



July 9, 2010

Mr. Frank Rusco
Director, Natural Resources and Environment
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Comments on the GAO EAct 2005 Section 241 Report

Dear Mr. Rusco,

The National Hydropower Association (NHA) appreciates this opportunity to provide comments to the Government Accountability Office (GAO) on the draft report of the Section 241 trial type hearing and alternative condition and prescription provisions of the Energy Policy Act of 2005 (EAct 2005).

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new hydrokinetic technologies. NHA's membership consists of more than 170 organizations including public utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, consultants and others involved in the industry.

NHA members have a keen interest in the Section 241 provisions having participated in the development of the interim final rules and developing substantial experience with the provisions as utilized in their re-licensing proceedings.

The following comments are also endorsed by the American Public Power Association¹ and the Edison Electric Institute².

¹ APPA is a national service organization that represents the interests of more than 2,000 publicly owned, not-for-profit electric utilities located in all states except Hawaii. Over 70 percent of APPA's members serve communities with less than 10,000 residents, and approximately 45 million Americans receive their electricity from public power systems operated by municipalities, counties, authorities, states, or public utility districts.

² EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates. Our members represent approximately 70% of the U.S. electric power industry. They generate electricity from a diverse portfolio of fuel resources, including hydropower.

History

NHA and the hydropower industry sought the provisions of Section 241 to inject additional accountability and transparency into the process for developing mandatory conditions and prescriptions. Prior to EAct 2005, the hydropower licensing process provided no administrative mechanism to review preliminary conditions and prescriptions proposed by the agencies. A licensee's only option was to challenge conditions in the court of appeals – a process which only served to delay implementation of appropriate mitigation and other measures at a significant cost to both the licensees and the agencies.

The ability to hold a trial-type hearing provides licensees with a tool to ensure proposed conditions and prescriptions are based on accurate information and address impacts directly related to the project.

In addition, the pre-EAct 2005 process did not afford consideration of alternatives to agency proposed conditions and prescriptions. Requiring agency analysis and acceptance of alternatives that meet the same standard for natural resource protection (though at lower cost or with increased power savings) allows licensees the ability to fully realize the clean energy potential of their projects in the most cost efficient manner.

In the end, the ultimate goal of the industry in supporting the Section 241 provisions was better, maximized outcomes in the licensing process – both for environmental protection and for needed renewable energy generation from hydropower.

General Comments and Response to Report Recommendations

NHA commends the GAO and its staff for the extensive work it undertook in interviewing licensees, agencies and other stakeholders in meeting the report's objectives to illustrate the use of the Section 241 provisions, their outcomes, and the views on those outcomes and the process itself.

Hydropower licensing is one of the most heavily intensive processes for a generation source in the United States and includes the high level of input from a wide variety of stakeholders. Based on the experience of NHA and its members, and a review of the results of the interviews GAO conducted, the Association believes that the provisions of EAct 2005 Section 241 are providing more transparency and accountability, for all stakeholders, in the process as Congress intended and leading to better licensing outcomes.

Though some administrative modifications to the agencies' interim final rules are both needed and useful, NHA believes these can be accomplished without any statutory changes to the structure of the program. Additional information on proposed changes is included.

Finally, NHA also fully supports the GAO's recommendations in the report that: (1) agencies provide in their written statement filed with the Federal Energy Regulatory Commission (FERC)

the reasons for not adopting proposed alternative conditions or prescriptions, as is currently required by the interim rule; and (2) the agencies issue a final rule governing the use of Section 241 provisions with additional notice and opportunity for public comment.

NHA endorses the above recommendations and looks forward to working with the agencies and other stakeholders as a final rule is developed.

Specific Comments on the Report

Based on the extensive research conducted by the GAO in the preparation of this report, NHA can draw several conclusions. But, in general, it is clear from the comments and data that Section 241 has indeed met the goals of transparency and accountability that was intended.

A. Need for agency statement on modified conditions

Of the 139 conditions that were modified, only 13 came with explanations of why the conditions were modified, as opposed to accepted or rejected. It is important for resource agencies to provide the reasoning behind the actions they take in accepting, rejecting, modifying and removing proposed conditions and prescriptions. Without such reasoning, it is hard for stakeholders to determine, as the GAO pointed out, the basis of the changes, their extent, and if the proposed alternatives had any affect on the final licensing conditions. Providing such reasoning offers a fuller picture of the licensing process to stakeholders, FERC, and Congress.

B. Settlements not adversely affected by Section 241 provisions

In the process, we continue to see settlement between involved parties and less employment of the trial-type hearing. In the few cases where a trial-type hearing has been utilized, the administrative law judge (ALJ) has ruled for both the licensee and the agencies.

We believe the Section 241 provisions have fostered a greater environment of collaboration amongst stakeholders. Of all the proposed alternative conditions and prescriptions, 72 percent resulted in modification of conditions, indicating that common ground was found and agreement reached on mutually beneficial licensing conditions. And while there is some concern that the trial-type hearings have been time and resource consuming, only three went to completion, with the majority of proceedings initiated being settled in negotiations before an ALJ decision was issued.

C. Section 241 has resulted in the generation of better Information

NHA also believes that the process has generated better information. Both licensees and resource agency officials expressed that the resource agencies put more effort into researching, supporting and explaining their conditions and prescriptions, as well as

requesting more extensive studies from the licensee. This ensures a complete scientific and fact-based support of licensing conditions set by the resource agencies.

D. The process is demanding on all parties involved

Among the comments from stakeholders and resource agencies, cost to the resource agencies was often cited as a negative result of Section 241. In addition to the agencies, the process involves extensive effort and resources on the part of the licensee as well. The goal is transparency and accountability, and the hydropower industry believes there should be an appropriate level of investment towards these goals and feels that it too has made a significant contribution.

Proposed Recommendations for Final Rule Issuance

On November 17, 2005, the Departments of Agriculture, Interior and Commerce issued interim final rules for implementing the trial-type hearing and alternatives provisions of EAct 2005. In the interim rule it was indicated that revised final rules would be promulgated within 18 months, based on comments received and the initial results of the procedures set forth.

NHA filed comments on that rule in January 2006. Over four and a half years later, the Departments and stakeholders have had extensive experience with Section 241 provisions and NHA believes the agencies should proceed with issuing a final rule, after a period of public comment. As per our June 2009 joint letter with the Hydropower Reform Coalition, NHA believes that there are opportunities to enhance the cost effectiveness of the procedures before issuance of a final rule.

For example, with regard to the trial type hearing process, Section 241 provides that the license applicants shall be entitled to trial-type hearing of no more than 90 days on fact disputes related to the licensing conditions. As it is now, the ALJ issues his or her decision within that 90 day time frame. NHA believes those 90 days should be dedicated to proceedings in order to give parties sufficient time to develop an adequate record on the facts at issue and to provide appropriate due process. Therefore, we recommend that in the final rule making the process be modified to (1) start the 90 day hearing clock when direct testimony is filed and (2) authorize the ALJ to write his or her decision following completion of the hearing.

NHA looks forward to providing additional recommendations and expanding on the recommendations posed here by providing supplementary input as the agencies work to finalize their interim rule.

Conclusion

NHA would again like to thank the GAO for this opportunity to provide comments on the draft report. The Section 241 provisions of EAct 2005 are important to providing the most cost

effective and fact-based licensing conditions and prescriptions to ensure that hydropower generation has an opportunity to fully realize its important role in America's renewable, clean energy portfolio.

Sincerely,

A handwritten signature in cursive script that reads "Linda Church Ciocci". The signature is written in a dark ink and is positioned to the left of the typed name.

Linda Church Ciocci
Executive Director