

Questions for the Record Senator Craig

Question 1: What are the agencies' plans to revise and finalize the Interim Final Rule?

Answer: When the rules were published on November 17, 2005, the agencies indicated they would consider the public comments that were received and their initial experience in implementing the rules and consider issuing Final Rules within approximately 18 months. That remains our intent. The agencies have received comments through the Interim Final Rule and are currently reviewing them.

Question 2: In your opinion, once the 15 "transition projects" are addressed, will we settle into a process that works within FERC's timelines?

Answer: We believe that our major workload challenge is occurring in this initial period of implementation, which will carry forward through most of Calendar Year 2007. This is because we are not only implementing a new process, but also: (a) addressing the transition projects; (b) managing two high profile, complicated cases, namely Hells Canyon and Klamath; and (c) considering (next year) possible changes to the rule. After this initial period, workloads may be at more manageable levels. Historically, approximately 1/4 to 1/3 of all relicensings have included conditions or prescriptions from any of the three resource agencies and a far lesser number have conditions from more than one agency. It is expected that parties will request EPA processes in the majority of those re-licensing proceedings, but we will not be dealing with pending proceedings and considering whether to revise the rules. At any given time, the need to address one or more difficult cases may create workload issues, but that should not be typical after the initial implementation period.

Question 3: At the hearing, I asked FERC to report back to the Committee in about six months regarding the progress that is being made in implementing the new hydropower licensing procedures. Will DOI work with FERC on this progress report?

Answer: DOI, DOC, and USDA will be pleased to provide FERC with any assistance it requests.

Questions for the Record Senator Bingaman

Question 1: Mr. Robinson's testimony lists several instances where the resource agencies have withdrawn or modified conditions and prescriptions, and he attributes this at least in part to the new law. Can you explain why conditions and prescriptions have been withdrawn or modified in the examples given by Mr. Robinson?

Answer: Interior has three cases where section 4(e) conditions or section 18 prescriptions were modified after the deadline for requesting Energy Policy Act processes.

First, in the Rocky Reach Project (Washington) relicensing, the Chelan Public Utility District (PUD) filed alternative section 18 prescriptions on December 19, 2005. At that time, however, the Chelan PUD, Interior, through the FWS, and other parties to the FERC proceeding were close to executing a comprehensive settlement to resolve outstanding issues in the relicensing. On March 20, 2006, the Chelan PUD filed the fully executed settlement agreement with FERC, and on March 27, 2006, the Chelan PUD withdrew its alternatives. This reflects Interior's continuing policy to seek to resolve resource issues in FERC license proceedings through settlement. The Energy Policy Act had no bearing on Interior's decision to enter into the settlement.

Second, in the Priest Rapids Project (Washington) relicensing, the Grant PUD requested a trial-type hearing regarding section 4(e) conditions filed by Interior on behalf of the Bureau of Reclamation (BOR), and section 18 prescriptions filed on behalf on the FWS on December 19, 2005. After several discussions with Grant PUD, the BOR decided to withdraw its section 4(e) conditions and, in their place, file section 10(a) conditions. The BOR's section 10(a) recommendations are very similar to its section 4(e) conditions, and the BOR believes its recommendations are in the public interest and will be supported by FERC. For those reasons, the BOR did not see the need to go through a trial-type hearing.

Third, in the Hells Canyon Project (Idaho), the Idaho Power Company requested a trial-type hearing regarding preliminary section 4(e) conditions filed by Interior on behalf of the BLM on March 29, 2006. During the pre-hearing phase of the trial-type hearing, IPC and the BLM agreed on terms to resolve IPC's concerns with the BLM's preliminary conditions, pursuant to which, on May 15, 2006, the BLM filed with FERC revised preliminary section 4(e) conditions. On May 16, 2006, IPC withdrew its hearing request.

The USDA Forest Service has agreed to revise or modify section 4(e) conditions in two license proceedings since the deadline for requesting EAct processes. First, in the Boulder Creek Hydroelectric Project license proceeding, FERC No. 2219, the USDA received a hearing request on December 19, 2005, from Garkane Energy Cooperative (Utah), the licensee/applicant. The request pertained to one of the Section 4(e) conditions that the Forest Service had submitted to FERC in the Boulder Creek Project licensing

proceeding. In April 2006, Garkane and the Forest Service reached a settlement that provided for a modification by the Forest Service of the disputed condition and new protection, mitigation, and enhancement measures to be added to Garkane's license proposal.

Second, in the Hells Canyon Project (Idaho), the Idaho Power Company (IPC) requested a trial-type hearing regarding preliminary section 4(e) conditions filed by the USDA Forest Service. During the pre-hearing phase of the trial-type hearing, IPC and the Forest Service agreed on terms to resolve issues regarding nine of ten conditions at issue in OPC's hearing request. On May 9, 2006, the Forest Service filed with FERC revised preliminary section 4(e) conditions covering the nine conditions resolved.

Regarding the National Oceanic and Atmospheric Administration (NOAA) prescriptions referred to in Mr. Robinson's testimony (Upper North Fork Feather River, project no. 2105, and Poe, project no. 2107, both in California), the agency amended previously filed section 18 prescriptions on December 12, 2005, because it was reasonably certain that a watershed-scale settlement agreement would be reached that would provide greater protections for Central Valley spring-run Chinook salmon and Central Valley steelhead. The settlement was signed earlier this year.

Question 1a: Are you in fact “rethinking your approach” to conditioning projects, as the NHA testimony suggests? If so, in what manner?

Answer: The new statute underscored the need to carefully formulate and justify conditions and prescriptions. Given that conditions and prescriptions may generate hearings on contested material facts, agencies are taking care to make certain that the factual basis of their determinations is especially clear. However, this does not mean that agencies are or will be reluctant to propose conditions and prescriptions where warranted. The agencies continue to participate in FERC license proceedings in accordance with their statutory and trust responsibilities. This includes, as applicable, determining conditions necessary to adequately protect and utilize reservations, and to prescribe fishways at projects where the Secretary deems them to be necessary and appropriate. As in the past, agencies must support those decisions with substantial evidence, and must provide a clear rationale for their conditions and prescriptions. We realize that we must marshal the facts and documents supporting conditions and prescriptions in a manner that anticipates factual challenges before an Administrative Law Judge.

Question 1b: How can we be assured that the hydroelectric relicensing provisions are being implemented in a manner that does not undermine resource protection?

Answer: As noted in the answer to the previous question, the new statutory requirements have not made agencies reluctant to propose conditions or prescriptions where warranted. As Mr. Finfer noted at the hearing, the Departments of Commerce and the Interior formulated prescriptions and conditions for the Klamath Project under the new

requirements, yet their proposed prescriptions and conditions address the full range of resource protection issues.

Question 2: The Administration estimates that the new law will result in the request of at least 47 hearings and the proposal of 351 alternative conditions and prescriptions per year, with a cost to the Federal Government of \$5 million. Do the resource agencies have necessary funding and staff to undertake the hearings and evaluate the alternative conditions and prescriptions as required by the new provisions?

Answer: The cited workload estimate was provided when the rule was published on November 17, 2005, in order to comply with the requirements of the Paperwork Reduction Act. However, it was an initial estimate that applied only to the first year of implementation, and a new estimate was required. Further, the initial estimate had to be provided before the submittal of hearings and alternative requests for the “transition” projects. We recently completed a draft revision of the initial estimate that reflects the submittals for transition projects. It projects a reduction in workload of approximately 2/3 from the initial estimate provided with the rule. Notice of the proposed revision to the workload estimate was published in the Federal Register on May 3, 2006.

We believe that our major workload challenge is occurring in this initial period of implementation, which will carry forward through most of Calendar Year 2007. This is because we are not only implementing a new process, but also: (a) addressing the transition projects; (b) managing two high profile, complicated cases, namely Hells Canyon and Klamath; and (c) considering (next year) possible changes to the rule.

After this initial period, however, workloads may be at more manageable levels. Historically, approximately 1/4 to 1/3 of all relicensings have included conditions or prescriptions from any of the three resource agencies and a far lesser number have conditions from more than one agency. It is expected that parties will request EPA processes in the majority of those re-licensing proceedings, but we will not be dealing with pending proceedings and considering whether to revise the rule. At any given time, of course, the need to address one or more difficult cases may create workload issues, but that should not be a normal occurrence after the initial implementation period. We believe that agency budgets, when both base funding and the increases requested in the FY 2007 President’s Budget (as noted in the answer to Question 2a below) are taken into account, will prove adequate to address this workload.

It should be noted that the \$5 million figure cited in the question was not cited as a measure of Federal costs but instead costs to the public participants in the process.

Question 2a: Can we expect to see this level of funding requested in the President’s Budget for future fiscal years? Was this amount requested for FY 2007? If not, why not?

Answer: The Department of the Interior has requested an increase of \$400,000 for Fiscal Year 2007 to address the anticipated hearings workload. The Department of Commerce

has requested \$2.8 million to augment technical and legal capabilities and to pay the U.S. Coast Guard, which is providing Administrative Law Judges to conduct hearings. The Forest Service did not request additional funding

We believe that the above agency budgets will prove adequate to implement the new requirements. As noted in the answer to the previous question, we have provided revised workload estimates that are reduced from those that were provided when the rules were published, and believe that workloads are likely to prove more manageable after the initial implementation period.

Question 3: What has been the average time that it takes the Department of the Interior's Office of Hearings and Appeals to complete an on-the-record hearing? How many cases are currently on the docket? With respect to these pending cases, what is the average length of time between filing of a notice of appeal and the commencement of an evidentiary hearing?

Answer: For on-the-record hearing cases concluded during FY 2005 and the first 7 months of FY 2006, the average length of time from receipt of the case by the Office of Hearings and Appeals (OHA) to case completion was 17 months. At the end of April 2006, OHA had 306 on-the-record hearing cases on its docket, of which 33 had had a hearing. The average length of time from receipt of the case to the commencement of the evidentiary hearing in those cases was 22 months. This data is not for cases filed after enactment of the EPAct.

Question 3a: Will the hydro hearings impact the hearing dockets at the resource agencies in a manner that will delay hearings on other matters? For example, will hearings on oil and gas, mining and grazing matters at the Department of the Interior be delayed because of the hydro provisions? Will the hydro appeals take precedence over other matters?

Answer: Because of the tight statutory time frame for the resource agencies to complete hydropower licensing hearings, these cases may take precedence over other matters. In FY 2006, Interior may have to delay hearings on certain matters (e.g., mining and grazing issues) to conduct hydropower licensing hearings. As noted in the answer to Question 2a, Interior has requested funding in FY 2007 for an additional Administrative Law Judge (ALJ) and staff attorney to assist with these cases, in order to minimize any impact on other cases. NOAA's hydropower hearings are not expected to have impacts on the U.S. Coast Guard's ability to conduct hearings for other programs within the Department of Commerce or other Departments. The U.S. Coast Guard's ALJ Office is adequately staffed to handle the workloads and to meet the timeframes specified in the regulation. The Department of Agriculture (Forest Service) also believes it is adequately staffed to address the anticipated workload.

Question 3b: You mention that USDA has made ALJ's available to conduct these hearings. What types of cases have these ALJ's been handling? Do these ALJ's have expertise in this subject matter?

Answer: The USDA Office of Administrative Law Judges has wide ranging expertise in areas that include making findings of fact on natural resource issues such as those that may be raised in these proceedings.

Question 3c: I understand from your testimony that Coast Guard ALJ's will be handling the NOAA fishway appeals. Do these ALJ's have expertise in this subject matter?

Answer: The U.S. Coast Guard ALJ Office has authority under the U.S. Code to hear adjudicatory matters on behalf of NOAA when one of its marine resource statutes or regulations is implicated. The Coast Guard ALJ's have many years of experience dealing with procedural regulations such as the regulations the Departments promulgated (e.g., the NOAA fisheries enforcement procedural regulations at 15 USC 904). NOAA has been working closely with the Coast Guard to alert them to the rules, participate in training for their ALJs and inform them about new developments.

Question 3d: What is the legal basis for allowing an ALJ from one Department to make determinations for the Secretary of another Department (for example, for a Coast Guard or USDA ALJ to make determinations that bind the Secretary of the Interior)?

Answer: Section 241 of the Energy Policy Act of 2005 (EPA) gives parties to a hydropower license proceeding the right to "a determination on the record, after opportunity for an agency trial-type hearing . . ." The agencies have interpreted this language as making applicable to hydropower licensing hearings the adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 554 *et seq.* Under 5 U.S.C. §§ 556(b)(3), 557(b), an agency is authorized by the APA to use any duly appointed ALJ to take evidence and render an initial decision, which can become the decision of the agency without further proceedings if the agency so provides by rule. In the interim final rules on hydropower licensing hearings, each resource agency authorized ALJs employed or used by another resource agency to render final decisions on disputed issues of material fact for both agencies in consolidated cases. In addition, the Economy Act, 31 U.S.C. § 1535, authorizes an agency to procure services from another agency pursuant to a reimbursable agreement. Since the APA allows an agency to use any duly appointed ALJ to preside at a trial-type hearing, the agencies can use Economy Act agreements to procure adjudication services from each other's ALJs where doing so will conserve resources for both the agencies and the parties and will avoid the risk of inconsistent results on common issues of material fact.

Question 4: Section 241 of the Energy Policy Act requires the resource agencies to submit into the record of the FERC proceeding a written statement demonstrating that in accepting conditions and prescriptions and rejecting others the Secretary gave equal consideration to the effects of the condition on energy supply, distribution, cost, and use;

flood control; navigation; water supply; air quality; and preservation of other aspects of environmental quality. Does the Department have expertise in these areas? What information do you plan to rely on in considering these factors? Please describe how you plan to carry out this procedural requirement. Will this requirement cause new delays?

Answer: The agencies will rely on the record of the entire licensing proceeding to prepare the statement. In doing so, it is expected that they will draw on interdisciplinary expertise including, as applicable, attorneys, biologists, economists and other professionals. They will also have the option to acquire this expertise from other departments or, if appropriate and feasible, to seek assistance from consultants. The process has been designed to fit within the time frames of FERC's rules, so we do not expect it to result in delays although, as noted in the answer to Question 2, the initial period of implementation will be especially challenging.

Question 5: Why were the rules implementing the hydroelectric relicensing provisions of EPAct issued as interim final rules without opportunity for public comment? Please provide the legal justification. Were persons outside of the Administration consulted regarding these rules? If so, who?

Answer: As noted when the rule was published, we believe that the fact that the rules are procedural and interpretative, coupled with Congress's express direction to put them in place within 90 days of enactment, necessitated their publication as interim final rules, a determination that is consistent with the Administrative Procedure Act (sections 553(b)(A) and (B)). However, the rules were published with a request for comments, and we have indicated that we will consider these comments and our initial experience in implementing the rules in order to make a determination on issuing a final rule next year. During the period in which the rules were under preparation, various agency staff held a small number of meetings with outside parties, most notably the National Hydropower Association and the Hydropower Reform Coalition. The purpose of these meetings was to hear the general views of these parties, but the agencies did not share drafts of the rules.

Question 6: Will implementation of the hydroelectric relicensing provisions cause new delays?

Answer: As noted in the answer to Question 2a, we believe that our major workload challenge is occurring in this initial period of implementation, which will carry forward through most of Calendar Year 2007. This is because we are not only implementing a new process, but also: (a) addressing the transition projects; (b) managing two high profile, complicated cases, namely Hells Canyon and Klamath; and (c) considering (next year) possible changes to the rule.

After this initial period, workloads may be at more manageable levels. Historically, approximately 1/4 to 1/3 of all relicensings have included conditions or prescriptions from any of the three resource agencies and a far lesser number have conditions from

more than one agency. It is expected that parties will request EAct processes in the majority of those re-licensing proceedings, but we will not be dealing with pending proceedings and considering whether to revise the rule. At any given time, the need to address one or more difficult cases may create workload issues, but that should not be typical after the initial implementation period.

Question 7: Who has the burden of proof in the trial-type hearings required by section 241 of EAct? Has this issue been raised in any appeals proceedings to date? Do you expect that the ALJ's will be consistent in their interpretation of who has the burden of proof?

Answer: The trial-type hearings required by section 241 of EAct are conducted in accordance with the adjudication provisions of the APA. These provisions include 5 U.S.C. § 556(d), which states, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Since the EAct itself does not provide a burden of proof, the APA default burden of proof applies. The issue of which party in a hydropower licensing hearing is the "proponent" of an order has been raised in *Idaho Power Co. v. Bureau of Land Management*, No. DCHD-2006-01 (OHA). On May 3, 2006, the ALJ in that case issued an order determining that Idaho Power Company, as the party that requested the hearing, was the proponent and therefore had the burden of proof. On May 31, the USDA ALJ issued a similar ruling in the Hells Canyon proceeding involving Idaho Power and the Forest Service. While the agencies cannot predict whether other ALJs will rule the same way if the issue is presented to them, the agencies requested comments on this issue when they issued interim final rules, and expect to address it in their revised final rules, which will thereafter ensure consistency among all the ALJs handling these cases.

Question 8: Please provide for the record for each proceeding in which an appeal has been requested: (1) the conditions and prescriptions that are the subject of appeal; (2) the material facts that are alleged to be in dispute; (3) resolution, if any, of whether the fact is material; and (4) resolution, if any, of the appeal. What definition of "material fact" is to be used by the ALJ's?

Answer: Since publishing the Interim Final Rules, Interior has received hearing requests in seven FERC license proceedings: Hells Canyon, Klamath, Box Canyon, Condit, Priest Rapids, Merrimack, and Bar Mills. The Forest Service (USDA) has received hearing requests in eight proceedings: Hells Canyon, Boulder Creek, Kern Canyon, Pitt River 3-4&5, Upper North Fork Feather River, Poe, Stanislaus-Spring Gap, and Portal. The Department of Commerce (National Marine Fisheries Service) has received hearing requests in three proceedings: Bar Mills, Condit, and Klamath.

In response to questions 8(1) and 8(2), we have provided CDs that include, for each case above, the agency's filing (or FERC license in Box Canyon) that includes the pertinent conditions or prescriptions, as well as the hearing requests, which include the alleged issues of material fact. In addition, we have (on separate pages for each project) provided narratives that identify the hearing requests in response to questions 8(2) and narratives

that respond to questions 8(3) and 8(4). In the case of the Hells Canyon Complex, we have also provided a supplemental CD with the revised agency filings by Interior and USDA (Forest Service) which are referenced in their respective narratives.

The interim final rule defines material fact as "a fact that, if proved, may affect a Department's decision whether to affirm, modify or withdraw any preliminary condition or prescription."

Department of the Interior

Hells Canyon Complex

(2) On January 26, 2006, Interior filed preliminary section 4(e) conditions on behalf of the BLM and preliminary section 18 prescriptions on behalf of the FWS. On February 27, 2006, the Idaho Power Company (IPC) filed a hearing request regarding the BLM's section 4(e) conditions.

(3) On May 4, 2006, the ALJ in this proceeding dismissed three issues (11.1, 12.2, and 19.2) for lack of jurisdiction without ruling specifically on materiality. These were issues that the BLM had previously stipulated to in its answer. In that same order, the ALJ replaced IPC's six remaining issues with 60 new issues drafted by the ALJ. It appears that IPC's original issues have been dismissed, but the ALJ did not make specific rulings as to whether they were in fact material, factual, or disputed. The ALJ reserved the right to narrow or reduce his list of 60 issues following discovery. The ALJ apparently relied on the regulation's definition of "material fact," 43 C.F.R. § 45.2, and did not further define that term.

(4) During the pre-hearing phase of the trial-type hearing, IPC and the BLM agreed on terms to resolve IPC's issues regarding the BLM's preliminary conditions, pursuant to which, on May 15, 2006, the BLM filed revised preliminary conditions with FERC. On May 16, 2006, the IPC withdrew its hearing request.

Department of the Interior

Klamath Project

(2) On March 29, 2006, Interior filed preliminary section 4(e) conditions on behalf of the BOR and BLM, as well as preliminary section 18 prescriptions on behalf of the FWS. On April 28, 2006, Interior received a hearing request from PacifiCorp asserting several issues of material fact pertaining to the BOR's section 4(e) conditions, the BLM's section 4(e) conditions, and the FWS' section 18 prescriptions. On April 27, 2006, the Pacific Coast Federation of Fisherman Association and the Institute for Fisheries Resources filed a joint hearing request alleging issues of material fact regarding the BOR's section 4(e) conditions.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact," which is set forth at 43 C.F.R. § 45.2 and clarified in the preamble of the Interim Final Rules.

(4) These hearing requests remain pending.

Department of the Interior

Box Canyon Project

(2) On July 11, 2005, FERC issued a license to the Public Utility District No. 1 of Pend Oreille County (PUD). In that license, FERC included section 4(e) conditions filed by Interior on behalf of the BIA, as well as section 18 prescriptions filed by Interior on behalf of the FWS. We have included the BIA's section 4(e) conditions and the FWS's section 18 prescriptions as they appear in Appendices A and C of the July 11, 2005 license. On December 19, 2005, the PUD and Ponderay Newsprint Company (PNC) each filed a request for a trial-type hearing regarding the BIA's section 4(e) conditions and FWS's section 18 prescriptions.

(3) The hearing requests were rejected on jurisdictional grounds (see below), so materiality was not addressed.

(4) On July 11, 2005, FERC issued a license to the PUD for the Box Canyon Project, nearly a month prior to enactment of the EPAct and over four months prior to publication of the Interim Final Rules. Hence, both the PUD's and PNC's hearing requests fell outside the scope of the EPAct and the Interim Final Rules, and, consequently, Interior rejected their hearing requests. The PUD and, more recently, the PNC filed separate lawsuits in the D.C. District Court. Those matters are still pending.

Department of the Interior

Condit Project

(2) In 1994, Interior filed section 18 fishway prescriptions on behalf of the FWS. On December 19, 2005, PacifiCorp filed a request for a trial-type hearing regarding the FWS's section 18 fishway prescriptions.

(3) There have been no rulings on materiality in this case. It is presumed that, if the case is ever referred to an ALJ, the ALJ will use the regulatory definition of "material fact" in effect at the time of referral.

(4) In 1999, PacifiCorp, Interior, and several other parties executed a settlement agreement to resolve disputes in the relicensing of the project through surrender of the project license and decommissioning of project works. That settlement remains pending before FERC, which has deferred evaluation of PacifiCorp's 1991 license application. As a result, on March 15, 2006, Interior notified PacifiCorp and all hearing interveners that Interior would not schedule any hearing for the Condit Project unless and until FERC issues a notice or order reinitiating the proceeding to evaluate PacifiCorp's 1991 license application. In the event FERC issues such a notice or order, Interior will, within 45 days, issue a notice establishing a time frame for the FWS' answer and hearing.

Department of the Interior

Priest Rapids Project

(2) On May 26, 2005, Interior filed preliminary section 4(e) conditions on behalf of the BOR and section 18 prescriptions on behalf of the FWS. On December 19, 2005, the Public Utility District No. 1 for Grant County (Grant) filed a hearing request regarding the FWS's section 18 prescriptions and the BOR's section 4(e) conditions.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact" in effect at the time the case is referred to an ALJ.

(4) In March 2006, the BOR withdrew the challenged section 4(e) conditions, and shortly thereafter Grant amended its hearing request and withdrew the issue pertaining to BOR's section 4(e) conditions. At this time, Grant's issues pertaining to the FWS's section 18 prescriptions remain pending.

Department of the Interior

Merrimack Project

(2) On May 16, 2005, Interior filed preliminary section 18 prescriptions on behalf of the FWS. On December 19, 2005, the Public Service Company of New Hampshire filed a hearing request regarding the FWS's section 18 fishway prescriptions.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact" in effect at the time the case is referred to an ALJ.

(4) This hearing request remains pending.

Department of the Interior

Bar Mills Project

(2) On December 12, 2005, Interior filed modified section 18 fishway prescriptions on behalf of the FWS. On January 11, 2006, FLP Energy Maine Hydro filed a hearing request regarding the FWS's section 18 prescriptions.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact" in effect at the time the case is referred to an ALJ.

(4) In March 2006, DOI notified FPL Energy Maine Hydro and all hearing interveners that the FWS will file its answer by January 19, 2007. The hearing will be consolidated with NMFS and the case will be referred to the U.S. Coast Guard. The hearing will occur in mid/late March 2007. This hearing request remains pending.

Department of Agriculture – Forest Service

Hells Canyon Complex

(2) On January 26, 2006, the Forest Service filed preliminary section 4(e) conditions covering a range of issues. On February 27, 2006, the Idaho Power Company (IPC) filed a hearing request regarding the Forest Service's section 4(e) conditions.

(3) IPC and the Forest Service are currently in negotiations regarding the disputed conditions.

(4) On May 10, 2006, the Forest Service filed revised preliminary conditions with FERC for the Hells Canyon Project. The revisions cover 9 of the 10 challenged conditions. However, IPC's hearing request remains pending before a USDA ALJ with respect to the remaining condition.

Department of Agriculture – Forest Service

Boulder Creek Hydroelectric Project

(2) Garkane Energy Cooperative (Garkane), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding one of the Section 4(e) conditions that the Forest Service had submitted to FERC in the Boulder Creek Hydroelectric Project (Project, FERC No. P-2219) licensing proceeding.

(3) Garkane and the Forest Service reached settlement regarding the disputed condition; therefore, there was no need to resolve whether the disputed facts were material. Per the settlement, Garkane withdrew its hearing request and the Forest Service submitted a modified condition to FERC. The settlement reflects the Forest Service's consideration and balancing of resource protection and project economics. The settlement agreement also includes additional protection, mitigation, and enhancement measures that were not included in the Forest Service final condition nor could they be required under FPA 4(e) authority.

(4) The request for hearing was withdrawn, and the Forest Service filed a modified condition.

Department of Agriculture – Forest Service

Portal Project

(2) Southern California Edison (SCE), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding two of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Portal Hydroelectric Project (FERC No. P-2174) licensing proceeding.

(3) SCE and the Forest Service are currently in negotiations regarding the disputed conditions, but no resolution has been reached at this time.

(4) The hearing request remains pending.

Department of Agriculture – Forest Service

Kern Canyon Project

(2) Pacific Gas and Electric (PG&E), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding two of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Kern Canyon Hydroelectric Project (FERC No. P-178) licensing proceeding.

(3) PG&E and the Forest Service are currently in negotiations regarding the disputed conditions, but no resolution has been reached at this time.

(4) The hearing request remains pending.

Department of Agriculture – Forest Service

Pit 3/4/5 Project

(2) Pacific Gas and Electric (PG&E), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding one of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Pit 3/4/5 Hydroelectric Project (FERC No. P-233) licensing proceeding.

(3) PG&E and the Forest Service are currently in negotiations regarding the disputed condition, but no resolution has been reached at this time.

(4) The hearing request remains pending.

Department of Agriculture – Forest Service

Upper North Fork Feather Project

(2) Pacific Gas and Electric (PG&E), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding one of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Upper North Fork Feather Hydroelectric Project (FERC No. P-2105) licensing proceeding.

(3) PG&E and the Forest Service are currently in negotiations regarding the disputed condition, but no resolution has been reached at this time.

(4) The hearing request remains pending.

Department of Agriculture – Forest Service

Stanislaus-Spring Gap Hydroelectric Project

(2) Pacific Gas and Electric (PG&E), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding one of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Stanislaus-Spring Gap Hydroelectric Project (FERC No. P-2130) licensing proceeding.

(3) PG&E and the Forest Service are currently in negotiations regarding the disputed condition, but no resolution has been reached at this time.

(4) The hearing request remains pending.

Department of Agriculture – Forest Service

Poe Hydroelectric Project

(2) Pacific Gas and Electric (PG&E), the licensee/applicant, submitted a request with the USDA Forest Service on December 19, 2005, for a trial-type hearing regarding two of the FPA Section 4(e) conditions that the Forest Service had submitted to FERC in the Poe Hydroelectric Project (FERC No. P-2107) licensing proceeding.

(3) PG&E and the Forest Service are currently in negotiations regarding the disputed conditions, but no resolution has been achieved.

(4) The hearing request remains pending.

Department of Commerce – National Marine Fisheries Service

Condit Project

(2) On June 1, 1994, the National Marine Fisheries Service (NMFS) filed preliminary section 18 prescriptions. On December 19, 2005, PacifiCorp filed a hearing request regarding NMFS's preliminary section 18 prescriptions.

(3) There have been no rulings on materiality in this case. It is presumed that, if the case is referred to an ALJ, the ALJ will use the regulatory definition of "material fact" in effect at the time of referral.

(4) In 1999, PacifiCorp, NMFS, and several other parties executed a settlement agreement to resolve disputes in the relicensing of the project through surrender of the project license and decommissioning of project works. That settlement is pending before FERC, which has deferred evaluation of PacifiCorp's 1991 license application. As a result, on March 16, 2006, NMFS notified PacifiCorp and all hearing interveners that NMFS would not schedule any hearing for the Condit Project unless and until FERC issues a notice or order reinitiating the proceeding to evaluate PacifiCorp's 1991 license application. In the event FERC issues such a notice or order, NMFS will, within 45 days, issue a notice establishing a time frame for its answer and the hearing.

Department of Commerce - National Marine Fisheries Service

Bar Mills Project

(2) On December 12, 2005, the National Marine Fisheries Service (NMFS) filed modified section 18 prescriptions. On January 11, 2006, FPL Energy Maine Hydro filed a hearing request regarding NMFS's modified section 18 prescriptions.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact" in effect if and when the case is referred to an ALJ.

(4) On March 16, 2006, NMFS notified FPL Energy Maine Hydro and all hearing interveners that NMFS will file its answer by January 19, 2007. The hearing will be consolidated with DOI and the case will be referred to the U.S. Coast Guard. The hearing will occur in mid/late March 2007. This hearing request remains pending.

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(2) On March 29, 2006, the National Marine Fisheries Service (NMFS) filed preliminary section 18 prescriptions. On April 28, 2006, PacifiCorp and the Hoopa Valley Tribe filed hearing requests regarding NMFS' preliminary section 18 prescriptions. Those documents include alleged issues of material fact.

(3) There have been no rulings on materiality in this case. It is presumed that the ALJ will use the regulatory definition of "material fact," which is set forth at 50 C.F.R. § 221.2 and clarified in the preamble of the Interim Final Rules.

(4) These hearing requests are pending.

Question 9: Do the rules afford an opportunity for public comment on alternative conditions and fishway prescriptions (both those that are proposed by the parties and those that are adopted by the resource agencies)? If not, should there be an opportunity for comment?

Answer: The rules do not provide a distinct public comment period on alternatives. However, they do require parties to file alternatives early in the FERC process, so that FERC can evaluate any alternative conditions and prescriptions in its draft NEPA document, which does have a public comment period. All parties are allowed to comment on FERC's NEPA document, including the agencies' preliminary conditions and/or prescriptions and any alternatives. Further, each agency must consider FERC's NEPA document and any comments filed on such document when deciding whether to modify its preliminary conditions and prescriptions or to accept an alternative.

Question 10: Do you expect to issue revised rules implementing section 241? If so, when will they be published? What issues do you expect to address?

Answer: When the rules were published on November 17, 2005, the agencies indicated they would consider the public comments that were received and their initial experience in implementing the rules and consider issuing Final Rules within approximately 18 months. That remains our intent. It is important to note that the rules outline in detail the requirements associated with requests for hearings and how they will be processed. As this is a new requirement, we will examine closely any technical or managerial issues that arise as we address the initial set of cases.

Question 11: How do you plan to fulfill the Secretary's tribal trust responsibility in implementing section 241 of EPAct? Has the Department undertaken Government-to-Government consultation with the Tribes on implementation of these provisions? If so, please indicate when this occurred and what Tribes participated.

Answer: In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22951 (May 4, 1994), supplemented by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000), the Departments assessed the impact of the new regulations on Tribal trust resources and determined that they do not directly affect Tribal resources. The rules are procedural and administrative in nature. However, conditions and actions associated with an actual hydropower licensing proposal may directly affect Tribal resources. The Departments will continue to consult with Tribal governments in specific cases when developing section 4(e) conditions and section 18 prescriptions needed to address the management of Tribal trust resources. Consultation on individual projects typically occurs over a multi-year period and requires numerous contacts with the affected tribes.

A good example of such government-to-government consultation can be seen with the Klamath Project, in which Interior and Commerce each consulted with several tribes on their joint section 18 prescription, which was ultimately filed with FERC on March 29, 2006.