UNITED STATES OF AMERICA
Before the
FOREST SERVICE

Notice, Comment and Appeal Procedures for Projects and Activities on National Forest System Lands	**)**	**Docket No. RIN 0596-AB89**

COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION

Pursuant to the Forest Service's notice of proposed rulemaking ("NOPR") regarding notice, comment, and appeal procedures for projects and activities on National Forest System Lands issued December 18, 2002, the National Hydropower Association ("NHA") submits the following comments.

I. Introduction

NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. Our members represent 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. NHA's membership consists of more than 140 organizations including; public utilities, investor owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants and attorneys.

The Association has a strong interest in the Forest Service rulemaking as it relates to decisions made within the scope of licensing hydropower projects affecting National Forest lands. Many of NHA's members operate projects on National Forest lands. The Forest Service participates in the relicensing of these projects and may impose mandatory conditions under the authority given to the Service in Section 4(e) of the Federal Power Act ("FPA"). As part of the process of setting 4(e) conditions, licensees are currently afforded an appeal of the decisions by

the Forest Service. NHA strongly supports an appeals mechanism for mandatory conditions and applauds the Service for currently providing a process.

However, NHA is very concerned that this rulemaking would eliminate appeals for 4(e) conditions. The Association understands that the Forest Service is also considering a policy change that would classify 4(e) conditions as "non-decisional" actions. The policy change would mean that submission of mandatory conditions to the Federal Energy Regulatory Commission ("FERC") would no longer be considered an act implementing Forest Service Policy. As a result, the Service would not conduct analysis under the National Energy Policy Act or issue a Record of Decision. More importantly, these changes would preclude a hydropower applicant's opportunity to appeal 4(e) conditions before the Forest Service.

Currently, of the federal resource agencies that participate in the hydro licensing process, only the Forest Service provides an administrative appeal of mandatory conditions. NHA views any attempt to completely eliminate the current process as a step in the wrong direction. It is ironic that the Service is considering eliminating its appeal process at a time when FERC is drafting a rule that may integrate just such appeals into the hydro licensing process, and when other federal resource agencies are developing their own appeal procedures.

While NHA favors retaining a Forest Service's administrative appeal process, the Association does believe that the Service can improve upon the current process. Because the licensing of projects requires coordination between the Service and FERC, the lead agency in the hydro licensing process, any appeals process must be well crafted and integrated with the licensing process. NHA is certain this can be accomplished, and done in a way that works for both licensees and the Forest Service.

NHA understands that the scope of this rulemaking is not limited solely to appeals of 4(e) mandatory conditions. However, as one of the many issues affected by this rulemaking, NHA wanted to be certain that the Service received comments specific to the current mandatory conditions appeal process and possible improvements. NHA's comments are divided into two parts. The first outlines the Association's general views on the need for an effective appeals process for mandatory conditions. The second part of the comments highlights and discusses NHA recommendations on specific sections contained in the proposed rule.

II. General Comments Regarding Appeals of Forest Service Decisions on 4(e) Mandatory Conditions

NHA would first like to commend the Forest Service for initiating this rulemaking on its notice, comment, and appeal procedures. The Association appreciates the opportunity to present the Service with recommendations that we believe will dramatically increase the effectiveness and efficiency of the current appeals process with regard to decisions made pursuant to the Service's Section 4(e) authority.

There exist procedural problems in conjunction with the appeals mechanism for mandatory conditions in the hydro licensing process. Currently, the appeals process is not well integrated into the licensing process. The courts have generally held that FERC does not have the authority to reject 4(e) conditions imposed by the Service. As such, the applicant's only recourse is it to challenge the conditions in the court of appeals. NHA has found that, in some instances, the Service has submitted conditions to FERC without supporting evidence. The result is that the record established for the court of appeals to review is sparse at best. Even when such conditions are appealed administratively, the Service appeal record may not become part of the FERC record for review by the court of appeals. This occurs because the Forest Service only allows appeals for "final" 4(e) conditions, which are typically submitted to FERC late in the licensing

process. As a result, FERC has issued licenses while administrative appeal proceedings are still pending at the Forest Service. This lack of opportunity to challenge the basis of the Service's mandatory conditions presents serious questions of fairness and due process.

NHA believes the Service can take straightforward steps to rectify these problems. To start, the Forest Service should provide studies and other evidence on which it bases its 4(e) decisions and submit this evidence as part of the record for any Forest Service appeal, and as part of the FERC record in the event of any subsequent appeal of the license to the court of appeals. Second, the Service should work in cooperation with FERC to address the timeline for the issuance of mandatory conditions. NHA is aware that FERC and the Forest Service are working on just such issues in the joint rulemaking on the hydro licensing process. It is expected that any integration issues will be worked out there. However, the Forest Service still needs to submit 4(e) conditions earlier in the process. Finally, the Service should provide expedited procedures within its administrative appeal regulations. NHA supports an effective, but also efficient, appeal mechanism. A mandatory conditions appeal process that causes excessive delays in the licensing process, regardless of the outcome, is not helpful to applicants.

In addition to these recommendations specific to the appeals process, NHA recommends the following with respect to the development of mandatory conditions as a whole.

1. Base Mandatory Conditions on Sound Science and Consider the Economic Impacts of Conditions

NHA believes that the Forest Service has considerable discretion, if not an obligation, to take into account the power cost impacts and impacts to third parties when setting mandatory conditions. Decisions also should be based on the best available data and scientific analysis, to ensure that licensee and ratepayer resources are spent in achieving meaningful environmental

benefits. The Service should adopt express policies and rules for consideration of power cost impacts and for basing decisions on sound science.

2. Consult and Cooperate with the Commission in Setting Mandatory Conditions

The Commission consults with the Service under Section 10(j) of the FPA. The Service has not typically sought or considered the Commission's views when setting its mandatory conditions. As the agency with overall licensing responsibility and the mandate to balance environmental and economic factors in the public interest, the Commission's views should be important in informing the Forest Service's decisions. The Service should adopt rules or policies providing for consultation with the Commission. Such a consultation meeting is suggested in the Interagency Task Force Report on NEPA Procedures in FERC Hydroelectric Licensing (issued on May 22, 2000).

3. Adopt the Commission's Policy on the Environmental Baseline at Relicensing

The Forest Service should acknowledge and adopt the Commission's policy on environmental baseline at relicensing as upheld by the courts. They should refrain from attempting to evade this policy by requiring studies of pre-project conditions and using a pre-project or "without project" baseline as the benchmark for relicensing measures.

If adopted, NHA believes these suggestions, in conjunction with revisions adopted by FERC in the hydro licensing rulemaking, would go a long way to improving the development of mandatory conditions at the Forest Service.

III. Specific Section-by-Section Comments on NOPR Proposals

In addition to NHA's support of an appeal mechanism for mandatory conditions, the Association has the following section-specific comments on revisions proposed in the rulemaking.

1) Section 215.1(b) – Purpose and Scope

The proposed scope of the regulations unintentionally creates a gap in the appeals process that would preclude the public from fully reviewing and potentially appealing the Decision documentation. The proposed regulations would limit the appeal process to (i) those persons who submit comments during the comment period, and (ii) issues raised by the appellant in their comments. (See also proposed section 215.7(a)(2)(iv).) In most instances, this procedure is fair. However, if the Service materially changes the final decision documents, the public will not have had the opportunity to provide comments on that revision. This may be problematic in the case of persons who may not have commented on a particular issue – or filed comments in the first place – as they were in agreement with the draft decision document. One potential remedy would be to allow persons to file an appeal on new or materially revised issues present in the final decision document unless the Service agrees to reissue the draft decision document or a supplement to the draft decision document.

2) 215.2 Definitions

<u>Appeal Period</u>

The appeal period begins upon legal publication of a decision. The Service chooses a single newspaper in each region for publication of a notice about the decision. Unfortunately, persons interested in knowing when an appeal period begins may not have access to the chosen publication. In order to ensure that any and all potential appellants are given the opportunity to

respond, NHA suggests that the Service use its website to list its decisions and notice dates, as other federal agencies do.

Comment Period

NHA reiterates its concern that commenters may not be able to meet the 30 day deadline when publication of the notice is limited to a single regional newspaper.

Project and activities implementing a land and resource management plan

NHA is concerned that the aforementioned term and its definition are incongruous and would limit appeals solely to Forest Service projects and activities. The term itself implies that only projects and activities that implement land and resource management plans ("LRMP") are covered. NHA believes that only Forest Service projects or activities actually "implement" an LRMP. Private projects normally do not "implement" an LRMP, but rather are reviewed by the Service to ensure the project is consistent with the LRMP. Thus, under this reading, appeals would not be allowed for private projects.

The definition of the term, however, seems to broadens the scope of decisions as it makes no mention of LMRP implementation. The definition itself reads, "Site-specific projects and activities, including those for research, on National Forest System lands that are approved in a Decision Notice or Record of Decision by a Forest Service official." Perhaps the Service intends Part 215 to cover only Service projects and activities and intends for 18 CFR Part 251 to apply to private party projects. If that is the case, NHA believes that the submittal to FERC of 4(e) conditions would be covered by Part 251. Yet, under current practice the Service Decision Notices for 4(e) conditions only allow appeals pursuant to Part 215. The Forest Service should clearly state which process applies to appeals of conditions proposed under section 4(e) of the FPA.

NHA views this definition as critical to understanding and implementing the Part 215 regulations. Therefore, the Association strongly recommends that the Service clarify the definition as either including or excluding projects and actions to be taken by private parties on forest lands.

3) 215.3 – Proposed actions subject to legal notice and opportunity to comment

Section 215.3(a) presents the same issues as the prior section. Subsections (b) and (d) each appear limited to Forest Service actions only. Subsection (c), proposed revision of an EA, could apply equally to Service actions or private party actions, depending upon what the original EA covered. Taken together, all the subsections do not clearly indicate if the regulation is to cover private party actions. The same concerns are also raised by the proposed language in Section 215.10.

4) 215.5(b)(3) – Legal notice of proposed action and opportunity to comment

For the same reasons as stated above, NHA believes that the Service should not rely solely on a single regional newspaper as the means for publishing notices. The Association recommends that this subsection be amended to provide for publishing legal notices on the Service's website.

5) 215.5(c)(2) – Legal notice of proposed action and opportunity to comment

NHA supports the Service's proposal to allow electronically filed comments. However, the requirement regarding the potential need for signature verification is unclear. The proposed regulation states: "Verification of the author(s) may be necessary for electronically submitted comments." NHA agrees that signature verification is appropriate. However, to avoid potential conflicts, the Forest Service should set forth the verification process in the regulations now. One

possible method would be to require a commenter to mail the signed signature page (along with the letter's cover page) within one week of submitting electronically filed comments.

6) 215.5(c)(3) – Legal notice of proposed action and opportunity to comment

This subsection allows for the submittal of oral comments. While NHA applauds the Service for giving the public opportunities to make comments, the use of oral comments, especially if not done in person, is subject to even greater potential for abuse than electronically submitted comments. In addition to being unable to verify who has provided comments during a telephone conversation, the scope of the comments and the specific issues raised will not be clearly set forth for the public and Service to see. Furthermore, if appeals are limited to issues raised in comments, the recollection of the persons giving and receiving oral comments may differ, leading to an unresolveable dispute regarding which issues were raised in the oral comments. Consequently, NHA recommends that the Service not consider oral comments as a basis for appeal standing.

7) 215.12 – Who May Appeal

Subsection 215.12(c) provides that federal agencies may not appeal a Service Decision document. While not taking a position on this provision, NHA notes that the Service and other federal agencies have strongly encouraged FERC to allow other federal agencies to file a request for rehearing on FERC orders issuing new hydroelectric licenses. FERC currently does not allow other federal agencies to intervene if those agencies were cooperating agencies in the FERC's National Environmental Policy Act environmental review process. NHA questions why the Service would push for the opportunity for administrative review at FERC, but deny other federal agencies the opportunity to seek administrative review of Service decisions.

8) 215.14 – Appeal Time Period and Process

Subsection 215.14(e)(2) provides that if the Appeal Deciding Officer does not issue a written decision within 45 days following the appeal–filing period, the Responsible Officer's decision will be deemed the final agency action. NHA believes that such a process essentially denies the public the right to an effective administrative appeal process and suggests the Service consider solutions to this problem.

One such solution could be to create an Administrative Law Judge Department to hear appeals, similar to the Bureau of Land Management administrative appeals process. Having employees dedicated to handling appeals and not burdened by other responsibilities should help the Service meet its 45 day deadline.

Another solution may be deleting the position of an Appeal Reviewing Officer from the process. The Appeal Reviewing Officer, whose responsibilities are set forth in Section 215.20, does not add significant value. The Appeal Deciding Officer should review the record, seek answers to outstanding questions, and draft the decision. The Appeal Reviewing Officers merely adds an extra step to the process. Reducing this role may shorten the appeal process and allow the Service to meet its deadlines.

Finally, NHA recommends that the Appeal Deciding Officer not be a person in a position that is likely to want to accommodate decisions made by the Responsible Officer due to either working relationships or lines of authority. The Appeal Deciding Officer must have some independence.

9) 215.20 – Appeal Reviewing Officer

For the reasons discussed in the section immediately above, NHA suggests the role of the Appeal Reviewing Officer be deleted.

IV. CONCLUSION

Again, the National Hydropower Association commends the Commission for initiating this rulemaking proceeding and appreciates this opportunity to present its comments. We look forward to future opportunities to work with the Forest Service to develop a mandatory conditions appeal process that is both effective and efficient

Respectfully submitted,

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