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SOLICITATION OF PUBLIC COMMENTS ON RESOURCE AGENCY PROCEDURES FOR CONDITIONS AND PRESCRIPTIONS IN HYDROPOWER LICENSES

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COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE NATIONAL HYDROPOWER ASSOCIATION

The Edison Electric Institute ("EEI") and the National Hydropower Association ("NHA") strongly support the hydropower licensing reforms of section 241 of the Energy Policy Act of 2005 ("EPAct05"), and we deeply appreciate the expeditious issuance by the Departments of Agriculture, Commerce, and the Interior ("Departments") of an interim rule to implement these provisions.[1] The licensing reforms were adopted by Congress with broad bipartisan support and constitute a major improvement in the hydroelectric licensing process that will help assure that the mandatory license conditions and prescriptions issued by the Departments under sections 4(e) and 18 of the Federal Power Act ("FPA") are cost-effective, energy sensitive, supported by the

[1] Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804 (proposed Nov. 17, 2005) (to be codified at 7 C.F.R. pt.1, 43 C.F.R. pt. 45, and 50 C.F.R. pt. 221). Because the Departments have issued an interim final rule, and provided citations to the Code of Federal Regulations ("C.F.R."), EEI and NHA will make reference to those C.F.R. citations in our comments.

facts, and take into account impacts of the conditions on other project benefits.[2] This will produce substantial environmental and economic benefits.

For example, the provisions of section 241 and the interim rule will advance environmental interests by assuring that fishways required under section 18 are supported by sufficient evidence and achieve their intended purpose of providing passage for fish populations with a biological need for such passage. At the same time, section 241 and the interim rule will also help preserve the energy, economic, and other benefits of our nation's hydropower resources by assuring that conditions with lower cost or less energy impact are considered and equal consideration is given to various hydropower project attributes in setting the conditions.

As discussed below, EEI and NHA strongly support many key aspects of the interim rule. Nevertheless, EEI and NHA have concerns about certain components of the rule. In light of this, we request that the Departments issue final rules that adopt the changes we are recommending in these comments, ideally no later than May 1, 2006. This approach will maximize the benefits of the hydropower reforms adopted by Congress in EPAct05.

I. EXECUTIVE SUMMARY

EEI and NHA strongly support many aspects of the interim final rule. In particular, we endorse provisions contained in the rule making the trial-type hearing and alternative conditions processes applicable to pending licensing proceedings where no license has issued as of November 17, 2005. Further, EEI and NHA support the Departments' clarification that the rights to propose alternative conditions and to a trial-type hearing apply to the exercise of reserved conditioning authority. In addition, we applaud provisions in the rule that mandate that

[2] The term "conditions" in these comments should be read to refer to all FPA mandatory conditions, including "prescriptions" issued under Section 18 as well as "conditions" under Section 4(e).

the administrative law judge ("ALJ") determines whether there are material disputes of fact, and that the ALJ's factual findings are final.

Notwithstanding EEI and NHA's strong support for the interim final rule, we have concerns about certain provisions of the rule. Primary among those concerns is that the interim rule does not provide for a trial-type hearing of up to 90 days as required by section 241 because the hearing schedule is unreasonably compressed and in conflict with relevant provisions of the Administrative Procedure Act ("APA"). We are concerned that the hearing schedule simply will not provide the opportunity to develop an adequate factual record in many proceedings where there are a multiplicity of highly complex issues. Moreover, we are troubled that the interim final rule provides for a trial-type hearing on preliminary conditions, rather than final (modified) conditions, which conflicts with section 241. We are concerned that conducting hearings on preliminary conditions, which are not necessarily the conditions that the Departments will ultimately seek to impose on a license applicant, is an inefficient use of the resources of the Departments, license applicants, and other parties. Instead, providing the right to a trial-type hearing on final conditions would be much more efficient and would assure that license and others applicants turn to a trial-type hearing only after all other avenues for resolving issues are exhausted. EEI and NHA also believe that it is very important that the Departments clarify that the "equal consideration" standard applies to all mandatory conditions, preliminary and final.

II. EEI AND NHA INTERESTS

EEI is the trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members serve 71 percent of all electric utility customers in the Nation and generate almost 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on

hydropower, and many own and operate hydropower projects licensed by the Federal Energy Regulatory Commission ("FERC" or "the Commission"). In fact, EEI members comprise the largest group of FERC hydropower project license holders.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry. NHA represents 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. Its membership consists of more than 140 organizations including public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys.

III. KEY ASPECTS OF THE RULE THAT EEI AND NHA STRONGLY SUPPORT

EEI and NHA strongly support many aspects of the interim rule including:

1. The applicability of the trial-type hearing and alternative conditions provisions to pending licensing proceedings where no license has issued as of November 17, 2005;
2. The clarification that these reforms apply to the exercise of reserved conditioning authority;
3. That the ALJ, not bureau staff or the Office of Environmental Policy and Compliance, determines whether there is a material dispute of fact;
4. The requirement that ALJ findings of fact are final for any Department involved in the hearing; and
5. The provisions for submission of alternative conditions in response to preliminary conditions.

We also appreciate that the regulations issued by the three Departments are essentially identical, which will make the entire alternative conditions and trial-type process more workable and effective.

Applicability of the Rule

EEI and NHA strongly support the provisions of the rule that provide that the opportunity to request a trial-type hearing and submit alternative conditions applies to any licensing proceeding where preliminary or final conditions have been issued prior to November 17, 2005, and FERC has not issued a license by that date.[3] In response to this provision, a number of EEI and NHA members have filed alternative conditions and prescriptions and/or requests for trial-type hearings as part of their efforts to assure that license conditions are supported by the facts and are cost-effective.

There is no language in section 241 specifying its effective date. Consequently, according to principles of statutory construction, the hydroelectric licensing reforms are effective on the date of enactment of EPAct05, August 8, 2005.[4] Therefore, the new law applies to all hydroelectric licensing proceedings pending at that time.

Application of the trial-type hearing requirement to all pending licensing proceedings where no license has issued is also consistent with federal court precedent. Well-established legal principles provide that a court must apply new law in effect at the time of its decision. If this applies to the courts, then clearly the Departments must apply the new law to the conditions the Departments have has proposed to FERC for inclusion in hydroelectric licenses. *See Bradley*

[3] *See*,What deadlines apply to pending applications?, 7 C.F.R. § 1.604; 43 C.F.R. §45.4; 50 C.F.R. § 221.4.
[4] *See* 2 Norman J. Singer, *Sutherland Statutes and Statutory Construction,* §33.6 (6th ed. 2000), and cases cited therein.

v. School Bd. of Richmond, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-82 (1969).

The claim made by some that the interim rule applies "retroactively to reopen final and/or closed matters, in pending hydropower licenses, in violation of law" under the Supreme Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), is groundless.[5] There is nothing "final" or "closed" about the conditions proposed by the Departments under sections 18 and 4(e) of the FPA in proceedings where preliminary or final conditions have been submitted but FERC has not made its licensing decision.[6] Indeed, one could argue based on FERC precedent that even a proceeding that is subject to a pending rehearing is not final.[7] Therefore, applying section 241 to these conditions is not retroactive, and the *Landgraf* limits on the retroactive application of legislation do not apply.

Mandatory conditions proposed in proceedings where conditions have been issued, but no licensing decision has been made, are just that, proposed conditions. They have no legal force or effect until and unless FERC determines that a license that contains such conditions is consistent with the public interest standard under section 10(a) of the FPA. Only then, based on its public interest finding, may FERC issue a license order that includes the mandatory conditions developed by the Departments. As the D.C. Circuit stated: "If Congress had intended Interior to

[5] *See American Rivers v. United States Department of Interior*, No. 05-2086, at 2 (W.D. Wash. filed Dec. 16, 2005).

[6] It is not unusual for months or years to lapse between when a Department submits a Section 18 or 4(e) condition to FERC and when the license is issued.

[7] FERC has consistently held that licenses are not final until action has been taken on rehearing requests. *See, e.g., Public Utility District No. 1 of Okanogan County, Wash.*, 90 FERC ¶ 61,169 (2000); *Jack M. Fuls*, 36 FERC ¶ 61,136 (1986)

have authority to require prescriptions independent of the Commission's licensing process, it could easily have so specified."[8]

The Commission may refuse to issue a license on the ground that a mandatory condition would cause the license to violate the public interest standard of the FPA.[9] For example, in the Enloe Dam Project licensing proceeding, the National Marine Fisheries Service ("NMFS") of the Department of Commerce imposed a section 18 fish passage prescription on the Enloe Dam in Washington State near the Canadian border, even though such passage rendered the project uneconomic and was opposed by the Washington Department of Fish and Wildlife, the Okanogan Indian Nation, and the Province of British Columbia.[10] In response, FERC denied the license, including the NMFS section 18 condition, because "under the present and foreseeable circumstances" it could not "envision that licensing the project would be in the public interest."[11] This illustrates that no condition or prescription issued by a Department is "final" or "closed" until and unless FERC issues a license that contains such a condition.[12]

In sum, rather than seeking to retroactively apply section 241 to final, non-appealable licenses, the Departments have, consistent with the non-final status of the conditions at issue, provided that the hydroelectric licensing reforms apply to all conditions in licensing proceedings where no license has issued. EEI and NHA fully support this feature of the rule.

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[8] *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996).
[9] *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 112 (2d Cir. 1997).
[10] *Public Utility District No. 1 of Okanogan County, Wash.*, 90 FERC 61,169 (2000).
[11] *Id.* at 61,550.
[12] Moreover, when transmitting conditions to FERC, the Departments have reserved their right to modify such conditions if circumstances warrant such modification prior to the issuance of a license by FERC. If such conditions were "final" or "closed" this would not be possible. *See, e.g.*, U.S. Department of the Interior's Modified Conditions and Prescriptions for the Box Canyon Project, dated May 20, 2004, FERC Docket No. P-2042-013 (filed May 24, 2004)("If a settlement is attained, the Department will notify the Commission and amend its modified conditions and prescriptions to reflect the results of such a settlement.")

Application to Exercise of Reserved Conditioning Authority

EEI and NHA also applaud the Departments for clarifying that the rights to propose alternative conditions and to a trial-type hearing apply to the exercise of reserved conditioning authority, if and when such reserved authority is appropriate. The reservation of fishway authority under section 18 at relicensing is relatively common. Therefore, it is critical that section 241 reforms apply to all conditions, including fishway prescriptions, regardless of whether they are imposed at relicensing or during the term of a license. Any other approach would completely subvert the intent of the statute because it would permit the Departments to avoid their section 241 obligations by simply deferring the exercise of any such authority until after a license is issued.

ALJ Determination of Material Disputes of Fact

EEI and NHA also appreciate that the interim rule provides that an independent and unbiased fact-finder, the ALJ, decides whether there is a material dispute of fact. The provision of a neutral decisionmaker is a core requirement to a system of fair adjudicatory decision-making. *See, e.g., Arnett v. Kennedy,* 416 U.S. 134, 171 (1974). The alternative approach of permitting the Departments' staff, who are the proponents of the condition, to determine whether there are material disputes of fact could be used to unduly limit the access of license applicants and other parties to the trial-type hearing process. While we deeply respect the expertise and public service commitment of the staffs of the Departments, fundamental fairness and the APA require that staff members who are proponents of a condition not be permitted to participate in the determination of whether a material disputed fact exists.

ALJ Findings of Fact Are Final

EEI and NHA also support the interim rule provision providing that "[t]he ALJ's decision….will be final with respect to the disputed issues of material fact for any Department involved in the hearing."[13] This will assure that the relevant conditions/prescriptions issued by the Departments are consistent with the facts as determined by the ALJ. If the Departments had taken the opposite approach and given Departmental staff the option of completely ignoring the ALJ's findings of fact, then they would have substantially diminished the utility of such a hearing.

Timing of the Submission of Alternative Conditions

EEI and NHA also support the provisions of the interim rule related to the submission of alternative conditions in response to preliminary conditions, with the minor modification that the deadline for submitting alternative conditions should be 45 days subsequent to the issuance of preliminary conditions instead of the 30 days provided in the interim rule. This is the same time period provided by FERC for reply comments to preliminary conditions under the Integrated Licensing Process ("ILP") timetable.

Submitting alternative conditions in response to preliminary conditions will support the efforts of many license applicants and other license parties to negotiate and resolve disputes regarding section 18 and 4(e) conditions during the time period between the issuance of preliminary and final (modified) conditions. In essence, the schedule formalizes and defines what already occurs informally in many proceedings. EEI and NHA believe that the interim rule provisions on this point will help expedite the resolution of disputed issues because they force

[13] *See* What are the requirements for the ALJ's decision?, 7 C.F.R. § 1.660(d); 43 C.F.R. § 45.60(d); 50 C.F.R. § 221.60(d).

the license applicant and other parties to clearly state which alternative will meet the relevant environmental goals in a more cost-effective manner, and mandate that the Departments adopt such a condition if it meets the relevant statutory standards. These provisions also will permit FERC to fully analyze the environmental impacts of proposed alternatives in its National Environmental Policy Act environmental documents and in compiling the record for each license proceeding.

IV. EEI AND NHA CONCERNS

The Interim Rule Does Not Provide for a 90-Day Trial-Type Hearing

Section 241 provides that license applicants and other parties to a hydropower licensing proceeding "shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions." The 90-day period for the hearing is extremely short, particularly in light of the myriad of highly complex technical issues that will be the subject of these hearings. Therefore, in order to give the parties sufficient time to develop an adequate record on the facts at issue, and to provide appropriate due process, every day of the 90-day hearing period authorized by Congress will be needed in many proceedings. EEI and NHA recommend solving this problem by (1) starting the 90-day hearing clock when direct testimony is filed and (2) authorizing the ALJ to write his or her decision following completion of the hearing.

EEI and NHA are concerned that the interim final rule takes what Congress intended to be a hearing of up to 90 days and compresses it into a hearing that could actually be less than a week long. Specifically, the rule requires that discovery, the hearing, the filing of briefs, and the ALJ's decision all be accomplished within the 90-day period. It is likely that an ALJ assigned to a section 241 trial-type hearing will take 25 to 30 days to draft his or her decision, or an even

lengthier period of time in highly complex proceedings where the licensing record is tens of thousands of pages long. In addition, a large part of the 90-day period will be devoted to the preparation of briefs and discovery. For example, the first month of the proceeding is likely to be focused primarily on discovery outside of the hearing process because motions for discovery are due seven days after the hearing commences, objections to discovery are due seven days later, and all discovery must be completed within 25 days of the pre-hearing conference.[14] Therefore, after accounting for time devoted to the preparation and filing of briefs, the actual time available for the hearing itself will be approximately seven days, not nearly enough time to conduct and complete an adequate hearing in proceedings that involve a large number of highly complex factual disputes and witnesses. This is illustrated below by the timetable of a hypothetical trial-type hearing that begins on March 1, 2006, conducted in accordance with the deadlines in the interim rule:

- March 1, 2006: Agencies refer cases for hearing and issue notice of referral.
- March 6, 2006: Hearing clerk assigns ALJ, issues docketing notice, and ALJ issues notice of prehearing conference.
- March 8, 2006: Motions for discovery are due.
- March 15, 2006: Objections to discovery are due.
- March 21, 2006: ALJ conducts prehearing conference.
- March 23, 2006: ALJ issues order on discovery and hearing schedule.
- April 13, 2006: All discovery must be completed.
- April 18, 2006: Updated witness and exhibit list and prepared direct testimony is filed.
- April 24, 2006: ALJ begins hearing.

[14] *See* How may parties obtain discovery of information needed for the case?, 7 C.F.R. § 1.641; 43 C.F.R. § 45.41; 50 C.F.R. §221.41.

- April 28, 2006: Hearing ends and record is closed.
- May 5, 2006: Parties file briefs.
- May 30, 2006: ALJ issues decision.

In addition to being flawed on policy grounds and unworkable in cases of any complexity, the extraordinarily compressed hearing schedule is inconsistent with the plain language of section 241, which provides that a "determination on the record," i.e., the ALJ's decision, shall occur "after opportunity for agency trial-type hearing…." Therefore, the statute expressly requires that the ALJ's "determination on the record" be made after completion of the hearing, not during the hearing process itself.

Moreover, the section 241 right to a hearing must be construed and applied in a manner that is consistent with applicable provisions of the APA. In *U.S. v. Florida East Coast Ry. Co.*, 410 U.S. 224, 240 (1973), the Supreme Court held:

> Under these circumstances, confronted with a grant of substantive authority made after the Administrative Procedure Act was enacted,[] we think that reference to that Act, in which Congress devoted itself to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute.

Section 241 was adopted long after the APA. Therefore, the Departments must turn to the relevant provisions of the APA – specifically, sections 554, 556, and 557[15] – to determine what is meant by the term "trial-type hearing" as it is used in section 241. But in fact, the hearing process in the interim rule is <u>not</u> consistent with sections 554, 556 and 557 of the APA.

Section 554 applies to every case of adjudication "required by statute to be determined on the record after opportunity for agency hearing." Clearly, this includes relicensing proceedings

[15] 5 U.S.C. §§ 554, 556, 557 (2000).

subject to section 241.[16] In such cases, section 554 provides that the agency must give all interested parties the opportunity to submit and consider facts, arguments, and offers of settlement. To the extent that the parties are unable to determine a controversy by consent, the agency must also provide for a "hearing and decision" in accordance with sections 556 and 557 of the APA.[17] The APA draws a critical distinction between hearings, which are governed by section 556, and decisions, which are governed by section 557. This distinction is not reflected in the interim final rule.

Section 556 defines the scope of the hearing process subject to the 90-day requirement of section 241. Under section 556, a hearing involves the taking of evidence by an impartial ALJ. The parties are entitled to present their case by oral or documentary evidence, to submit rebuttal evidence, and to cross-examine as may be required for a full and true disclosure of the facts. Section 556 also contemplates that the ALJ will rule on various motions and resolve discovery disputes, but it does not encompass either the submission of briefs or the issuance of the ALJ's decision.

Section 557 provides that the parties have the right to submit proposed findings and conclusions to the ALJ. Moreover, section 557 provides that the ALJ's decision shall include a statement of findings and conclusions, and the reasons and the basis therefore, on all material issues of fact.

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[16] *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 662 (9th Cir. 1984) ("Under 16 U.S.C. § 825g … hydroelectric licensing is an adjudication required by statute to be determined on the record after opportunity for an agency hearing.") (quotation marks omitted). The language of section 241 plainly requires a determination "on the record" after an agency "trial-type hearing" with the right to discovery and cross examination, which is sufficient to trigger the application of the APA evidentiary hearing process. *See Florida East Coast Ry.*, 410 U.S. at 240; *U.S. v. Allegheny-Ludlum Steel Corp*., 406 U.S. 742, 756-57 (1972).

[17] Sections 556 and 557 apply by virtue of the terms of Section 554. *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1263-64 (9th Cir. 1977).

Because the section 241 hearing right is subject to the foregoing provisions of the APA, and because those provisions draw a sharp distinction between the hearing process and the briefing and ALJ decisionmaking process, the Departments must construe section 241 in a manner that is consistent with such requirements. Thus, the rule should be revised to require that only the hearing process itself, as defined by section 556 of the APA, be conducted within the 90-day limit. It is plainly inconsistent with the structure of the APA to include the briefing and decision-making process within the 90-day limit. In fact, such an interpretation virtually ensures that a party will not have a fair opportunity to present direct and rebuttal evidence and conduct cross examination as required by section 556 of the APA. Thus, the rule should be revised to secure the fundamental rights granted by the APA.

This could be accomplished by starting the 90-day hearing clock the day prepared direct testimony is filed, which will initiate the development of the evidentiary record, including the opportunity for rebuttal testimony and cross examination.[18] Following completion of the 90-day hearing period, parties should be provided 45 days to prepare initial and reply briefs, and the ALJ should be provided 30 days to write his or her decision. This approach would comply with the APA and help assure an adequate record on complex factual disputes associated with mandatory conditions, and at the same time it would provide for an expedited hearing process consistent with the intent of Congress.[19]

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[18] In trial-type hearings conducted by FERC the actual hearing itself is generally considered commenced the day that live testimony, cross-examination, and redirect begins. *See,for example, Key Span Energy Development Corporation v. New York Independent System Operator*, 103 FERC ¶ 63,016 (2003).

[19] We also request that the Departments clarify that if multiple hearings are requested in a particular proceeding and they are not consolidated, then such hearings should be held consecutively, rather than simultaneously, to avoid placing unreasonable burdens and costs on license parties. Furthermore, if multiple hearings are consolidated into one hearing, a hearing involving two Departments should be permitted to last up to 180 days and a hearing involving

Equal Consideration

Section 241(c) adds a new FPA section 33(a)(4) which provides that, in adopting section 4(e) conditions, the Departments shall "submit into the public record of the Commission proceeding with *any condition under section 4(e)* or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section" (emphasis added). Furthermore, the written statement "must demonstrate that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost and use; flood control; navigation; water supply; and air quality…."

Similarly, section 241(c) adds a new FPA section 33(b)(4) which provides that, in adopting section 18 prescriptions, the Departments shall "submit into the public record of the Commission proceeding with *any prescription under section 18* or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section" (emphasis added). Likewise, the written statement "must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost and use; flood control; navigation; water supply; and air quality…."

It is thus clear that Congress intended that all FPA section 4(e) conditions and section 18 prescriptions be subject to this "equal consideration" standard. Yet EEI and NHA are concerned that the Departments have misconstrued the "equal consideration" standard not to apply to all such conditions and prescriptions.

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three Departments be permitted to last up to 270 days. This flexibility will allow sufficient time for parties to develop an adequate factual record in a consolidated hearing where many complex issues are in dispute.

In recent correspondence between the Department of Commerce and certain license applicants, the Department indicated that it is under no obligation to apply the "equal consideration" standard to mandatory conditions unless an alternative is submitted pursuant to section 241.[20] The Departments should clarify that the equal consideration standard, including the issuance of a written statement demonstrating such consideration, applies to all FPA section 4(e) conditions and section 18 prescriptions, preliminary and final, in keeping with the requirements of section 241.

Hearing Should Be on Final Rather Than Preliminary Conditions

EEI and NHA understand that the Departments chose to provide for a trial-type hearing on preliminary conditions, instead of final (modified) conditions, in order to better "work within FERC's time frame and NEPA process."[21] Nevertheless, we believe that section 241 provides that the right to such a hearing applies to the final (modified) mandatory conditions that the Departments actually seek to impose on license applicants pursuant to sections 4(e) and 18 of the FPA, not preliminary conditions.

The statute provides for a hearing right "with respect to such conditions" issued under sections 4(e) and 18.[22] Specifically, section 241(a) provides the right for a hearing as an amendment to the conditioning clause of section 4(e), which specifies that licenses issued within a reservation "shall be subject to and contain such conditions as the Secretary … shall deem necessary for the adequate protection and utilization of such reservation." Similarly, section

[20] U.S. Department of Commerce Response to Motion For Rejection of Modified Prescription For Fishways Filed August 30, 2005, and Request For Rehearing of Staff's Letter Dated September 7, 2005, FERC Docket No. P-11810-000 (filed Oct. 13, 2005).
[21] Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. at 69,806.
[22] *See* 16 U.S.C. § 797(e) (2000); 16 U.S.C. § 811 (2000).

241(b) provides the right for a hearing as an amendment to the prescription provision of section 18, which specifies that licenses shall require "such fishways as may be prescribed by the Secretary." If Congress had intended the hearing to be conducted on preliminary conditions, it would have provided a right to a hearing "with respect to such preliminary conditions." It did not do so.

We also believe that it is not the best use of the resources of the Departments, license applicants, and other parties to undergo the intense demands associated with a trial-type hearing on preliminary conditions that are not necessarily the conditions the Departments will ultimately seek to impose on a license applicant. Disputed issues of material fact at the preliminary condition stage may be resolved or become moot without the need for a trial-type hearing as the Departments consult with applicants, FERC, and other participants in the licensing process, and as they consider and adopt alternatives. Requiring applicants and others to precipitate trial-type hearings at the preliminary condition stage ensures that resources will be used to engage in hearings and to address issues that may otherwise not be necessary, which would result in a waste of resources. On the other hand, knowing that trial-type hearings are available if such issues remain unresolved at the final condition stage will help to ensure that the Departments and licensing participants will actively seek to identify and resolve such disputes through consultation earlier in the licensing process, without the need for an actual hearing in each case to achieve this result, which would achieve a better use of the resources.[23]

In addition, we are concerned that holding the adversarial process of a trial-type hearing at the preliminary condition stage will stymie efforts to resolve license conditions through the

[23] When filing alternative conditions license applicants and other parties may raise disputed material facts related to such conditions. The Departments should give careful consideration to such disputed material facts when considering whether or not to accept an alternative condition, and thus further minimize the need for a subsequent trial-type hearing.

exchange of information and negotiations. Parties in proceedings with significant, unresolved issues may feel compelled to request a trial-type hearing at the preliminary condition stage in order to protect their legal position in the event a settlement has yet to be reached at the preliminary condition stage, which is a common occurrence. By contrast, providing for the right to a trial-type hearing on final conditions would make this procedure a "last resort," which would only be turned to by license applicants and other parties after all other avenues for resolving contested issues through settlement or other means were exhausted. The Departments would then be required to submit revised final conditions to FERC consistent with the ALJ's findings of fact, to the extent that the facts it previously relied on as support for its condition was found by the ALJ to be invalid.

Moreover, the final or modified conditions that are included in a license often differ dramatically from the preliminary conditions proposed by an agency. Therefore, providing for hearings on preliminary conditions would permit the Departments to avoid the scrutiny of a trial-type hearing because they could issue final license conditions that differ dramatically from those submitted at the preliminary condition stage and that are based on new material issues of fact. This would be a violation of the letter and spirit of section 241. If the Departments insist that hearings be held on preliminary conditions, the Departments must provide the applicant and other parties the right to a trial-type hearing on any final condition where: (1) the trial-type hearings held for preliminary conditions did not address disputed material facts underlying such final conditions; (2) the Department issued no preliminary condition, but reserved the right to submit mandatory conditions later in the licensing process; or (3) the Department adds modified conditions that were not included with its preliminary conditions and these conditions raise new disputed issues of material fact.

Burden of Proof

EEI and NHA agree that the standard of proof in a trial-type hearing conducted pursuant to the APA is a preponderance of the evidence. Moreover, pursuant to the APA, the burden of proof is assigned to "the proponent of a rule or order." 5 U.S.C. §556(d) (2000). In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Supreme Court held that the "burden of proof" set forth in the APA imposes the burden of persuasion on the proponent of a rule or order. In the mandatory conditioning context, the proponent is the Department that seeks to impose a condition on a license. *See also Garvey v. NTSB*, 190 F.3d 571, 579-80 (D.C. Cir. 1999).

In *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), the Supreme Court made clear that the conditioning agency is responsible for assembling the evidence in support of its condition. This is consistent with the APA requirement that the proponent of an order "has the burden of proof." Therefore, the Departments have the burden in these proceedings to show that a preponderance of the evidence supports any disputed material fact supporting their proposed conditions. This should be made clear in the rule.

Separation of Functions

EEI and NHA are concerned that the interim rule lacks clear provisions providing for the separation of investigative, prosecutorial, and adjudicative functions during the section 241 trial-type hearing process. The APA permits an agency to engage in all three functions, but it requires an agency to establish and maintain internal separation of those functions in a formal adjudication like the section 241 trial-type hearing. The APA provides that an employee "engaged in the performance of investigative or prosecuting functions," such as participation in a section 241 trial-type hearing, may not "participate or advise in the decision [or] recommended

decision" that is the subject of such a hearing. 5 U.S.C. § 554(d) (2000). Therefore, staff of the Departments involved in the preparation of conditions and the trial-type hearing may not participate in advising senior staff and officials on any decision with respect to such conditions.

Preexisting regulations reflect the need for a separation of functions. The Departments' regulations require separation of functions pursuant to the Fraud Civil Remedies Act of 1986.[24] Further, joint regulations for the Fish and Wildlife Service, National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration pertaining to the endangered species exemption process also mandate a separation of functions.[25] Specifically, these regulations provide:

> The Secretary shall not allow an agency employee or agent who participated in the endangered species consultation at issue or a factually related matter to participate or advise in a determination under this part except as witness or counsel in public proceedings.[26]

Similarly, the Departments should maintain a separation of functions during section 241 trial-type hearings.

Separation of agency functions is needed because it is inappropriate and unfair for a staffer that was an advocate in a trial-type hearing to then advise senior Departmental employees on how to decide the case. *See Amos Treat & Co., Inc. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962). For example, in *American Gen. Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979), the Court set aside a Federal Trade Commission decision because one Commissioner had previously participated in the case as FTC counsel. Therefore, the staffs of the Departments that participate

[24] *See* Separation of functions, 7 C.F.R. §1.315 (2005) (Agriculture); Separation of functions, 15 C.F.R. § 25.14 (2005) (Commerce); Separation of functions, 43 C.F.R. §35.14 (2005) (Interior).
[25] *See* Separation of functions and ex parte communications, 50 C.F.R. §452.07 (2005).
[26] *Id.* at 452.07(a)(2).

in the trial-type hearing must be barred from participating in decisions on alternative and/or modified conditions.

Unworkable Deadlines

The effectiveness of the rule and the benefits of section 241 are severely compromised by a series of extraordinarily tight deadlines. EEI and NHA appreciate the desire of the FERC and the Departments to conform the trial-type hearing to the ILP process schedule. However, some reasonable accommodation in the ILP schedule must be made in order to reflect Congress's mandate that a meaningful opportunity for a trial-type hearing, and a determination on the record, be provided. The Departments' desire to conform the hearing to a schedule established by FERC through the ILP regulation does not trump the statutory rights of license parties under section 241.[27]

In addition, EEI and NHA note that the licensing proceeding schedules issued by FERC are often modified in controversial proceedings. Oftentimes, this occurs due to reasons beyond the control of FERC, such as the lack of a Clean Water Act section 401 certification or an Endangered Species Act Biological Opinion. Alternatively, sometimes new and unexpected issues and/or information arise that require additional time-consuming NEPA analysis or Endangered Species Act consultation by FERC in order to comply with the law. While a key goal of the ILP is to minimize such delays, even if one assumes a dramatic reduction in delay due to the ILP, FERC may not meet its ILP prescribed deadlines in controversial and difficult cases, which are precisely the cases where trial-type hearings are likely to occur. Accordingly, it

[27] Moreover, it will be a number of years before any licensing proceeding utilizing the ILP will be far enough along in the licensing process for a trial-type hearing to be requested. All of the requests for a trial-type hearing and alternative conditions filed to date are associated with licensing proceedings using either the "alternative" or "traditional" licensing processes.

would be most unfortunate if licensees, other parties, and the ALJ endure great difficulties and burdens to complete the trial-type hearing process within an extremely tight timeframe only to find that FERC's relicensing NEPA schedule is delayed for many months beyond the ILP mandated schedule, and that all of the resulting effort was for naught.

EEI and NHA are concerned with several burdensome deadlines required by the interim final rule. License parties are only given 30 days to file alternative conditions and/or requests for a trial-type hearing. This is simply not enough time to review, analyze and respond to what are often hundreds, if not thousands, of pages of supporting materials associated with preliminary conditions, to develop alternative conditions that provide an "equivalent level of detail" to those proposed by the agency, to define and contest disputed issues of material fact, and to identify witnesses and exhibits.[28] Moreover, the 30-day limit also makes it difficult for the license applicant to attempt to resolve any contested issue informally because it leaves little or no time for such discussions. It is also inconsistent with FERC's ILP regulations, which provide parties 45 days to respond to conditions. At a minimum, the deadline for submitting alternatives and/or requests for hearings should be at least 45 days, or such longer time period as may be set by FERC for reply comments on conditions in a particular proceeding.

In addition, the 15-day deadline to intervene in the trial-type hearing process and to provide a response to the request for hearing is also too short. Fifteen days is not enough time to adequately develop a response to a hearing request, to provide an explanation of positions with regard to disputed issues of material fact, and to identify witnesses and exhibits. By contrast, the interim rule gives the Departments 45 days to answer any hearing requests. [29] It simply is unfair

[28] How do I propose an alternative?, 7 C.F.R. §1.671(b)(1); 43 C.F.R. § 45.71(b)(1); 50 C.F.R. § 221.71(b)(1).

[29] Another inequity in the interim rule is that it places no time limit within which the

and inappropriate for the Departments to give themselves a response period that is three times longer than that given to license parties. A better approach would be to give license parties 30 days to intervene and respond to requests for a trial-type hearing and to provide that the Departments' answer be made 30 days later.

Discovery Is Needlessly Delayed and Limited

The interim rule provides that discovery shall be obtained "[b]y agreement of the parties or with the permission of the ALJ...."[30] This approach needlessly limits and delays discovery in a way that compromises the parties' discovery rights. It also wastes valuable time that could be devoted to the conduct of the trial-type hearing itself or to the drafting of the ALJ's determination on the record.

While there may be proceedings where the parties agree to conduct discovery prior to an ALJ's authorization, there will undoubtedly be many proceedings where this does not occur. In those cases, discovery will not even begin until approximately three weeks into the proceeding, when the ALJ issues an order on discovery. Moreover, under the interim rule, all such discovery must be completed within 25 days of the pre-hearing conference, which means that the actual time available for discovery is about three weeks. Section 241 specifically provides for discovery, not that such discovery must be first authorized by the parties or the ALJ.

Departments must submit answers to trial-type hearing requests for pending proceedings where requests for hearings had to be filed by December 19, 2005. This should be corrected in a final rule. In addition, the Departments should be restricted to using existing information in the record as support for their answers to these requests. Otherwise, they are potentially provided with an unlimited period of time to supplement the record in response to a hearing request. This is highly prejudicial to the entity requesting the hearing.

[30] How may parties obtain discovery of information needed for the case?, 7 C.F.R. §1.641(a); 43 C.F.R. §45.41(a); 50 C.F.R. §221.41(a).

Consequently, there is no need for the Departments to take this approach. Instead, discovery should be authorized to begin immediately upon referral of a case to an ALJ.

FERC's regulations regarding discovery in proceedings set for hearing offer an alternative approach that expedites the discovery process and that EEI and NHA encourage the Departments to adopt. The FERC regulations provide that "participants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding," without prior authorization from a FERC ALJ. 18 C.F.R. § 385.402(a). Parties "may obtain discovery by data requests, written interrogatories, and requests for production of documents" as well as depositions. [31] *Id.* at 385.403(a). The ALJ becomes involved only if there are discovery disputes, and the ALJ may resolve such disputes through the means of a discovery conference. In addition, the ALJ will rule on motions to quash or compel discovery. EEI and NHA recommend that the Departments employ a similar discovery approach for section 241 trial-type hearings.

Electronic Filing and Service

The interim rule provides that documents may be filed by hand delivery, express mail, courier service, or facsimile. Electronic filing and service would be far more efficient and less costly. It would also expedite communications between parties and the Department, and amongst parties. Therefore, the Departments should establish a system for electronic filing of hearing requests, documents in hearing proceedings, and alternatives as soon as possible.

If necessary to accommodate Interior Department limitations on electronic communications associated with ongoing litigation, the Departments of Agriculture and Commerce should implement e-filing and service first. This would enable parties to utilize the

[31] An ALJ order is required for the deposition of non-parties or for the inspection of property.

benefits of e-filing when challenging conditions proposed by those two Departments.

At a minimum, the rules should require electronic filing at FERC of a request for trial-type hearing and all other documents filed in the proceeding. Typically, documents that are e-filed at FERC are posted on FERC's website the same day, which would provide more immediate notice to license parties that a trial-type hearing has been requested and of other actions in the trial-type hearing. While this is no substitute for direct service on license parties, it would provide a means for parties actively monitoring a licensing proceeding docket at FERC to check the FERC document to determine the status of a particular proceeding

Another problem with the interim rule is the requirement that certain documents not in the FERC record be attached to any request for a trial-type hearing, which then must be sent to all license parties by overnight mail. While complying with this requirement might be feasible in many proceedings, there will be cases where voluminous documents must be provided in support of a hearing request that are not in the record. EEI and NHA understand that one of our members incurred a cost of close of approximately $10,000 simply to pay for overnight service associated with a trial-type hearing request, due to the requirement that all relevant documents not in the FERC record be attached to service copies. In order to reduce costs, the Departments should provide entities requesting a trial-type hearing with the option of putting all such documents on a website, and of providing with their service copies the name of the site and instructions on how best to access it.

Exercise of Reserved Authority

EEI and NHA strongly support the provision of the interim rule that provides that the rule will apply in the future to the exercise of reserved mandatory conditioning authority. The Departments should clarify that this term applies in all instances where the Departments exercise

reserved authority, regardless of whether the license containing such reserved authority was issued before or after enactment of section 241.

Further, the rule does not specify the timetable for submitting an alternative condition, or a request for a trial-type hearing regarding the proposed exercise of reserved authority. Such clarification is needed because, unlike in a licensing proceeding where parties typically know that conditions will likely be filed, the exercise of reserved authority in the middle of a license term could be completely unexpected to the licensees and other parties. Therefore, such parties should be provided at least 120 days from the issuance of proposed license conditions to request a trial-type hearing and/or propose an alternative condition.

Arbitrary Page Limits

Various provisions of the interim final rule needlessly and arbitrarily constrict the page allowance for significant filings. In particular, the rule imposes a two-page limit for a description of each material disputed fact, an explanation of why the Department's factual assumptions are erroneous, the materiality of the factual dispute, and citations to supporting information. This is simply not enough space to adequately convey all of the information regarding disputed material facts that is required by the Departments in their regulations. The limit should, at a minimum, be increased to five pages per disputed factual issue. Similarly, the one-page limit regarding witnesses and exhibits as well as summaries of their testimony is too short. It should be increased to at least three pages. These pages limits would permit license parties to adequately respond to the Departments' requirements for information but would still provide for expedited review and response by the Departments.

V. CONCLUSION

EEI and NHA respectfully request that the Departments issue a revised final hydropower licensing rule no later than May 1, 2006 consistent with the comments herein.

Respectfully submitted,

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