Rules



■ Two challenges to the Interim Rules:

- *American Rivers v. Department of Interior*, No. C05-2086, 2006 WL 2841929, at *15 (W.D. Wash. Oct. 3, 2006) to enjoin and set aside joint rules.
 - Claim 1 involved retroactive rulemaking (because the rules applied to proceedings in which preliminary Section 4(e) and 18 conditions already had been issued).
 - Claim 2 involved an APA claim of no notice and comment because interim rules were immediately effective.
 - Both claims dismissed on the merits.

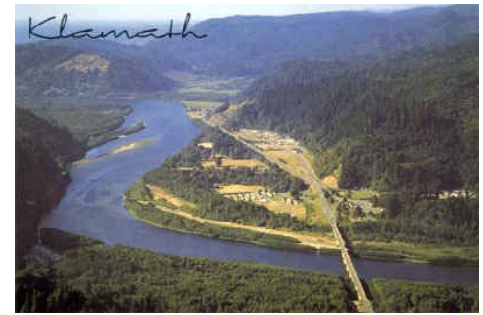
Challenges to Interim Rules



Pub. Util. Dist. No. 1 of Pend Oreille County v. DOI, U.S. Dist. Ct. for the District of Columbia, Case No. 1:06cv00365 (filed Mar. 1, 2006) (case stayed, parties in mediation).

- **July 11, 2005: FERC issued a license. Pend Oreille filed for rehearing.**
- **August 8, 2005: While rehearing was pending at FERC, EAct 2005 was enacted.**
- **March 1, 2006: Challenge to the Rule filed in Public Utility District No. 1 of Pend Oreille County in the U.S. District Court for D.C.**
- **The Interim Final Rule held that the new hearing procedures would only apply to cases in which FERC had not yet issued a license as of November 17, 2005.**
- **Pend Oreille's complaint asserts that the EAct 2005 procedures should apply to any license that is not yet final (i.e., still pending on rehearing) at FERC.**

Recommendations for Revising Rules for Trial-Type Hearings



Equal Consideration: The rules are ambiguous as to whether a Department must give equal consideration to power and nonpower values, as required by EAct, in developing its mandatory conditions. The rules could be read to mean that a Department must only give equal consideration in a case where an alternative is presented, which would be contrary to the plain language of the statute. The Departments should clarify that equal consideration is required any time the Department adopts a condition, regardless of whether alternatives were presented.

Prehearing Deadlines: A party should have a minimum of 45 days to file its hearing request, instead of 30 days.

Recommendations for Revising Rules for Trial-Type Hearings (continued)



Although the rules claim to be substantively identical, the rule for the Department of Commerce gives it five days more than Interior and Agriculture to file its answer. This creates confusion as to subsequent time deadlines.

Discovery: Clarify and limit the permissible scope of discovery. For example, the final rule could limit the number of written interrogatories and requests for production a party may serve on another party.

Hearing consolidation. The interim final rules do not specify whether hearings that are not consolidated will be held consecutively, or simultaneously.

Recommendations for Revising Rules for Trial-Type Hearings



Hearing Time Line: Modify deadlines within the 90-day trial period (and beyond) to allow more time for the evidentiary phases of the trial.

- Extend time to file post-hearing briefs to 45 days after the close of the hearing record.
- Allow the ALJ 30 days after the deadline for filing reply briefs to issue a decision.

Standard and Burden of Proof. Clarify which party bears the burden of proof at a trial-type hearing, and the preponderance of the evidence standard.

- All ALJs so far have ruled the party challenging the condition, not the agency, bears the burden of proof.
- In contrast, one could argue that the disputing party may bear a threshold burden of showing a disputed fact issue exists, but the burden of proof then shifts to the agency proposing a condition.
- Whichever party bears the burden of proof, standard of proof is preponderance of the evidence. Agency not entitled to deference or "substantial evidence" standard.

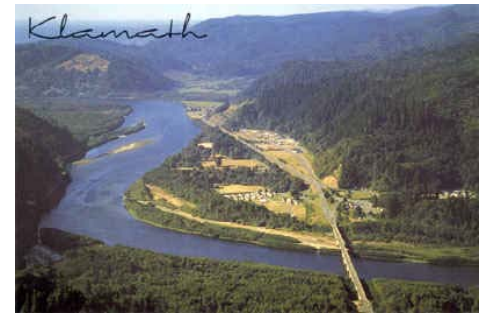
Recommendations for Revising Rules for Trial-Type Hearings (continued)



Right to hearing on modified or final conditions: The rules are silent as to a party's right to challenge a Department's modified or final conditions that are substantially different from the Department's preliminary conditions.

Forum Shopping: Agencies should not be permitted to pick particular locations/ALJs favorable to them.

Unanswered Questions



Issue Exhaustion: Would a party be precluded from raising a factual dispute pertaining to a condition or prescription in a judicial challenge to the license if the party did not raise the factual issue in a trial-type hearing request?

What is the legal effect of a successful challenge to a Section 4(e) or Section 18 condition if the same condition is imposed in an ESA § 7 Biological Opinion or a Clean Water Act § 401 certification?

Do the procedures apply in reopener proceedings in which FERC included a Department's reservation of authority in a license issued before the interim rules were implemented?



For more information

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