
NHA and EEI are pleased to submit these comments on DOI's September 9, 2004 NOPR. We appreciate the Department’s willingness to further examine the role of its conditioning authority in the licensing process, as well as its interest in establishing an administrative appeals process for Federal Power Act (FPA) Section 4(e) conditions and Section 18 prescriptions crafted by the Department that FERC considers to be “mandatory” and not subject to change.1

NHA is the only national trade association committed exclusively to representing the interests of the U.S. hydropower industry, the largest provider of renewable energy in the United States. Our members represent over 61 percent of domestic, non-federal hydropower capacity and nearly 80,000 megawatts overall in North America. NHA’s membership consists of more than 130 companies including public utilities, investor owned utilities, independent power producers, equipment manufacturers, engineers, attorneys, and consultants. NHA has been based in Washington, DC since 1983.

EEI is the association of the nation’s investor-owned electric utility companies, international affiliates, and industry associates worldwide. Our Alliance of Energy Suppliers represents shareholder-owned electric energy supplier and marketers, including affiliate and independent power producers that own generation facilities. Our U.S. members serve more than 90 percent of the ultimate customers in the shareholder-owned segment of the industry, and nearly 70 percent of all electric utility ultimate customers in the nation. They generate almost 70 percent

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of the electricity generated by U.S. utilities. EEI members own and operate hundreds of FERC-licensed hydropower projects, a majority of such projects.

INTRODUCTION

Hydropower is the nation’s largest renewable resource. It provides approximately seven percent of the nation’s electricity and over 75 percent of its renewable energy. Hydropower’s numerous power, environmental, and societal benefits are well documented. In short, hydropower’s attributes are unmatched by any other power generating source in use today.

With over half of the nation’s hydropower capacity up for relicensing in the next 14 years, and with many of those projects beginning or soon to begin the licensing process, it is critical that substantive improvements to the licensing process are achieved as soon as possible. Without improvements, the licensing process will continue to erode the many benefits provided by hydropower projects to millions of electricity consumers across the United States.

While awaiting much needed hydropower licensing reform legislation, such as that contained in H.R. 6, the Energy Policy Act of 2003, administrative remedies pursued by agencies with mandatory conditioning authority, as well as FERC, can certainly help address some of the problems that today plague the licensing process. NHA and EEI (together the Associations) again commend the Department for exploring administrative remedies which could be of value.

Regarding the Department’s interest in establishing an administrative appeals process, we have long called for an appeals process for mandatory conditions. An appeals process housed within the federal mandatory conditioning agencies or FERC would increase agency accountability, add transparency to the process, and should reduce the number of licensing disputes that require review by the Court of Appeals. In addition, such an appeal process is consistent with the concurring opinion in Wisconsin Power & Light Company v. FERC, 363 F.3d 453 (C.A.D.C. 2004), which questions “whether Interior can develop all of its evidence internally, without affording the applicant some sort of hearing.”

In light of the importance of hydropower projects to the nation’s air quality, economy, energy security, and electric power grid reliability, it behooves all involved in the licensing process to act deliberately and with an eye to the broad public interest. Those, like DOI, who have mandatory conditioning authority bear a special burden in that regard. The Department should use the authorities under FPA Sections 4(e) and 18 to craft mandatory conditions and prescriptions (MCPs) judiciously and should pursue policies that require decision-making to be transparent to those affected and accountable to the public interest.

OVERVIEW OF NHA AND EEI COMMENTS

As stated above, our Associations commend the Department for further exploring its mandatory conditioning role in the FERC hydropower licensing process and for developing an appeals process for Section 4(e) conditions and Section 18 prescriptions. Below is an overview of our comments. Detailed comments follow this summary.

- We recommend that the Department eliminate the Mandatory Condition Review Process (MCRP). Not only have we found the MCRP to be of little, if any, value, it is duplicative and a largely inefficient use of time and resources. The time saved by removing the MCRP could be better spent on the proposed evidentiary hearing and administrative appeals process (page 4).
If the Department chooses not to adopt our recommendation to eliminate the MCRP, the Associations offer several recommendations for improving the MCRP so that it functions and adds value to the licensing process (pages 5-7).

The Department should clarify the term “modified MCP” under its proposal (page 7).

The Associations support the Department’s proposal that only license applicants may appeal MCPs because applicants, unlike non-applicant stakeholders, presently do not have an administrative opportunity for the review of MCPs (pages 7-9).

We recommend that appeals of modified MCPs in settlement agreements, under certain circumstances, be allowed (page 9).

The Department must submit MCPs as expeditiously as possible to ensure that appeals may be timely filed (pages 9-10).

We recommend that the administrative appeal process also apply to the MCPs developed if the Department exercises any reserved authority (page 10).

DOI should drop its requirement that applicants must always include proposed alternatives in an appeal (pages 11-12).

It is appropriate that any party to a licensing proceeding can comment on an appeal, but the applicant should be served all comments (page 12).

We recommend changes to the standard by which alternative MCPs are measured to conform the Department’s alternative MCP standards with the FPA (page 13).

We recommend several changes to the Department’s Section 25.59 on how appeals are to be reviewed (pages 13-14).

We recommend that the Department establish and adopt standards and criteria to which its staff must adhere when crafting MCPs during the FERC licensing process to ensure that the MCPs are warranted, reasonable, and take into account impacts on project operations and other resources (pages 14-16).

Consistent with H.R. 6, the Associations request the establishment of timely trial type hearings for disputed issues of material fact which could be requested by a party to a licensing proceeding (pages 16-20).²

We recommend that the Department accept alternative MCPs from license applicants if such alternative MCPs provide for the adequate protection and utilization of the reservation or are no less protective than the fishway initially prescribed (pages 20-22).

NHA AND EEI COMMENTS ON THE DEPARTMENT’S SEPTEMBER 9, 2004 NOPR

I. SUBPART A: MANDATORY CONDITION REVIEW PROCESS (MCRP)

The first part of the NOPR proposes to codify in DOI regulations the existing MCRP process that is available for use by stakeholders in the licensing process. The MCRP is for those stakeholders who disagree with DOI proposed MCPs submitted to FERC pursuant to FPA Sections 4(e) and 18.

While our Associations appreciate the positive intent underlying the MCRP established by DOI and DOC on January 19, 2001, we do not believe the process has provided significant benefits. The fundamental problem is that the MCRP duplicates the review and communication regarding

² "While H.R. 6 provides that an applicant is entitled to receive such hearing, nothing in H.R. 6 precludes another party from requesting a hearing and the agency granting such request."
MCPs that already occurs in the licensing process prior to the submission of “preliminary” or “modified” MCPs.

For example, when the Department issues preliminary MCPs in an alternative licensing process (ALP), the collaborative settlement negotiations that are the hallmark of the ALP provide license applicants and other stakeholders ample opportunities to convey their concerns to the Departmental staff responsible for developing such conditions. Similarly, the new integrated licensing process (ILP) is based on interaction and communication between applicants, other stakeholders and DOI staff throughout the licensing process, including a specific opportunity for reply comments on preliminary MCPs.

In addition, the more formalized traditional licensing process (TLP) provides applicants and other parties the opportunity to file comments on preliminary MCPs in the FERC docket and to request that the Department modify such MCPs. Therefore, all three licensing processes provide ample opportunity for review of preliminary conditions that is not enhanced by the availability of the MCRP process.

It is our understanding that when a license applicant files comments regarding preliminary MCPs pursuant to the MCRP, the request ultimately lands on the desk of the same Departmental staff with whom the licensee is already communicating in the licensing process. The requirement that regional or state-level officials sign-off on the product of the MCRP review conducted by the same field staff that developed the MCP does not change this reality. Consequently, the experience of our members generally has been that the MCRP is a paperwork exercise that increases the complexity of the licensing process and adds little or no value.

The experience of our members with the MCRP process has generally been unfavorable. For example, in at least two licensing proceedings in which the applicant filed requests for MCRP review, the requests were never acknowledged. Other licensee requests for MCRP review have had no discernable impact on the content of mandatory conditions. In at least one case, the lack of meaningful review through the MCRP has given the applicant no choice but to seek review of the contested conditions in the U.S. Court of Appeals, an outcome that might have been avoided if an administrative appeal process had been available.

The only instance of which we are aware that the MCRP had an impact occurred when senior headquarters staff played a role in a MCRP review. Of course, this kind of high-level review is not required as part of the MCRP and instead is part of the administrative appeal process being proposed by the Department of Interior in the above-mentioned rulemaking.

Therefore, we recommend that DOI eliminate the MCRP and instead focus its resources on (1) active and open participation by Department staff in the pre-license application consultation process, (2) providing preliminary MCPs using standards recommended in Section III of these comments, (3) creating an evidentiary trial type hearing for disputed issues of material fact described in Section IV on these comments, (4) creating an administrative appeal process of the sort proposed by DOI with the Associations’ recommended modifications, and (5) adopting the other steps recommended in these comments. We believe that this will be more useful in addressing concerns of all parties with the preliminary MCPs and in providing the information DOI needs to issue its final MCPs.

If, despite our recommendation to the contrary, DOI chooses to retain the MCRP and create regulations implementing it, NHA and EEI request the following improvements to the MCRP.
A. SECTION 25.5 – WHEN WILL THE DEPARTMENT FILE ITS PRELIMINARY CONDITIONS OR PRESCRIPTIONS?

In subsection (a), DOI commits to filing its Preliminary MCPs with FERC within 60 days after FERC issues its notice that the license application is ready for environmental analysis (REA). Our Associations believe that DOI, in addition to filing the Preliminary MCPs, must provide to FERC, plus the license applicant and any other party to the FERC Service List, the full administrative record that DOI considered in preparing the MCPs. This would include information reviewed by DOI, even if it was not relied upon to support the MCPs. For instance, the information may have been (i) provided to DOI by a person who viewed the situation differently from DOI, or (ii) found unpersuasive by DOI.

Additionally, to expedite the licensing process and to help avoid later time conflicts, DOI should have its Bureaus file preliminary MCPs within 60 days after the license applicant has filed its license application with FERC. In all three licensing processes, the involved DOI bureau will be aware of the license applicant’s proposed project. The DOI will have completed three years of consultation regarding the project.

Filing preliminary MCPs earlier would allow more time to implement the evidentiary hearing process recommended in Section III to these comments. Also, it should allow DOI to issue its final MCPs within 60 days after the FERC REA. This, in turn, would enable the administrative appeal process to be completed prior to the time that FERC must issue its draft environmental review document.

One of the key components for DOI to craft appropriate preliminary MCPs is full participation in the licensing consultation process. Our members have noted that agency staff frequently does not actively consult with the license applicant and other parties as much as requested. This lack of participation may lead to contested MCPs. We strongly urge the DOI to ensure that its staff has the appropriate level of funding to actively participate in the licensing process. Furthermore, DOI should consider limiting the right of its staff to submit MCPs if they have not adequately participated in the licensing process.

In subsection (c), DOI proposes to reserve its authority under Sections 4(e) and 18 to reopen a license if all required studies are not complete at the time DOI issues its preliminary MCPs. Such a requirement is beyond DOI's authority and is generally inconsistent with the licensing process, as well as the environmental review process under the National Environmental Policy Act (NEPA). Specifically, to the extent that DOI does not submit timely MCPs, then the FERC regulations at 18 CFR §4.34 require that any subsequently filed MCPs be treated as advisory conditions pursuant to FPA Section 10(a).

Also, FERC issues the REA notice when FERC has determined that all necessary information has been filed or is available for FERC, and the other involved state and federal agencies, to perform their NEPA environmental analyses and make informed decisions. FERC, not DOI, decides what studies must be conducted by a license applicant. Moreover, FERC is not obligated to require studies requested by DOI.

Instead, FERC has made it clear that it is “it is up to Interior to provide the record to support” its conditions. Curtis/Palmer Hydroelectric Company, 92 FERC ¶ 61,037 at 61,089 (2000). If DOI proposes to maintain this subsection, then DOI must modify the proposed regulation to state that the Department will reserve MCP authority in an issued license only if studies necessary to establishing the MCP either have been required by FERC, or are being undertaken by DOI, and
are not complete. Furthermore, the regulations should indicate that the reserved authority will be used sparingly, only if absolutely necessary in light of the new information provided by the completed studies.

The regulation should also clarify that the exercise of reserved authority would not occur until after a final license order is issued as the reservation of authority is not effective until the license is issued, and then only by implementing due process to trigger a reservation (i.e., new information, opportunity to comment, appeal process). DOI should use these regulations as the opportunity to prohibit DOI bureaus from using their reserved authority to create MCPs when the bureaus have not otherwise timely filed MCPs with FERC.

B. SECTION 25.6 – WHEN MAY THE PUBLIC REVIEW AND COMMENT ON THE DEPARTMENT’S PRELIMINARY CONDITIONS AND PRESCRIPTIONS?

Section 25.6(c) should provide that comments submitted to DOI regarding the MCPs must also be filed at FERC and served on the applicant and all other parties on the FERC service list. All dates for responding to comments should begin on the date that the comments are received by FERC. The transmittal of comments should be in a method to ensure that they are available to the parties at the same time the comments are filed with FERC. DOI should encourage electronic filing of the comments at FERC and electronic distribution of the comments to the applicant and other parties.

Also, proposed Section 25.6 is missing an essential step to ensure that comments are appropriately addressed. We suggest that a subsection 25.6(e) be added to the regulation to require that the Department assign a tracking number to each set of public comments. The commenter should be provided with an acknowledgment within 10 days of submitting the comments. The acknowledgment should identify a contact within the Department charged with addressing the comments. Previously, our members’ experience is that comments filed with the Department may not be acknowledged and addressed.

C. SECTION 25.7 – WHEN WILL THE DEPARTMENT SUBMIT MODIFIED CONDITIONS AND PRESCRIPTIONS TO FERC?

When DOI issues modified MCPs, DOI should include any additional information that was not previously provided with the preliminary MCPs to the MCRP participants to ensure that each participant has the full administrative record on which DOI is relying. Currently, we understand that DOI only provides an “index to the Department’s administrative record.”

Given the short time frame for filing administrative appeals, and absent the ability to review the full DOI administrative record immediately upon issuance of the modified MCPS, a license applicant would not likely have a reasonable opportunity to read the index, obtain the additional information, review the basis for the modified MCPs, and then prepare any administrative appeal that contains the required information. DOI should make clear that the modified MCPs may not have changed from the preliminary MCPs. DOI should change the name from “modified” MCPs to “final” MCPs, or clarify that the “modified” MCP may be an MCP reconfirmed without change, as explained in the comments to proposed section 25.51.
D. SECTION 25.8 – WHAT PROCESS WILL BE USED TO REVIEW CONDITIONS AND PRESCRIPTIONS SUBMITTED AS PART OF AN OFFER OF SETTLEMENT, WHETHER IN AN ALTERNATIVE LICENSING PROCESS OR OTHERWISE?

The provisions for how MCPs are handled in the context of a settlement needs to be clarified. In particular, the regulations should confirm that DOI may not modify settlement provisions based on comments received in the MCRP process without the consent of the other parties to the settlement. Currently, Section 25.8(b)(2) requires DOI to “discuss” the matter with the other signatories. However, the language then does not state that the DOI will obtain the agreement of those signatories if DOI plans to modify the agreed upon MCPs. Unless the settlement agreement provides otherwise, it would be inappropriate for DOI to unilaterally change the MCPs without concurrence from all parties to the agreement.

Additionally, proposed Section 25.8(b)(4) limits the opportunities to review settlement agreement MCPs to the process set forth in Section 25.8(b). This limitation would be inappropriate if DOI modified the MCPs based on comments after the settlement was filed and if the applicant was not in agreement with those changes and did not then have an opportunity to seek an administrative appeal of the MCPs.

Page 54,604 of the NOPR states that DOI “may” suspend settlement negotiations if FERC issues its REA when settlement negotiations are ongoing at that time. Suspension of negotiations may be appropriate in some situations for a limited period to provide DOI with time to submit its preliminary MCPs, but we urge DOI to continue with settlement negotiations whenever feasible.

II. SUBPART B: PROCEDURES FOR APPEAL OF MANDATORY CONDITIONS AND PRESCRIPTIONS IN FERC HYDROPOWER LICENSING

A. SECTION 25.51 – WHAT TERMS ARE USED IN THIS SUBPART?

DOI should consider using the term “final conditions” instead of modified conditions to refer to conditions that are subject to the administrative appeal process. Alternatively, DOI should clarify that the term “modified MCP” does not mean that the preliminary MCPs submitted to FERC within 60 days of the REA have always been modified.

Instead, the term should refer to the DOI MCPs that are filed with FERC within 60 days after comments are received on the FERC draft NEPA document (or the final environmental assessment if no draft NEPA document was filed) whether or not the MCPs have been revised. This clarification is needed because, as currently drafted, the appeal process appears to cover only modified MCPs. Unless changed, the DOI regulations suggest that if the preliminary MCPs are simply affirmed in the MCRP process, the licensee would not have a right to file an administrative appeal.

B. SECTION 25.52 – WHO MAY APPEAL?

1. Limiting the Administrative Appeal to License Applicants is Appropriate

NHA and EEI support the DOI proposal to limit the administrative appeal to license applicants. Importantly, the administrative appeal is the applicant’s only opportunity for an administrative review of a MCP. Based on the Bangor Hydro and American Rivers decisions, FERC believes
that it generally may not reject an MCP.\footnote{One important exception to this general rule is that pursuant to \textit{Escondido Mutual Water Co. v. La Jolla Band of Mission Indians}, 466 U.S. 765 at 783 (1984) the Commission has no obligation to include in a license conditions regarding reservations that are affected by project but contain no project works. \textit{See also, Duke Power}, 100 FERC ¶ 61,294 (2002); \textit{Minnesota Power & Light Co.}, 75 FERC ¶ 61,151 (1996); \textit{City of Tacoma, Washington}, 86 FERC ¶ 61,311 at 62,075 (1999); \textit{City and County of Denver, Colorado}, 94 FERC ¶ 61,313 at 62,155 (2001); \textit{El Dorado Irrigation District}, 94 FERC ¶ 61,375 at 62,389 (2001).} To obtain review of the MCPs, license applicants must file a request for rehearing at FERC, which FERC will summarily deny, and then file a petition for review with a U.S. Court of Appeals. Thus, the DOI proposed administrative process provides the license applicant with an opportunity for due process that is not currently available.

Other stakeholders who are involved in the licensing process do not face the same problem as license applicants, who effectively are given no opportunity for an administrative appeal under the current process. If a stakeholder believes that the MCPs are inadequate, the stakeholder has the opportunity to request that FERC impose more stringent conditions within a license. While FERC may not reduce the requirements in a MCP, FERC may strengthen or create more burdensome requirements if the stakeholders show that such measures are necessary.

Stakeholders may seek administrative rehearing of any FERC order that fails to impose these more burdensome requirements. An appeal to DOI is unnecessary to accomplish this objective. Therefore, other stakeholders do not have the same need for the administrative appeal process at DOI as compared to the license applicant. Moreover, the interests of these stakeholders would be fully protected as they would have the right to submit comments as part of appeal process and DOI would be obligated to take these views into consideration in any decision regarding any appeal.

Additionally, limiting the appeal right to license applicants will help prevent the appeal process from becoming unmanageable if DOI were subject to numerous administrative appeals. Multiple appeals would make it extremely difficult for DOI to address the administrative appeals in the time frame proposed in the NOPR. Also, each appellant could propose an alternative to a MCP. DOI would then need to determine how it should compare the various alternatives against each other and the applicant would need to evaluate the cost and feasibility of each alternative. This would both complicate and increase the time needed for the administrative appeal process.

\textbf{2. Limiting Administrative Appeals to License Applicants is Consistent with Federal Agency Practice and Due Process}

We are aware that arguments have been raised that providing the right to file an administrative appeal to the license applicant, but not to others, may be a violation of other parties’ due process rights. Those claims are inaccurate. While the NOPR provides the license applicant with the right to an administrative appeal, nothing prohibits another entity from participating in the appeal.

Furthermore, this distinction in right of appeal is provided for in a number of other agency appeal processes such as those under the Coastal Zone Management Act (CZMA) and the Clean Water Act (CWA). Under Section 1456 of the CZMA, a license applicant must provide certification that the activity complies with the state’s coastal management plan. The state must provide a concurrence with this certification. The statute provides the Secretary of Commerce with the ability to override the state’s concurrence (or lack thereof) “on his own initiative or upon appeal by the applicant.”
Similarly, the applicant is given a specific right to appeal in the issuance of a Section 404 permit under the CWA. The regulations issued by the Army Corps of Engineers in 2000 (33 C.F.R. 331) provide an “affected party” with the right to an administrative appeal of conditions imposed on the 404 permit. An affected party is defined as “a permit applicant, landowner, a lease, easement or option holder (i.e. an individual who has an identifiable and substantial legal interest in the property).” This right to request an appeal conference is not granted to other parties.

Additionally, the U.S. Forest Service regulations at 36 CFR Part 251 Subpart C, provides for administrative appeals by those who apply for written authorizations to occupy and use national Forest System lands. Other interested persons may not appeal these decisions.

Finally, as the DOI administrative appeal process does not affect the final appealability or reviewability of the FERC issued license, there is no deprivation of due process of others who have an interest in seeking review of the FERC license order. Therefore, there is no violation of due process by granting the applicant, but no other parties, this right.

C. SECTION 25.53 – WHAT LIMITS ARE THERE TO RAISING AN ISSUE ON APPEAL?

This section creates a concern that was previously discussed in Section 25.8. The rulemaking asserts that modified MCPs agreed to in a settlement agreement may not be appealed. However, if the applicant is not a settling party or if the applicant did not concur in any change to an MCP in the settlement agreement, then the applicant should have the right to file an administrative appeal.

Additionally, the section only allows appeals of MCPs if the specific issue was raised during the MRCP process and in the FERC record, or if the modified MCP was primarily based on new information. This could result in a situation where the applicant had no concern with the preliminary MCPs, yet DOI modifies them in such a way that the applicant has a significant concern with the modified MCPs and the applicant cannot appeal. A license applicant should also be able to appeal modified MCPs if the modified MCPs adversely affect the project in a manner different from the preliminary MCPs.

D. SECTION 25.54 – WHEN IS AN APPEAL TIMELY?

NHA and EEI are concerned that the requirement that an appeal be filed within 30 days, with no exceptions, will not provide sufficient time in certain cases to give license applicants the ability to develop and file a meaningful administrative appeal. The administrative appeal process is most likely to be used to request high-level review of costly and highly controversial MCPs. In these cases, the supporting documentation underlying the MCPs typically compromises hundreds of pages of materials.

For example, in an ongoing licensing proceeding, DOI recently submitted over 10,000 pages of documents to FERC in support of the MCPs. In this situation, it would be difficult, if not impossible, for the license applicant to review all the documentation underlying the MCPs and prepare a responsive administrative appeal within 30 days. Therefore, the rule should be modified to give DOI the authority to extend the time period for filing an appeal up to an additional 60 days in the event of extraordinary circumstances, such as the existence of a voluminous record in support of the MCPs that the applicant seeks to appeal. This would
prevent the appeal process from causing undue delay, but at the same time would preserve the authority of DOI to accommodate extraordinary circumstances that justify a modest extension of time to file an appeal.

In addition, under all circumstances, to ensure that the applicant has sufficient time to file an appeal, DOI must transmit the modified MCPs to the license applicant as expeditiously as the MCPs are filed with FERC. The license applicant must be assured that it will have received the MCPs on the same day that the conditions are date stamped at FERC, which starts the appeal period. We understand that many applicants do not receive MCPs in time to allow an applicant to prepare an appeal that meets the proposed regulatory requirements, which will create a significant problem given the short period for filing administrative appeals.

Finally, DOI must clarify that the appeal process also applies to the exercise of any reserved MCP authority. For example, if DOI reserves its Section 18 fishway authority at licensing, but then seeks to require the installation of fish passage ten years later, the licensee should have the opportunity to file an administrative appeal at that time. The impact of a MCP on a licensee is the same, regardless of whether it is imposed at the time of licensing or at a later date through a reservation of authority. Therefore, the same opportunity for administrative appeal should be made available regarding MCPs imposed on a licensee through the use of reserved authority.

**E. SECTION 25.55 – WHERE IS THE APPEAL FILED?**

Section 25.55(a) and (b) require an administrative appeal to be filed with the DOI Office of Environmental Policy and Compliance, FERC, and the FERC Service List. We support this broad distribution of an administrative appeal. Section 25.55(a) also requires the Assistant Secretary to designate a “professional review team” to evaluate the appeal. This review team should include at least one individual with engineering expertise regarding the operation of hydroelectric projects. Such an individual would significantly improve the quality of the review by assuring that it incorporates a clear understanding of project operations and constraints. We believe that DOI should be able to find qualified individuals from the U.S. Bureau of Reclamation staff that can participate on the review team.

Under proposed Section 25.55(c)(2), an appeal may be dismissed if any of the “documentation set forth in §25.56” is not provided or if the appellant proposes a remedy that is not within the Secretary’s authority. We note that some of the documentation required by Section 25.56 may not be applicable to all appeals or that information may be hard to obtain and include in the appeal filed within the 30-day period, such as the cost analysis required under subsection 25.56(f). We suggest that proposed Section 25.55(c) be modified to read “the applicable required documentation as available.”

Also, a remedy that is outside the authority of the Secretary to implement may not be readily ascertainable by an appellant. Therefore, an appellant proposed remedy that DOI believes is outside its authority to implement should not result in the dismissal of an administrative appeal. Regardless of DOI’s perceived legal status of the requested remedy, the concerns underlying the license applicant’s appeal may deserve some type of remedy from DOI.

For example, the MCP could easily be inappropriate by itself. If so, the Secretary will need to either remove the MCP or develop a more appropriate remedy than that proposed by the appellant. Furthermore, Section 25.55(c) should be clarified to state that only the Assistant Secretary may dismiss the appeal. The review team should not have the independent authority
to dismiss an appeal because this could prevent the appellant from receiving the type of high-level policy review that is the main benefit of the new appeal process.

F. SECTION 25.56 – WHAT MUST THE APPEAL INCLUDE?

1. Section 25.56(b)

Section 25.56(b) would require that the appeal be limited to issues raised in the MCRP process or upon the receipt of new information. However, as previously noted, the opportunity to raise an issue previously may not have existed and the DOI may have modified the MCP based on something other than new information.

For example, the preliminary MCPs may not have adversely affected the applicant. Another party to the MCRP may have sought additional or revised MCPs. If the DOI modifies an MCP pursuant to the MCRP, and that change adversely affects the project, the applicant may not have an opportunity in the MCRP to challenge that modified MCP under the proposed regulations. The applicant’s first opportunity to contest the modified MCPs would be under the administrative appeal process. Yet, according to section 25.56(b), the applicant would not be eligible to file an administrative appeal if it did not contest the preliminary MCP in the MCRP.

Furthermore, the applicant is apparently directed to provide the new information upon which the modified MCP was based. This assumes that new information exists and that the DOI has provided that new information to the applicant. As DOI is the keeper of the information, DOI should already have all the relevant data that was used as a justification for the MCP. At a minimum, DOI must ensure the applicant is aware of all new information in a timely manner if DOI is going to require the applicant to provide that information back to DOI. Also, as noted above, the applicant may be unable to provide “new information” if DOI modifies its MCPs without presenting any new information in support of the modified MCPs.

2. Section 25.56(c)

Additionally, the section requires the applicant’s appeal to contain a substantial amount of data, some of which is potentially problematic, and some of which may be irrelevant to the issue for which an administrative appeal is sought. In particular, Section 25.56(c) requires that the appeal contain a “summary of consultation.” This could mean communication during the MCRP dispute or historical consultation regarding anything associated with the issue since the beginning of the licensing process. DOI should explain what consultation is necessarily relevant.

For example, if historical consultation is intended, that information should be in the FERC record and would not be needed again in an appeal. DOI should require that the applicant only provide a summary of the consultation to the degree that the (i) consultation is not already in the FERC record, and (ii) consultation information is relevant to the issue under appeal. Next, DOI should clarify that there is no requirement for the applicant to consult after issuance of the modified MCPs and before filing an appeal. Such post modified MCPs consultation would be impractical to conduct given the short period of time for a license applicant to file an appeal.

3. Section 25.56(d)

The proposed rule, in Section 25.56(d), also requires that the administrative appeal contain a “proposed alternative” and that the alternative meet certain standards. However, in many
situations, an alternative condition is inappropriate and the appeal may simply seek to remove a modified MCP. Therefore, the rulemaking should remove the requirement to propose an alternative.

Moreover, the review team should not be able to reject an appeal, pursuant to Section 25.55(c)(ii) because an applicant has not filed an alternative MCP. We agree that an appellant must support any alternative the applicant proposes with substantial evidence.

4. Section 25.56(f)

Section 25.56(f) of the proposed rule requires the appellant to include significant economic/financial information in the appeal. We are pleased that DOI is willing to review economic and financial information when evaluating its MCPs. However, the submission of any such information must be voluntary.

We note that not all of the economic/financial information required in the proposed rule may be relevant to each appeal. For example, if the applicant is not alleging that the MCPs under appeal place an undue economic burden on the project, but instead are not supported by substantial evidence or “mandate a level of mitigation that is inappropriate given the level of impacts attributable to the project,” the applicant should not be required to provide the economic information. Only information relevant to the issues raised on appeal should be compiled and transmitted with that appeal; the relevant information will be dependent upon the particular project and issue being appealed.

For cases where economic information is provided, DOI must create a mechanism for treating applicant identified commercially sensitive information as confidential. Hydropower project owners and other generators of electricity operate in a competitive marketplace, in particular at the wholesale level and also in a number of states at the retail level. In such an environment, information about project economics and project finances may be sensitive and, if not kept confidential, may harm the company involved as well as its customers and shareholders.

Further, DOI should consult with the license applicant regarding whether such information should be provided earlier in the MCP process so that DOI may conduct an economic and financial analysis in preparing its preliminary MCPs, again with appropriate safeguards for confidential information. That analysis should occur before issuance of the MCPs and certainly before issuance of the modified MCPs. The materials supporting its decision/discussions of these issues should be included in the record, but should be redacted to protect confidential information. The applicant should be provided copies of those materials. Then, the applicant would have an opportunity to provide a constructive response in its appeal, with appropriate supporting data.

G. SECTION 25.57 – WHO MAY COMMENT ON AN APPEAL?

The rulemaking allows all stakeholders to comment on an appeals within a reasonable 21 day time period. The rulemaking, however, should include a requirement that comments on administrative appeals of MCPs are to be filed with FERC and served on the applicant.
H. SECTION 25.59 – HOW WILL THE APPEAL BE REVIEWED?

1. Section 25.59(c)

Subsection 25.59(c)(1) provides that the Assistant Secretary should consider if the modified MCPs conflict with conditions of another Department or other bureaus within DOI. The regulation should be revised to have the Assistant Secretary also consider if the MCPs conflict with likely FERC conditions, as proposed in any draft or final NEPA document.

Subsection 25.59(c)(2) requires that an applicant’s alternative measure be “as effective as that of the Department.” The term “as effective as” is not consistent with the FPA, and NHA and EEI are concerned about how that term will be interpreted as DOI implements the proposed regulations. To the extent feasible, NHA and EEI suggest that the rulemaking rely upon the FPA for direction. The appellant’s alternatives to MCPs issued under authority of FPA Section 4(e) should meet the FPA statutory standard of providing for the “adequate protection and utilization” of the federal reservation. This standard would be consistent with the purposes for which the MCP was issued. Thus, any alternative should be judged by whether it meets that same standard.

For appellant alternatives to MCPs issued under the authority of FPA Section 18, the “as effective as” test is not as clear because Section 18 does present a standard pursuant to which the Department is to issue prescriptions for the construction, maintenance, and operation of fishways. We interpret the “as effective as” test in the NOPR to mean that the alternative is as effective as the DOI MCP in providing passage for the existing fishery resources that are intended to be assisted by the prescribed fishway to the extent that such fishway prescription is reasonable and appropriate. The Department should clarify that this is the meaning behind the term “as effective as” so that license applicants may effectively propose alternatives to Section 18 prescriptions.

Importantly, some may read subsection 25.59(c) to imply that only three reasons would justify the Assistant Secretary removing or modifying an MCP. That should not be the case. For example, pursuant to the proposed regulations, the Assistant Secretary may find that the MCPs (i) are not supported by substantial evidence, (ii) are not economically feasible, (iii) do not benefit the environment in a manner that justifies their cost, (iv) do not appropriately consider other power and non-power resources, or (v) are improper for other valid reasons.

In short, the MCPs and license applicants alternatives should pass the FPA standards. We suggest that the regulations give the Assistant Secretary the ability to use our proposed standards and criteria (in Section III, below) to evaluate unreasonable or inappropriate MCPs and to judge any license applicant proposed alternative mitigation measures. The Associations proposed standards are based on the requirements for issuing FPA licenses.

2. Section 25.59(d)

Section 25.59(d) may not be applicable at all if the appellant challenges an MCP, but does not propose an alternative. As explained above, an appellant should not be required to propose an alternative. Thus, the DOI should amend this subsection to be applicable only if the appellant is proposing an alternative. Additionally, subsection (d)(3) requires that the alternative be consistent with DOI’s responsibilities for protecting fish, wildlife, and cultural resources. But, these responsibilities do not take into account economics, power or other non-power factors of which the FPA currently requires consideration.
We recommend that the Assistant Secretary’s review of alternatives be more similar to the evaluation that FERC provides pursuant to Section 4(e) and 10(a). DOI should give equal consideration to power, recreation, water supply, irrigation, and flood control, as well as the benefits to fish and wildlife resources, not only in reviewing MCPs on appeal, but in proposing preliminary MCPs and in establishing final MCPs.

Finally, subsection (d)(4) requires the Assistant Secretary to determine if the condition will conflict with conditions or prescriptions of other Departments or bureaus in DOI. We support such an analysis, and believe that it should cover conflicts with any other conditions in the FERC license, including conditions set by FERC even though FERC is not a “Department” or “bureau.” At the same time, DOI should not necessarily be required to change its MCPs simply because a conflict exists. Such other conditions could be unreasonable or inappropriate, and the applicant may wish to challenge the other conditions rather than the DOI MCP.

Similarly, if an applicant’s alternative is thought to conflict with conditions or prescriptions of other agencies, DOI should not automatically reject the alternative. The Assistant Secretary should ensure that the MCPs meet the standards and criteria we propose below to these comments (i.e., supported by substantial evidence in the record, give equal consideration of power and non-power factors, consider economic benefits, evaluate consistency with FPA obligations of FERC, etc.). Importantly, DOI should consider the total effect of all the conditions on the operation of a hydroelectric project. To the extent that FERC believes it may not modify DOI MCPs, then DOI should consider making those modifications to achieve an appropriate balance of power and non-power values.

III. THE PROPOSED REGULATIONS SHOULD BE MODIFIED TO REQUIRE AGENCY PERSONNEL TO ADHERE TO ESTABLISHED STANDARDS AND CRITERIA.

NHA and EEI appreciate DOI’s attempt in proposed Section 25.59 to set forth some factors that the Assistant Secretaries must assess in acting on administrative appeals. However, we are concerned that the proposed regulations leave out a critical element for a successful process – they do not contain any provisions that will ensure that agency personnel, including the Assistant Secretaries, in developing MCPs consider fundamental matters such as the actual and relative need for the MCPs, the likely success of the MCPs, and the impacts the MCPs will have on project operations and other power and non-power resources. The NOPR fails to establish any meaningful standards or criteria to govern the exercise of MCP authority by DOI personnel to ensure that such authority is not exercised in an arbitrary and capricious manner.

For example, the only limit specified as to the issuance of preliminary MCPs is that a "rationale" for them be provided (§ 25.5(a)). As to the issuance of modified MCPs, they are authorized "as needed" (§ 25.7(a)). With regard to actions on appeals to an Assistant Secretary, the only specified criterion to judge whether appealed MCPs are appropriate is if they "are not reasonably related to the impacts of the project because they mandate a level of mitigation that is inappropriate given the level of impacts attributable to the project" (§ 25.59 (c)(3)). The NOPR, therefore, does not specifically contemplate that DOI personnel will consider the actual and relative need for MCPs, costs, and adverse energy impacts, etc. in exercising MCP authority.

Indeed, the NOPR seems to indicate (by the provisions of § 25.56) that such factors as costs and energy impacts will be considered, if at all, only on appeals to an Assistant Secretary, and then only if a license applicant raises such issues on appeal. Thus, under the regulations proposed in
the NOPR, DOI personnel could, for example, prescribe multi-million dollar fishways designed
to handle a fish population size that does not currently exist and, based on existing evidence,
likely will never exist, or impose an expensive mandatory condition as to the use of a federal
“reservation” that will provide only marginal benefits or protection for the reservation.

The establishment of standards and criteria to govern the exercise of MCP authority is
important to ensure that agency personnel do not violate the requirement of the Administrative
Procedure Act that agency personnel do not act arbitrarily or capriciously. However, the
establishment of such standards and criteria is also essential to ensure that licenses subject to
MCPs undergo the public interest “balancing” required by the FPA. Because FERC believes that
it must include Section 4(e) conditions and Section 18 prescriptions in a license order, FERC
cannot use its resource "balancing" review to reject MCPs that are unreasonable even though
FPA Section 10(a)(1) specifically provides that all licenses are to be subject to such resource
balancing.

In order to meet the intent of the FPA that such "balancing" occur with respect to all issued
licenses, DOI should modify its proposed regulations to provide standards and criteria to govern
its personnel’s exercise of such authority. Further, these standards and criteria should be made
applicable to all stages of the process, from the issuance of the preliminary MCPs through
appeals to the Assistant Secretaries.

In light of the above, our Associations strongly recommend that DOI adopt, and insert in the
appropriate place in the new regulations, the following new regulation providing standards and
criteria to govern the issuance, modification, and appeals of MCPs:

“§25. Standards and Criteria for Conditions and Prescriptions
(a) The Department will not submit any preliminary or final condition or
prescription to FERC pursuant to §25.5(a) or §25.7(b), and the Assistant
Secretary will not file new modified conditions or prescriptions or a notice of no
change with FERC pursuant to §25.59(e), unless the condition or prescription
filed with FERC or covered by a notice of no change meets the following
standards and criteria:
1. There is a clear, reasonable and demonstrated need for the condition or
prescription;
2. There is a clear nexus between the operation/impact of the project and the
need for which the condition or prescription is directed;
3. There is a high probability that the condition or prescription will meet the
identified need;
4. Imposition of the condition or prescription is reasonable in meeting the
identified need given the benefits it will provide, its costs, and the impacts its
implementation will have on project operations and other resources
including, but not limited to, energy supply, distribution, cost, and use,
recreation, flood control, navigation, water supply, and air quality; and
5. There is no less costly or less burdensome condition or prescription available
to meet the identified need.
(b) Compliance of the condition or prescription with the standards and criteria of
subsection (a) must be demonstrated by substantial evidence contained in the
Department’s administrative record for the proceeding.

The submissions provided to FERC by the Department pursuant to §25.5(a) and §25.7(b), and the filings with FERC made by an Assistant Secretary pursuant to §25.59(e), shall include (1) a detailed description of how the condition or prescription complies with the standards and criteria of subsection (a), and (2) the substantial evidence contained in the Department’s administrative record demonstrating such compliance.

The requirements of this section are in addition to the requirements imposed by §25.59 or any other provision of this Part 25.”

In addition, if DOI eliminates the MCRP, as NHA and EEI have recommended, we recommend that the Department require its staff to engage actively and openly in the pre- and post-application licensing consultation process and to submit preliminary conditions within 60 days after the license application is submitted, as discussed on page 5 of these comments.

IV. PENDING LEGISLATION: COMMENTS ABOUT WHETHER ELEMENTS OF H.R. 6 AND S.14 SHOULD BE INCORPORATED INTO THIS RULEMAKING.

1. Should the Department include a provision for an on-the-record, trial-type hearing on disputed issues of material fact? If so, why? Provide specific examples of disputed material facts from past or present proceedings, and describe in detail how such a process would work in light of FERC schedules.

The Department is familiar with a number of ways in which on-the-record, trial-type hearings may be implemented in administrative proceedings. DOI has existing procedures with the Department’s Office of Hearings and Appeals (OHA) that handle similar proceedings and decide, in part, material issues of disputed fact. The DOI appeals process at 43 CFR Part 4 contains a variety of procedures that could be used to review preliminary MCPs. Those procedures contain some of the mechanisms requested by the Associations, such as evidentiary hearings before Administrative Law Judges, subpoena authority to obtain relevant documents, cross-examination of witnesses, etc. (See 43 CFR §§4.415, 4.423, 4.430-439, and 4.700, for example).

While these mechanisms are not designed specifically to handle the review of MCPs, the Associations are confident that Department staff are familiar enough with these mechanisms to carry out an evidentiary hearing process such as the one we recommend below.


This DOI question points out a critical omission in the DOI rulemaking – the need for hearings on disputed issues of material fact. Expedited hearings on focused, disputed issues of material fact should be instituted as the initial part of the DOI administrative appeal process. A material fact is one that “might affect the outcome of the suit under the governing law.” With the elimination of the MCRP, the evidentiary hearing process would commence upon the submission of the preliminary MCPs.

Examples of disputed material facts that are common to hydroelectric licensing proceedings are: (i) whether anadromous fish historically used the habitat above a dam prior to the dam being built; (ii) whether there is suitable habitat above a dam for the reintroduction of anadromous

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fish; (iii) what instream flows are necessary in a bypass reach to provide suitable habitat for fish; (iv) what method of upstream or downstream fish passage would be most cost-effective for a particular project; (v) what instream flows will provide effective sediment transport; and (vi) whether listed species are present in the project area.

There are many such disputes that may arise concerning the accuracy of basic underlying facts and the validity of the data gathering and analytical methodologies. Resolution of these disputes may often facilitate agreement among the parties on the appropriate license condition needed to remedy an environmental issue or impact.

The NOPR states that the Department considered but rejected the concept of including evidentiary hearings before administrative law judges (ALJs) as part of the administrative appeals process (AAP). The NOPR’s reasoning for dismissing this concept is: (1) FERC’s regulations do not provide time for an evidentiary hearing within the 90-day window contemplated by the NOPR for the AAP; (2) the President’s National Energy Policy called for making the licensing process more clear and efficient and it would not be consistent with that policy to add delay and complexity; and (3) the Department’s Office of Hearings and Appeals, which employs ALJs and manages evidentiary hearings, has substantial backlogs and would result in a two-year delay in the FERC process.

We believe the Department should reconsider this issue and include provisions in the AAP for expedited evidentiary hearings in appropriate cases. None of the Department’s concerns is insurmountable and all can be addressed in a way that balances the Department’s, the Administration’s, FERC’s, our members’, and the public’s mutual interest in an efficient licensing process with the substantial benefits of evidentiary hearings where there are disputed issues of material fact.

b. Trial Type Hearings are Commonly Used at Administrative Agencies.

It is well established that an agency should convene a trial-type evidentiary hearing “when disputed facts material to the contested agency decision exist,”6 and “the disputed issues may not be resolved through an examination of written submissions.”7 A trial-type hearing that provides for cross-examination is particularly appropriate when witness credibility is at issue.8

Issues regarding witness credibility and the accuracy of basic underlying facts are not the type that can be resolved “through the presentation of additional documentary evidence.”9 “Cross-examination is the best known means in a civilized society for ascertaining the truth.”10 Exposing witnesses’ prejudices and credibility, ascertaining the accuracy of fundamental facts regarding the nature of factual and scientific disputes, and testing and examining scientific assumptions and methodology cannot be accomplished effectively in a paper hearing.

c. The Licensing Process Would Benefit From a Trial Type Evidentiary Hearing.

All those experienced with the FERC licensing process – particularly in the post-license application filing period in cases where factual and scientific disputes have not been resolved through pre-filing consultation – are familiar with the frustrations of resource agency, FERC,

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6 Sierra Ass’n for Env’t v. FERC, 744 F.2d 661, 664 (9th Cir. 1984).
7 Environmental Action v. FERC, 996 F.2d 401, 413 (D. C. Cir. 1993).
stakeholder and applicant experts “talking past one another” in a flurry of written opinions and data but never being forced to engage each other on common ground. In contrast, an evidentiary hearing provides a forum in which the parties can “test, criticize, and illuminate alleged flaws in the evidence.”

Only an evidentiary hearing with discovery of documents and cross-examination can achieve full and true disclosure in these types of disputes. The result of the trial type hearing should be a better record for DOI and FERC to make decisions.

The NOPR is incorrect that an evidentiary hearing would inevitably cause a two-year delay in the FERC process. A limited hearing before an ALJ using expedited procedures can be accomplished in as little as three to four months, depending on the number and complexity of the issues and whether there are additional, relevant documents in the possession of the parties that have not already been submitted into the record. In this manner, the hearings could be accomplished within FERC’s regulatory schedules.

d. Benefits of a Trial Type Evidentiary Hearing

The record from an evidentiary trial-type hearing would inform FERC’s analysis in the NEPA document, would assist the Department in its development of modified MCPs, and would aid the Assistant Secretary in ruling on any administrative appeal of modified MCPs. Adding a provision for evidentiary hearing could result in a modest increase in the time and cost of licensing. However, these costs would be substantially outweighed by the public interest benefits of assuring that license conditions and prescriptions are supported by sound science and that the decisions of the Department are informed by the best available evidence.

Not every case would involve a disputed issue of material fact. We are hopeful that in most cases, factual and scientific issues will be resolved through the extensive pre-filing study and consultation process that occurs under all three of FERC’s licensing processes.

In cases where such issues are not resolved, however, hearings would substantially improve the quality and probative value of the record which would enhance review of these issues by the Department, FERC, and if necessary the courts. Moreover, forcing both applicants and other parties to make the evidentiary bases for their respective positions on MCPs subject to discovery, expert testimony, and the crucible of cross examination could, in many cases, lead to settlements and avoid further litigation before FERC, the Department and the courts.

e. NHA and EEI Proposed Evidentiary Hearing Process

We propose that the AAP include a provision for any party to request an evidentiary hearing on any discrete, disputed issue or issues of material fact arising from the Department’s preliminary MCPs. The hearing request would be filed with the Department and a copy submitted to FERC within 30 days of the Department’s issuance of its preliminary MCPs. In cases where the administrative record is voluminous, the Department would expand the filing period to 60 days, upon the request of the party seeking a hearing.

Within 30 days of filing of the request, the Department would determine whether such a disputed issue actually exists, and if so, set the scope of issues for hearing. The hearing would be concluded within 120 days of the Department’s hearing order, well before the Department’s

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11 Louisiana Ass’n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1993).
modified MCPs would need to be filed at FERC and FERC’s issuance of its final NEPA document. In an unusual case, the Department could conclude that longer than 120 days is needed, in which case there would still be ample time before its modified MCPs are due.13

We wish to make clear that we are not proposing that the ALJ issue an initial decision, findings of fact or conclusions of law, as perhaps the Department assumed in rejecting trial-type hearings in its NOPR. The purpose of the hearing would be to create a record for the Department to make a more informed decision in issuing modified MCPs, and to facilitate the Assistant Secretary’s decision on any appeals of those modified MCPs.

The ALJ’s role would be to conduct the hearing and resolve discovery disputes. FERC has used ALJ’s for this limited purpose in certain cases. If the Department determines that its own ALJ’s have too much of a backlog even to serve this limited function, it could request FERC to make its ALJ’s available, and could even coordinate the hearing with any evidentiary hearing order by FERC pursuant to FERC’s regulations.

We propose that the Department add to its proposed regulations the following language to incorporate an evidentiary hearing process. This provision could be added into either Subpart A of the DOI rulemaking in place of the MCRP if DOI removes the MCRP as we have suggested, or else as a part of the MCRP process. We believe that the use of a trial type hearing further supports the removal of the MCRP. In fact, without the MCRP, more time should be available for DOI to conduct an evidentiary hearing.

§25. When will the Department order a trial-type hearing?

a. The Department may order a trial-type hearing on any or all of its preliminary conditions and prescriptions upon the motion of any interested party of record to the FERC proceeding. The Department will order a hearing if the movant demonstrates that the preliminary conditions and prescriptions raise disputed issues of material fact.

b. Any motion for a trial-type hearing must be filed with the Department, and a copy submitted to FERC, within 30 days of the date of filing of the Department’s preliminary conditions and prescriptions, though a party may request a 30 day extension if the record is voluminous. The motion shall propose a schedule for DOI to conduct the evidentiary hearings.

c. The Department will issue an order granting or denying the hearing request within 30 days of filing of the request. If the request is denied, the applicant may nevertheless appeal the MCPs under subpart B.

d. A trial-type hearing granted by the Department will be limited to the issues prescribed by order of the Department.

e. The Department may set the case for hearing before its Office of Hearings and Appeals or may request FERC to designate a FERC administrative law judge to conduct the hearing. The Department may set the hearing to be conducted jointly with any issues set for hearing by FERC pursuant to 18 C.F.R. § 4.34(a) or § 5.29(e).

f. In its hearing order, the Department will establish expedited hearing procedures on a case-by-case basis which shall consist, at a minimum, of discovery of documents and an opportunity to cross-examine witnesses.

13 Under FERC’s ILP regulations, agency modified conditions and prescriptions are due 300 days after notice that the application is ready for environmental analysis, and FERC’s final NEPA document is due 90 days later. See 18 C.F.R. § 5.22 and 5.25.
h. The hearing order will set a date for concluding the hearing no later than 120 days following the date of the hearing order, unless the Department concludes that additional time is needed. If conducted by the Department’s Office of Hearings and Appeals, the Department will file the record of the hearing into the record of the proceeding at FERC.

i. The Department will consider the hearing record, along with FERC’s draft NEPA document and all other information available in the record, in submitting modified conditions and prescriptions to FERC.

2. The provisions of sections 25.56 et seq. cover the substantive requirements for appeals and standards by which appeals will be resolved. The record will document the basis for resolving the appeal. Are there other criteria that should be weighed, and are there tests that respondents suggest be considered in how to weigh such criteria? In the consideration of conditions and prescriptions should the Department give equal consideration to energy supply, distribution, cost and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality)? Should the Department consider other factors? How would the Department demonstrate that equal consideration was given to these factors? What would be the implications of providing equal consideration to such factors for the Department’s duties to protect tribal resources, fish, wildlife, and cultural resources if this standard were applied?

Yes, NHA and EEI support the adoption of other criteria and standards that should be evaluated in preparing MCPs and in reviewing alternatives to MCPs. Above, we have proposed a new regulation that would address this specific issue. Additionally, as the FERC cannot dismiss or modify MCPs, it is up to DOI to give equal consideration to all power and non-power factors and resources that are affected by its MCPs. This would not cause the Department to avoid its statutory duties, but rather, it must attempt to harmonize those duties with the obligations imposed by the FPA for carrying out sound energy policy that is in the public interest.

3. Should the Department be required to accept an alternative condition proposed by a license applicant if it provides adequate protection and utilization of the reservation, costs less to implement, and results in improved operation of the project works for electricity production?

Yes, the Department should be required to accept an alternative condition if it provides adequate protection and utilization of the reservation, costs less to implement, or results in improved operation of the project works for electricity production. The legislative language pertaining to FPA Section 4(e) MCPs is designed to ensure the protection of environmental resources while giving an applicant the flexibility and creativity to conserve water, power, and/or keep costs down – costs which are ultimately passed on to the consumer.

This concept is appropriate for incorporation into the DOI rulemaking. As the license applicant knows best how certain factors will impact their particular project, the license applicant is best situated to developing an alternative that may accomplish appropriate resource goals while minimizing impacts to the hydroelectric project.

For example, as the licensing process now functions, most project owners are experiencing a loss of generation capacity and operational flexibility. The use of a license applicant proposed alternative addresses this problem by providing the licensee an opportunity to propose more
cost effective measures and to keep as much clean, renewable electricity on-line as possible via an alternative condition.

In short, the concept serves the public interest by balancing important environmental protection goals with preserving as best as possible the many benefits of a hydropower project. It should also result in fewer requests for rehearing at FERC and fewer challenges in the federal courts. Without the need to contest FERC license orders, license applicants can move forward sooner to implement the MCPs. All parties will also save money by not having to prepare requests for rehearing and lawsuits.

The ability of a license applicant to propose an alternative does not reduce the “adequate protection and utilization” standard found in FPA Section 4(e). This is the same standard agencies are supposed to follow when they craft their MCPs pursuant to Section 4(e).

Given that the licensee, and ultimately the electric consumer, bear the cost of license conditions, it is appropriate and reasonable that the Department be required to accept a licensee's alternative if the alternative MCP satisfies existing requirements to protect the environment. The ultimate decision still lies at the Department.

4. Should the Department be required to accept an alternative prescription proposed by a license applicant if it is no less protective than the fishway prescribed by the Department, costs less to implement, and results in improved operation of the project works for electricity production?

Yes, for many of the same reasons expressed above, the Department should be required to accept alternative FPA Section 18 prescriptions if the alternative provided is no less protective than the fishway prescribed by the Department, costs less to implement, or results in improved operation of the project works for the production of electricity.

The concept takes a goal-oriented approach that permits the Secretary to determine and set a protective goal and decide whether the licensee’s alternative meets that goal. If an agency determines that an alternative prescription is not as protective as the original fishway prescription, the agency can reject the alternative, assuming, of course, that a need for a prescription exists.

Like the justification for FPA Section 4(e) alternative MCPs, allowing an alternative to Section 18 prescriptions is designed to ensure the protection of environmental resources while giving an applicant the flexibility and creativity to save water, to preserve project power and non-power benefits, and to keep costs down. Again, this is appropriate as the license applicant knows best how certain conditions, in this case fishways, will impact their particular project. Thus, DOI should also allow for a license applicant to propose an alternative fishway MCP.

5. In questions (3) and (4) above, an element of the criteria required is that the alternative proposed by the applicant “costs less to implement.” If the applicant, for whatever reason, such as improved operations, favors an alternative that is more expensive than that in the Department’s modified condition or prescription, is there any reason it should be rejected so long as it is “equally effective?”

No, the applicant’s proposed alternatives should not be rejected. If an applicant proposes an alternative FPA Section 4(e) or Section 18 MCP that is more costly than the DOI-proposed MCP, the alternative should be accepted as long as it meets the appropriate standard for
environmental protection (“adequate protection and utilization” for Section 4(e) and “no less protective” or “as effective as” for Section 18).

Applicants who propose alternatives that are more expensive than the agency proposals may do so for a variety of reasons that meet their particular needs. As stated earlier, the project operator knows best how conditions and prescriptions will impact their particular project and is best suited to propose alternatives that meet the appropriate level of environmental protection while also preserving the project’s benefits. If that applicant proposed alternative happens to be more expensive, it should be allowed.

CONCLUSION

NHA and EEI again commend the Department for exploring administrative improvements to its mandatory conditioning authority in the hydropower licensing process. We appreciate the opportunity to comment on the Department’s proposal and to provide our own recommendations. We believe that these recommendations, if adopted, will help address some of the problems that plague the licensing process today.