U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

SOLICITATION OF PUBLIC COMMENTS

NOTICE OF PROPOSED RULEMAKING REGARDING PROCEDURES FOR REVIEW OF FISHWAY PRESCRIPTIONS DEVELOPED BY THE DEPARTMENT OF COMMERCE IN THE CONTEXT OF FEDERAL ENERGY REGULATORY HYDROPOWER LICENSES

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COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION (NHA) AND EDISON ELECTRIC INSTITUTE (EEI)

The National Oceanic Atmospheric Administration (NOAA) through the Department of Commerce (DOC or Department) issued on September 9, 2004 a Notice of Proposed Rulemaking (NOPR) regarding Procedures for Review of Mandatory Fishway Prescriptions in Federal Energy Regulatory Commission (FERC) Hydropower Licenses. The September 9, 2004 NOPR builds upon a Notice of Solicitation of Public Comments on a Proposed Policy for Review of Mandatory Conditions Developed by the Departments of Interior and Commerce in the Context of Hydropower Licensing, which was issued by Department of Interior (DOI) and DOC on December 13, 2000.

NHA and EEI are pleased to submit these comments on Commerce's September 9, 2004 NOPR. We appreciate the Department's willingness to further examine the role of its mandatory conditioning authority in the licensing process, as well as its request for comments in establishing an administrative appeals process for mandatory Federal Power Act (FPA) Section 18 fishway prescriptions crafted by NOAA.

NHA is the only national trade association committed exclusively to representing the interests of the 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 suppliers 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 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 15 years, and with many of those projects 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, 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. We have long called for an appeals process for mandatory prescriptions. An appeals process housed within the Department 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. Thus, we encourage DOC to follow the actions proposed by DOI with regard to establishing an administrative appeals process, as modified by our comments to the DOI NOPR on this issue. (See the DOI September 9, 2004 Notice Of Proposed Rulemaking (Federal Register, Vol. 69, No. 174, pages 54602-612) and our attached comments to DOI.)

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 who have mandatory conditioning authority bear a special burden in that regard. The National Marine Fisheries Service at NOAA should use the authorities under FPA Section 18 to craft mandatory fishway prescriptions (MFPs) 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 seeking input on an appeal process for Section 18 fishway prescriptions. Below is an overview of our comments. Detailed comments follow this summary.

- We recommend that the Department eliminate the Mandatory Conditions 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 Associations' proposed evidentiary hearing and administrative appeals processes (pages 3-4, 9-12 and attached NHA-EEI comments to DOI).

- 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 better and adds some value to the licensing process (pages 3-8).
- The Department should clarify the term "modified fishway prescription" under its proposal (page 4).
- The Department should not suspend settlement discussions to prepare its fishway prescriptions (page 5).
- The Department's proposed use of reserved authority is stated too broadly in the regulation (page 5-6).
- Those filing comments with the Department regarding fishway prescriptions should file the comments with FERC and all other participants in the licensing process (page 6).
- The Department should ensure that all supporting documents are filed with FERC, the license applicant, and other participating parties (page 6).
- The Department's proposal to address issues during the time FERC considers requests for rehearing is inappropriate (page 6).
- The Department should not modify agreements upon settlement conditions without agreement by the settling parties (page 7-8).
- The Department should establish and adopt standards and criteria to which its staff must adhere when crafting fishway prescriptions during the FERC licensing process, to ensure that the prescriptions are warranted, reasonable, and take into account impacts on project operations and other resources (pages 8-9).
- Consistent with H.R. 6, the Associations request the establishment of timely trial type hearings for disputed issues of material fact (pages 9-12).
- The Department should also adopt a policy-level administrative appeal process for fishway prescriptions modeled after that proposed by the DOI, but with improvements recommended by the Associations (page 12 and Attachment).

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

I. MANDATORY CONDITIONS REVIEW PROCESS (MCRP)

The DOC NOPR would codify in DOC regulations the existing MCRP process that is available for use by stakeholders in the licensing process if those stakeholders disagree with NOAA proposed mandatory fishway prescriptions (MFPs) submitted to FERC pursuant to FPA Section 18.

While our Associations appreciate the positive intent underlying the MCRP established by the Departments of Interior and Commerce 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 MFPs that already occurs in the licensing process prior to the submission of "preliminary" or "modified" MFPs.

For example, when the Department issues preliminary MFPs 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 prescriptions. Similarly, the new integrated licensing process (ILP) is based on intensive interaction and communication between applicants, other stakeholders, and DOC staff throughout the licensing process, including a specific opportunity for reply comments on preliminary MFPs. In addition, the more formalized traditional licensing process (TLP) provides applicants and other parties the opportunity to file comments on preliminary MFPs in the FERC docket and to request that the Department modify

such MFPs. Therefore, all three licensing processes provide ample opportunity for review of preliminary prescriptions that is not enhanced by the availability of the MCRP process.

In actual practice, when a license applicant files comments regarding preliminary MFPs 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 MFP 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

For example, in two licensing proceedings in which the applicants 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 DOC 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 MFPs using standards recommended in Section II of these comments, (3) creating an evidentiary trial type hearing for disputed issues of material fact described in Section III 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 these actions will significantly improve the quality of the Department's decisions regarding MFPs.

If despite our recommendation to the contrary, DOC chooses to retain the MCRP and to create regulations implementing it, NHA and EEI request the following improvements to the MCRP.

a. Section 221.2 Definitions.

The definition of "Modified fishway prescriptions" should be expanded to include "modified" MFPs that are not "modified based on comments." For example, NOAA may merely reaffirm a preliminary MFP, which then becomes a "modified" MFP. This clarification could even be more important if the Department adopts an evidentiary hearing procedure and an appeal process.

b. Section 221.3 Traditional or Integrated Licensing Process.

i. Subsection 221.3(a)(2)(i) - Filing of preliminary prescriptions

To expedite the licensing process and to help avoid later time conflicts, DOC should file preliminary MFPs within 60 days after the license applicant has filed its license application with FERC. In all three licensing processes,

DOC will be aware of the license applicant's proposed project, and DOC will have completed three years of consultation regarding the project.

Filing preliminary MFPs earlier would allow more time to implement the evidentiary hearing process recommended in Section III to these comments. Also, it should allow DOC to issue its final MFPs within 60 days after the FERC REA. This would in turn 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 DOC to craft appropriate preliminary MFPs is full participation in the licensing consultation process. Our members have noted that agency staff does not always consult actively with the license applicant and other parties. This lack of participation may lead to contested MFPs. We strongly urge the DOC to ensure that its staff has the appropriate level of funding to actively participate in the licensing process. Furthermore, DOC should consider limiting the right of its staff to submit MFPs if they have not adequately participated in the licensing process.

In addition, when NOAA files its preliminary MFPs, it should be required to also provide to the applicant the full administrative record on which it relied, not just a "reference to relevant documents already on file at FERC."

NOAA proposes to suspend settlement discussions to prepare preliminary MFPs after FERC issues its "REA" notice. It is inappropriate for NOAA to determine as a matter of rule or policy that negotiations should be suspended upon issuance of an REA notice. Many license applicants have successfully conducted negotiations through these periods and believe the decision to suspend negotiations should be left up to the discretion of the involved NOAA staff.

ii. Subsection 221.3(a)(2) (iii) and (iv)

This part of the proposed rule describes what NOAA will do if it decides to reserve authority, rather than provide MFPs to FERC. NOAA expressly states that the reservation would be "invoked during the term of the license." This appears to mean that the reservation will not be triggered before the license is issued, but after the time for filing MFPs has passed. However, we would like NOAA to confirm this understanding.

More importantly, the proposed broad reservation of authority is beyond DOC's authority and is generally inconsistent with the licensing process. FERC issues the REA notice when the Commission has determined that all necessary information has been filed or is available for it and the other involved federal and state agencies to perform their environmental analyses and make informed decisions. FERC, not DOC, decides what studies must be conducted by a license applicant. Moreover, FERC is not obligated to require studies requested by DOC. Instead, FERC has made it clear that it is it is up to other agencies to provide the record to support their conditions and prescriptions. *Curtis/Palmer Hydroelectric* Company, 92 FERC ¶ 61,037 at 61,089 (2000).

If DOC proposes to maintain this subsection, DOC must modify the proposed regulation to state that the Department will reserve MFP authority only if studies necessary to establishing the MFP either have been required by FERC, or are being undertaken by DOC, and are not complete. Furthermore, the regulations should indicate that the reserved authority will be used sparingly, only if absolutely necessary in light of information provided by the studies when completed. The regulation should also mention that the exercise of reserved authority will occur only after a final license order is issued, and then only after due process is used to trigger a reservation (i.e. new information, opportunity to comment, appeal process).

Also, to the extent that DOC does not submit timely MFPs, FERC regulations at 18 CFR §4.34 require that any subsequently filed MFPs be treated as advisory conditions pursuant to FPA Section 10(a). DOC should use these regulations as the opportunity to prohibit staff from using their reserved authority to create MFPs when the staff has not otherwise timely filed MFPs with FERC.

iii. Section 221.3(a)(3) - Comment Opportunity.

The proposed rule provides that NOAA will consider all comments filed. However, there appears to be no requirement that comments filed at NOAA will also be filed at FERC and served on the applicant. This should be clarified or modified to ensure that the applicant has immediate access to comments filed so that the applicant can respond (e.g., correct any errors in the comments filed). DOC should encourage electronic filing of the comments at FERC and electronic distribution of the comments to the applicant and other parties.

Also, as proposed, this section is missing an essential step to ensure that comments are appropriately addressed. We suggest that a provision be added 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.

iv. Section 221.3(b)(3) - Filing modified prescriptions.

The proposed rule provides that the administrative record supporting the modified MFPs is to be filed at FERC. Although this appears to be a comprehensive filing, DOC should clarify that at the time that NOAA issues its final prescriptions, NOAA will file all data and documents relating to its MFPs (i.e., the administrative record) with FERC and serve that record on the applicant.

v. Section 221.3(c) - Reconsideration of modified prescriptions – requests for rehearing.

DOC proposes that if any intervener files with FERC a request for rehearing that clearly identifies substantial issues with a NOAA MFP and

provides supportive evidence, NOAA will review those concerns. NOAA will send FERC a written response within 30 days, if possible. If FERC allowed parties an opportunity to file briefs or present oral argument, NOAA will file a brief. If more time is needed than 30 days to respond, NOAA will notify FERC of its reason for delay along with a schedule.

NOAA should specify the level of official who would provide comments to FERC regarding the request for rehearing. NOAA should confirm that an independent senior or policy-level agency official will review the material and provide comments. This would avoid the potential for conflicts by asking the same person or someone in the same NOAA office to review comments critical of the NOAA MFPs.

Additionally, the potential for a delayed response by NOAA could create significant problems. FERC's rehearing process allows the filing of requests for rehearing during a specified 30 day period. FERC is then required to take action within 30 days or the rehearing request is denied by operation of law. Thus, NOAA cannot rely upon a period greater than 30 days in which to prepare a response. While FERC could issue an order tolling the action, NOAA would have no advance knowledge of any tolling order and would essentially be gambling that FERC will issue a tolling order.

Also, FERC does not allow responses to rehearing requests. That is exactly what NOAA proposes. FERC addresses a request for rehearing based on the existing record. Under the NOAA proposal, NOAA could file additional evidence in the record upon which FERC could make a decision. Such a supplemental filing would deny the other licensing process participants due process as they would not have the opportunity to comment upon or challenge the NOAA submittal.

As we have explained in Section III below, an evidentiary hearing before an Administrative Law Judge is appropriate to add to this process, but not at the end of the FERC proceeding when the record and associated NEPA document are already complete. The FERC rehearing period is not the time to conduct a hearing. Rather, the goal of a hearing is to help ensure an adequate record for FERC decisions prior to license issuance. Consequently, we recommend that NOAA revise its rulemaking to provide for an evidentiary hearing on the MFPs prior to the time FERC issues a license order. We propose that NOAA delete section 221.3(c).

c. Section 221.4 Prescriptions submitted with an offer of settlement, whether in an Alternative Licensing Process (ALP) or otherwise.

NOAA should not be able to modify MFPs without the concurrence of the other settling parties, unless the settlement agreement provides otherwise. Furthermore, we oppose the policy in the rulemaking that NOAA will suspend settlement discussions when they are developing preliminary MFPs. Additionally, the rulemaking presumes that a settlement will be executed. While all participants in an Alternative Licensing Process may strive to reach a settlement that does not mean a settlement will be reached. Neither the

Traditional nor the Integrated Licensing Processes require a settlement among those interested in the licensing of a power project.

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

NHA and EEI 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, in developing MFPs, consider fundamental matters such as the actual and relative need for the MFPs, the likely success of the MFPs, and the impacts the MFPs 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 MFP authority by NOAA personnel to ensure that such authority is not exercised in an arbitrary and capricious manner. Thus, under the regulations proposed in the NOPR, NOAA 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 prescription that will provide only marginal benefits.

The establishment of standards and criteria to govern the exercise of MFP authority is necessary 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 MFPs undergo the public interest "balancing" required by the FPA. Because FERC must include Section 18 prescriptions in a license order, FERC cannot use its resource "balancing" review to reject or ameliorate MFPs that are unreasonable even though Section 10(a)(1) of the FPA 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, DOC should modify its proposed regulations to provide standards and criteria to govern its personnel's exercise of such authority.

In light of the above, we strongly recommend that DOC 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 MFPs. This could be in place of the proposed MCRP regulations, if DOC accepts our recommendation not to adopt those regulations.

"**§221._ Standards and Criteria for Conditions and Prescriptions**

(a) The Department will not submit any preliminary or final prescription to FERC unless the 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 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.

(c) The submissions provided to FERC by the Department shall include (1) a detailed description of how the 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.

In addition, if DOC eliminates the MCRP, as NHA and EEI have recommended, we recommend that the Department to 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.

III. DOC SHOULD ADOPT A SIMPLIFIED EVIDENTIARY HEARING PROCESS

A. An Expedited Hearing Process to Resolve Disputed Issues of Material Fact is Appropriate

Expedited hearings on focused, disputed issues of material fact should be instituted by the Department as part of the MFP development process. A material fact is one that "might affect the outcome of the suit under the governing law."[1] 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 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.

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,"[2] and "the disputed issues may not be resolved through an examination of written

[1] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).
[2] *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 664 (9th Cir. 1984).

submissions."[3] A trial-type hearing that provides for cross-examination is particularly appropriate when witness credibility is at issue.[4] 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."[5] "Cross-examination is the best known means in a civilized society for ascertaining the truth."[6] 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, 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."[7] Only an evidentiary hearing with discovery of documents and cross-examination can achieve full and true disclosure in these types of disputes.[8] The result of the trial type hearing should be a better record for DOC and FERC to make decisions.

An evidentiary hearing would not inevitably cause a 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 MFPs, and would aid the Department in ruling on any administrative appeal of modified MFPs. 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 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 any of the three FERC

[3] *Environmental Action v. FERC*, 996 F.2d 401, 413 (D. C. Cir. 1993).
[4] *Virginia Elec. & Power Co.*, 72 FERC ¶ 61,075, p. 61,394 (1995).
[5] *Tennessee Gas Pipeline Co*., 55 FERC ¶ 61,483, p. 62,625 (1991).
[6] *Transwestern Pipeline Co*., 50 FERC ¶ 63,021, p. 65,909 n.11 (1990).
[7] *Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1993).
[8] Administrative Procedure Act, 5 U.S.C. § 556(d) (2000). *See, e.g.,* 18 C.F.R. § 385.505 (2004).

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 MFPs 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 evidentiary hearing process 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 MFPs. 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 MFPs, with the option of a 30-day extension if faced with a voluminous record. 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 modified MFPs 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 MFPs are due.[9]

We wish to make clear that we are not proposing that an ALJ issue an initial decision, findings of fact or conclusions of law. The purpose of the hearing would be to create a record for the Department to make a more informed decision in issuing modified MFPs, and to facilitate the decision on any appeals of those modified MFPs. 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. The Department could use a FERC ALJ for this proceeding or 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 in place of the MCRP if DOC 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 DOC to conduct an evidentiary hearing.

§251._ 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 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 prescriptions raise disputed issues of material fact.

[9] 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.

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 prescriptions, though the party may request a 30-day extension of the deadline if faced with a voluminous record. The motion shall propose a schedule for DOC 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.

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 own administrative law judge 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.

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 administrative law judge, 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 prescriptions to FERC.

IV. DOC SHOULD ALSO ADOPT A POLICY-LEVEL ADMINISTRATIVE APPEAL PROCESS.

The Department should adopt a policy-level administrative appeal process modeled after that proposed by DOI in its counterpart proposed rule, but with the following improvements that we have recommended in our comments to DOI. Our comments on the DOI NOPR are attached for the Department's use in crafting an administrative appeal process. We recommend that the Department use as much of the DOI administrative appeal process as feasible. We believe that the administrative appeal processes should be similar to facilitate their timely and efficient use by license applicants and others in the licensing process.

CONCLUSION

Again, NHA and EEI 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.