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Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses; Interim Rule

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[Docket No.: DOI–2015–0001]

RINs 0596–AC42, 1090–AA91, and 0648–AU01

Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses

AGENCIES: Office of the Secretary, Agriculture; Office of the Secretary, Interior; National Oceanic and Atmospheric Administration, Commerce.

ACTION: Revised interim rules with request for comment.

SUMMARY: The Departments of Agriculture, the Interior, and Commerce are jointly revising the procedures they established in November 2005 for expedited trial-type hearings required by the Energy Policy Act of 2005. The hearings are conducted to expeditiously resolve disputed issues of material fact with respect to conditions or prescriptions developed for inclusion in a hydropower license issued by the Federal Energy Regulatory Commission under the Federal Power Act. The Departments are also revising the procedures for considering alternative conditions and prescriptions submitted by a party to a license proceeding.

DATES:

Effective date: These rules are effective on April 30, 2015.

Comment date: You should submit your comments by June 1, 2015.

ADDRESSES: You may submit comments, identified by any of the Regulation Identifier Numbers (RINs) shown above (0596–AC42, 1090–AA91, or 0648–AU01), by either of the methods listed below. Comments submitted to any one of the three Departments will be shared with the others, so it is not necessary to submit comments to all three Departments.

1. *Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments on-line.

2. *Mail or hand delivery to any of the following:*

a. Deputy Chief, National Forest Systems, c/o WO Lands Staff, Department of Agriculture, Mail stop 1124, 1400 Independence Avenue SW., Washington, DC 20250–1124;

b. Office of Hearings and Appeals, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203; or

c. Chief, Habitat Protection Division, Office of Habitat Conservation, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Washington Office Director, Lands and Realty Management, Forest Service, U.S. Department of Agriculture, 202–205–1769; John Rudolph, Solicitor's Office, Department of the Interior, 202–208–3553; or Melanie Harris, Office of Habitat Conservation, National Marine Fisheries Service, 301–427–8636. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Departments of Agriculture, the Interior, and Commerce (the Departments) are revising the interim final rules they published jointly in November 2005 to implement section 241 of the Energy Policy Act of 2005. That section created additional procedures applicable to conditions or prescriptions that a Department develops for inclusion in a hydropower license issued by Federal Energy Regulatory Commission (FERC). Specifically, section 241 amended sections 4 and 18 of the Federal Power Act (FPA) to provide for trial-type hearings on disputed issues of material fact with respect to a Department's conditions or prescriptions; and it added a new section 33 to the FPA, allowing parties to propose alternative conditions and prescriptions.

The Departments are promulgating three substantially similar rules—one for each agency—with a common preamble. The rules and preamble address a few issues that were left open in the 2005 rulemaking, such as who has the burden of proof in a trial-type hearing and whether a trial-type hearing is an administrative remedy that a party must exhaust before challenging conditions or prescriptions in court. In addition, the rules and preamble respond to the public comments we received on the 2005 rules, and they make a number of changes reflecting our experience in implementing those rules.

The rules are being made effective as revised interim final rules, so that interested parties and the agencies may avail themselves of improvements being made to the procedures adopted in 2005. The Departments are also requesting comments on additional ways the rules can be improved.

A detailed explanation of the revisions is provided below, but some of the highlights of the revised rules are as follows:

- The rules clarify the availability of the trial-type hearing and alternatives processes in the situation where a Department has previously reserved its authority to include conditions or prescriptions in a hydropower license, and it now decides to exercise that authority. The rules also extend the period of time for a party to request a hearing or submit an alternative in that situation.
- The rules extend a few of the deadlines in the 2005 rules, while not adopting some commenters' recommendations that the Departments significantly expand the hearing schedule. Specifically, parties are given 5 additional days to take each of the following steps: file a notice of intervention and response; update their witness and exhibit lists and submit written testimony following discovery; prepare for the hearing; and submit post-hearing briefs.
- The rules allow for a stay, not to exceed 120 days, to facilitate settlement negotiations among the parties. As necessary, the parties would coordinate with FERC regarding any effect on the time frame established for the license proceeding.
- The rules adopt the unanimous position of the Administrative Law Judges (ALJs) in the cases adjudicated to date, that the party requesting a hearing has the burden of proof.
- The rules accept the argument of some commenters that the ALJ decision can come after the statutory 90-day period specified for the hearing itself. However, the rules require that the decision come no later than 120 days after the case was referred to the ALJ, to keep the whole process within FERC's time frame for the license proceeding.
- The rules allow a party who has participated in a trial-type hearing and has filed an alternative condition or prescription to submit a revised alternative within 20 days after the ALJ decision, based on the facts as found by the ALJ.
- The rules clarify that FPA section 33 requires a Department to prepare an equal consideration statement only

when a party has submitted an alternative condition or prescription.

• Finally, the preamble provides additional guidance on the term ''disputed issues of material fact.''

II. Public Comments

You may submit your comments by either of the methods listed in the **ADDRESSES** section above. We will consider all comments received by the deadline stated in the **DATES** section above. Based on the comments received, we will consider promulgation of further revised final rules.

Please make your comments as specific as possible and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the rules that you are addressing.

We will make comments available for public review during regular business hours. To review the comments, you may contact any of the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Before including your personal address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

III. Background

A. Interim Final Rules

On November 17, 2005, at 70 FR 69804, the Departments jointly published interim final rules implementing section 241 of the Energy Policy Act of 2005 (EPAct), Public Law 109–58. Section 241 of EPAct amended FPA sections 4(e) and 18, 16 U.S.C. 797(e), 811, to provide that any party to a license proceeding before FERC is entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, of any disputed issues of material fact with respect to mandatory conditions or prescriptions developed by one or more of the three Departments for inclusion in a hydropower license. EPAct section 241 also added a new FPA section 33, 16 U.S.C. 823d, allowing any party to the license proceeding to propose an alternative condition or prescription, and specifying the consideration that the Departments must give to such alternatives.

The interim final rules were made immediately effective, but a 60-day comment period was provided for the public to suggest changes to the interim regulations. The Departments stated in the preamble that, based on the comments received and the initial results of implementation, they would consider publication of revised final rules. Since that time, the Departments have gained experience under the interim regulations necessary to properly evaluate the comments received, and have developed these revised interim final rules.

The November 17, 2005, preamble to the interim final rules contains additional background information that the reader may wish to consult concerning EPAct, the FPA, FERC's integrated licensing process (ILP), the trial-type hearing process, and the alternative conditions and prescriptions process.

B. Comments Received

The Departments received substantive comments on the interim final rules from the following organizations:

• American Public Power Association, Sacramento Municipal Utility District, and Public Utility District No. 1 of Snohomish County, Washington;

• Association of California Water Agencies;

• Center for Biological Diversity (CBD);

• Edison Electric Institute and National Hydropower Association (EEI/NHA);

• Georgia Department of Natural Resources, Wildlife Resources Division;

• Greater Yellowstone Coalition (GYC);

• Hoopa Valley Tribe (HVT);

• Hydropower Reform Coalition (HRC);

• Idaho Rivers United;

• Los Angeles Department of Water and Power

• Ohio Department of Natural Resources;

• PacifiCorp;

• Ponderay Newsprint Company;

• Power Authority of the State of New York;

• Public Utility District No. 1 of Pend Oreille County, Washington;

• Public Utility District No. 2 of Grant County, Washington; and

• Southern Company.

The Departments also received about 3,000 nearly identical letters from individuals expressing concern about the environmental effects of the new procedures. Taken together, the comments were extensive and very helpful to the Departments in determining what changes were needed to the interim regulations. Responses to the comments are provided below in the section-by-section analysis of the revised regulations.

C. Litigation Challenging the Interim Final Rules

Following publication of the interim final rules, lawsuits were filed challenging certain aspects of the rulemaking.

In *American Rivers* v. *U.S. Department of the Interior,* 2006 WL 2841929 (W.D. Wash. 2006), seven non-governmental organizations sued the three Departments, alleging that (1) publication of the interim final rules without prior notice and comment violated the Administrative Procedure Act (APA), 5 U.S.C. 553, and (2) the rules were impermissibly retroactive. In its October 3, 2006, decision, the court rejected plaintiffs' arguments, holding that (1) the rules were exempt from the APA's notice and comment requirements because they were procedural and interpretative, and (2) the rules did not result in an impermissible retroactive application of EPAct.

In *Public Utility District No. 1 of Pend Oreille County, Washington* v. *U.S. Department of the Interior,* No. 1:06cv00365 (D.D.C., filed Mar. 1, 2006), a licensee challenged the decision of the Departments in the interim final rules to limit the trial-type hearing and alternatives processes to license proceedings in which the license had not been issued as of November 17, 2005. FERC had issued a licensing order to the plaintiff in July 2005, but the plaintiff had sought rehearing from FERC and therefore argued that its license proceeding was still pending as of November 17, 2005. A nearly identical suit was filed the following month, *Ponderay Newsprint Co.* v. *U.S. Department of the Interior,* No. 1:06cv00768 (D.D.C., filed Apr. 26, 2006), and the two cases were consolidated. In March 2010, the plaintiffs voluntarily dismissed their lawsuits as part of a comprehensive settlement agreement with the Departments of Agriculture and the Interior.

D. Other Significant Litigation

Another notable legal development since publication of the interim final rule was the issuance of the decision in *City of Tacoma, Washington* v. *Federal Energy Regulatory Comm'n,* 460 F.3d 53 (D.C. Cir. 2006). The case involved several consolidated petitions challenging the license issued by FERC in 1998 (and amended in 2005) for the

Cushman Project located in the State of Washington. While a detailed discussion of the court's multiple holdings is beyond the scope of this preamble, the Departments note that the decision provides useful guidance in the implementation of Federal agencies' various authorities under the FPA, including those addressed in these regulations.

For example, in one holding, the court discussed the relationships among the delegated authorities possessed by FERC and the Departments, respectively, under the FPA. Noting that the conditioning authority conferred on the Secretaries by section 4(e) is mandatory and independent of FERC's authorities, the court stated,

> Though FERC makes the final decision as to whether to issue a license, FERC shares its authority to impose license conditions with other federal agencies. To the extent Congress has delegated licensing authority to agencies other than FERC, those agencies, and not FERC, determine how to exercise that authority, subject of course to judicial review.

460 F.3d at 65 (citations omitted). The court held that, while the Departments ''should certainly make every effort to cooperate and to coordinate their efforts, because license conditions imposed by one agency may alter the conditions the other agency deems necessary,'' FERC may not unilaterally place restrictions (such as a strict time limit) on the exercise of the other Departments' authorities. *Id.* In another holding, the court adopted an expansive interpretation of the section 4(e) requirement that a project and associated license be located ''within'' a reservation. *Id.* at 65–66.

E. Request for Additional Comment Period

In July 2009, NHA and HRC sent a joint letter to the three Departments, asking that an additional 60-day comment period be provided before publication of final rules. The organizations noted that they and their members had gained extensive experience with the interim final rules since their initial comments were submitted in January 2006, and they now have additional comments to offer on ways to improve the trial-type hearing and alternatives processes.

The Departments have decided to grant NHA and HRC's request. Instead of publishing final rules, we are publishing these revised interim final rules with a 60-day comment period. Under this approach, we are putting into effect several improvements to the November 2005 interim final rules, while providing the public with updated information on which to base additional comments, including our responses to the prior comments we received.

F. Government Accountability Office (GAO) Report

In September 2010, GAO released Report GAO–10–770 entitled, ''Hydropower Licensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed.'' The report analyzed implementation of EPAct section 241 since 2005 and made two recommendations. The first recommendation was that the Secretaries of Agriculture, Commerce, and the Interior

> [d]irect cognizant officials, where the agency has not adopted a proposed alternative condition or prescription, to include in the written statement filed with FERC (1) its reasons for not doing so, in accordance with the interim rules and (2) whether a proposed alternative was withdrawn as a result of negotiations and an explanation of what occurred subsequent to the withdrawal. . . .

GAO Report at 19.

As noted by GAO, the interim final rules already require each Department to file with FERC, along with any modified condition or prescription the Department adopts, a statement explaining (i) the basis for the modified condition or prescription and (ii), if the Department is not adopting a proposed alternative, its reasons for not doing so. 7 CFR 1.673(c); 43 CFR 45.73(c); 50 CFR 221.73(c).

However, the Departments pointed out in their comments to GAO that, in some cases, a license party that submitted an alternative condition or prescription later withdraws it, often as a result of negotiations with the Department. In cases where there is no longer an alternative to consider because a proposed alternative has been voluntarily withdrawn, the statutory requirement to provide a reason for not adopting an alternative does not apply. The Departments' written statement will, however, include an explanatory notation indicating that a proposed alternative was voluntarily withdrawn.

GAO's second recommendation was that the Departments ''[i]ssue final rules governing the use of the section 241 provisions after providing an additional period for notice and an opportunity for public comment and after considering their own lessons learned from their experience with the interim rules.'' GAO Report at 19. As explained above, we are publishing these revised interim final rules with a 60-day comment period, as requested by NHA and HRC and as recommended by GAO.

G. Other Developments Since Release of Interim Final Rules

In developing the interim final regulations, the Departments anticipated that the Department of Commerce involvement in licensing proceedings under the FPA would be limited to issuance of fishway prescriptions under FPA section 18. This was consistent with Commerce's traditional experience in implementing the FPA. The Commerce regulations therefore referenced only the National Marine Fisheries Service (NMFS) and section 18 of the Act.

However, in the years since promulgation of the interim final regulations, alternative energy projects that would use new technologies to harness tidal and wave energy have been increasingly proposed for development. As applicants have moved into the marine environment in proposing projects to be licensed by FERC, impacts not traditionally associated with licenses under the FPA have emerged. For example, projects have been proposed within areas designated as National Marine Sanctuaries.

These developments have necessarily required broader interest and involvement in the licensing process throughout the Department of Commerce, including within the National Marine Sanctuary Program (NMSP). In 2006, in response to a proposal to site a wave energy project within the Olympic Coast National Marine Sanctuary, NMSP filed conditions with FERC under FPA section 4(e) to address impacts of the proposed Makah Bay Offshore Wave Pilot Project (Project No. 12751–001, applicant Finavera Renewables Ocean Energy, Ltd.). It is likely that the interest and involvement of Commerce agencies beyond NMFS will continue and will include the need to address impacts other than to fish migration under section 18.[1]

While the wording of the current regulations does not foreclose issuance of such conditions, and the procedures of EPAct would be available under the

[1] FERC initially accepted and proposed to incorporate all of the NMSP conditions into the draft project license. *See Finavera Renewables Ocean Energy, Ltd.,* 121 FERC ¶ 61,288 (2007). On rehearing, FERC reversed itself, stating that it did not believe the sanctuary constituted a ''reservation'' under the FPA, although it continued to include most of the NMSP conditions in the license. *See* 122 FERC ¶ 61,248 (March 20, 2008). On May 19, 2008, FERC granted NOAA's request for rehearing on the revised order, but on rehearing declined to reverse its determination that a sanctuary does not constitute a ''reservation'' under the FPA. *See,* 124 FERC ¶ 61,063 (July 18, 2008). No Court of Appeals has addressed these issues.

current regulations where such conditions are issued, the Departments believe the regulations should be changed to expressly apply to those situations. Therefore, Commerce is revising its regulations to make clear that any Commerce agency that identifies a basis to issue conditions under section 4(e) will be subject to these regulations. Currently, NMSP is the only known such agency.

IV. Section-by-Section Analysis

The following discussion explains the changes made to the regulations published in November 2005 and provides the Departments' response to the comments received. Regulations that have not been changed and that were not the subject of public comments are not discussed. The reader may wish to consult the section-by-section analysis in the interim final rules for additional explanation of all the regulations.

Three separate versions of the revised interim final regulations are provided, one version each for Agriculture, Interior, and Commerce. The structure and content of the regulations are substantially similar, but there are variations, such as to account for differences in the names of the Departments and their organizational components. The three versions also vary somewhat in their references to conditions and prescriptions, since Agriculture does not develop prescriptions under FPA section 18, while Interior and Commerce may develop either conditions or prescriptions or both.

For each section discussed below, the CFR title, section number, and heading for each Department are shown, 7 CFR for Agriculture, 43 CFR for Interior, and 50 CFR for Commerce.

7 CFR 1.601 What is the purpose of this subpart, and to what license proceedings does it apply?

43 CFR 45.1 What is the purpose of this part, and to what license proceedings does it apply?

50 CFR 221.1 What is the purpose of this part, and to what license proceedings does it apply?

Paragraphs (a)(1)–(2) of these sections in the interim final rules provided that the trial-type hearing process in these regulations applies to mandatory conditions and prescriptions developed by a Department under FPA section 4(e) or 18 and does not apply to recommendations that a Department may submit to FERC under FPA section 10(a) or (j). The Departments have expanded paragraph (a)(2) in the final rules to exclude more generally provisions that a Department may submit to FERC under any authority other than FPA section 4(e) or 18. Such provisions would include recommendations under section 10(a) or (j), terms and conditions under section 30(c), or any other provisions not submitted under section 4(e) or 18.

Commenters raised four sets of issues concerning the applicability of the EPAct hearing and alternatives processes, as set forth in paragraphs (c) and (d) of these regulations.

Cases pending on November 17, 2005. Paragraph (d)(1) provides that the regulations apply to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions or prescriptions have been or are filed with FERC. Some commenters contended that applying the regulations to proceedings where preliminary or ''final'' conditions or prescriptions had been submitted before November 17, 2005, would be disruptive, would impose an undue burden on stakeholders, and would constitute an impermissible retroactive application of the EPAct provisions. Others argued that claims of retroactivity are groundless, since proposed conditions and prescriptions are not final or closed until FERC has made its licensing decision.

The Departments agree that applying the EPAct provisions to licensing proceedings pending at the time of enactment does not constitute retroactive application. The same allegation of retroactive application was considered and rejected by the court in *American Rivers.* There, the court held that the interim regulations did not have an impermissible retroactive impact, noting that conditions and prescriptions that have not been included in a final FERC license cannot be regarded as completed events. Paragraph (d)(1) therefore remains substantially unchanged.

Reserved authority. On occasion, a Department does not submit conditions or prescriptions for inclusion in a license during the license proceeding, but reserves the authority to do so at a later point, *e.g.,* if conditions change or the Department obtains additional information. The interim regulations provided that, if the Department notifies FERC that it is reserving its authority, the hearing and alternatives processes would be available to the license parties if and when the Department subsequently exercised its reserved authority.

Some commenters asserted that these processes should be available, not only when the Department subsequently exercises reserved conditioning or prescriptive authority, but also when the Department initially decides to reserve its authority. According to these commenters, the reservation of authority is a decision not to impose a condition or prescription, with consequences for natural resources, and should be subject to the hearing and alternatives processes.

Under the terms of EPAct, license applicants and other parties are entitled to trial-type hearings with respect to conditions or prescriptions that a Department deems necessary. Similarly, the opportunity to propose an alternative arises when the Department deems a condition or prescription to be necessary. Thus, under EPAct, it is only when a Department affirmatively exercises its discretion to mandate a condition or prescription that the hearing and alternatives processes are triggered. Allowing for trial-type hearings and alternatives when the agencies have not exercised this authority would be both inconsistent with the legislation and an inefficient use of the Departments' resources. Consequently, the revised interim final regulations continue to provide that the hearing and alternatives processes are available only when a Department submits a preliminary condition or prescription to FERC, either during the initial licensing proceeding or subsequently through the exercise of reserved authority.

Exercise of reserved authority. Other commenters noted that, with respect to the exercise of reserved authority, the language of the interim regulations appeared to limit the availability of these processes to a Department's exercise after November 17, 2005, of an authority it reserved on or after that date. They argued that the processes should be equally available to a Department's exercise after November 17, 2005, of an authority it reserved before that date. The Departments agree that Congress intended the hearing and alternatives processes to apply to any case in which a Department issues mandatory conditions or prescriptions on or after the date of EPAct's enactment. Paragraph (c) has been revised and a new paragraph (d)(2) has been added to clarify this point. Interim paragraph (d)(2) has been deleted as no longer needed, for the reasons explained below in connection with 7 CFR 1.604, 43 CFR 45.4, and 50 CFR 221.4.

Exhaustion of administrative remedies. Several parties commented that utilizing EPAct's trial-type hearing and alternatives processes should not be a condition precedent to seeking appellate court review of mandatory

conditions and prescriptions. According to these commenters, the failure to request a trial-type hearing on disputed issues of material fact or to propose an alternative should not be considered a failure to exhaust administrative remedies.

Section 241 of EPAct does not itself contain an express exhaustion requirement, and there have been no court decisions addressing the issue of exhaustion in the context of EPAct trial-type hearings to date. Whether the doctrine of exhaustion applies to a given claim will be determined by the court based on the specific circumstances involved, such as whether any exhaustion provision from another statute applies, the nature of the claim being raised, and the applicability of any exhaustion defenses.

The Departments note that license parties have ample opportunities to provide input into the processes for developing mandatory conditions and prescriptions. In addition to the trial-type hearing and alternatives processes, the FERC licensing process provides opportunities for parties to comment on a Department's preliminary conditions or prescriptions, and on FERC's environmental assessment or draft environmental impact statement that discusses such preliminary conditions or prescriptions, See, *e.g.,* 18 CFR 5.23(a), 5.24(b)–(c), 5.25(b)–(c). Presenting information and concerns to the Departments well before the court of appeals review is the best way to ensure that the Departments are aware of the concerns and have an opportunity to consider them in formulating their conditions and prescriptions.

No changes have been made to the regulations in response to the comments on this issue.

7 CFR 1.602 What terms are used in this subpart?

43 CFR 45.2 What terms are used in this part?

50 CFR 221.2 What terms are used in this part?

These sections define the meaning of various terms used in the regulations. They are unchanged from the interim regulations, except for two address changes and the following two modifications.

First, a definition of ''modified condition or prescription'' has been added, as recommended by a commenter.

Second, the definition of ''preliminary condition or prescription'' has been revised by changing ''a'' to ''any'' in the first line and by omitting the citations to FERC's regulations in the last line. While the Departments make every effort to submit their preliminary conditions and prescriptions in accordance with the requirements in FERC's regulations, circumstances on occasion may necessitate the submission of a preliminary condition or prescription after FERC's regulatory deadline. *See City of Tacoma,* discussed under section II.D. of this preamble. In such instances, the license parties should still have an opportunity to request a trial-type hearing as to disputed issues of material fact and to submit alternative conditions or prescriptions.

Some commenters suggested that the Departments clarify the definition of ''material fact'' in these sections to expressly exclude allegations of law or policy, or any argument directed at whether a preliminary condition or prescription should be adopted, modified, or rejected, or whether a proposed alternative should be adopted or rejected. The comments cited several specific examples of issues that parties have sought to raise in trial-type hearing proceedings that the commenters considered inappropriate.

The Departments agree that the commenters accurately described both the intent of the statute and interim regulations and the experience to date in trial-type hearing proceedings. The regulations clearly prohibit an ALJ from rendering a conclusion on the ultimate question of whether a condition or prescription should be affirmed, modified, or withdrawn, because that conclusion is reserved to the Secretary's discretion and expert judgment. 7 CFR 1.660(b)(3), 43 CFR 45.60(b)(3), 50 CFR 221.60(b)(3). Therefore, the November 2005 preamble made clear that issues of law or policy are not appropriate for resolution in a trial-type hearing. 70 FR at 69809.

The Departments do not find it necessary to change the regulatory text on this point but are including an extended preamble discussion of ''disputed issues of material fact,'' which provides further clarification and draws from the Departments' experience to date under the rules. See section IV.A. below.

7 CFR 1.603 How are time periods computed?

43 CFR 45.3 How are time periods computed?

50 CFR 221.3 How are time periods computed?

Some commenters requested that the regulations allow extensions of time for filing hearing requests, notices of intervention, or answers upon a showing of extraordinary circumstances. The interim final rules provided that no extension of time could be granted for these particular filings. 7 CFR 1.603(b), 43 CFR 45.3(b), 50 CFR 221.3(b). The revised interim final regulations do not incorporate these requested changes, but we have extended the time for filing a notice of intervention and response (see 7 CFR 1.622, 43 CFR 45.22, 50 CFR 221.22).

As noted in the preamble to the interim final rules, strict time limitations are necessary to ensure timely completion of the hearing and alternatives processes and to avoid delays in the FERC licensing proceeding. 70 FR at 69809. Parties with a significant interest in the proceeding will presumably have already participated in the pre-filing consultation, scoping, and study processes for at least 3 years prior to the submission of preliminary conditions or prescriptions. A substantial and voluminous record will also have been developed during that time. Most parties should therefore be sufficiently prepared to respond to the Departments' preliminary conditions or prescriptions and prepare a hearing request or notice of intervention and response within the allotted time, without the need for extensions.

The preamble to the interim rules also explained that, as a practical matter, no ALJ would be available prior to referral to rule on an extension motion. According to the commenters, an ALJ is not necessary to rule on extension requests and ''the Departments could make such a determination during their initial adequacy review of the hearing request or alternate condition.'' HRC Comments at 41. The Departments disagree. These rules establish stringent time frames to which all parties must abide, absent an extension granted by a neutral and impartial ALJ or a provision of these rules.

The commenters further observed that the hearing request imposes a significant burden on all parties that should be avoided if there is an available resolution that simply needs time to succeed. A new provision for a limited stay of the proceedings to allow settlement negotiations should provide an opportunity for such resolution. See 7 CFR 1.624, 43 CFR 45.24, 50 CFR 221.24, discussed below.

7 CFR 1.604 What deadlines apply to pending applications?

43 CFR 45.4 What deadlines apply to pending applications?

50 CFR 221.4 What deadlines apply to pending applications?

These sections from the interim regulations dealing with pending applications have been removed and replaced in the revised interim final regulations. They applied to license proceedings in which (1) a Department had filed a preliminary condition or prescription before the November 17, 2005, effective date of the regulations, and (2) FERC had not issued a license as of that date. They provided that hearing requests and alternatives in such cases would be due on or before December 19, 2005. All license parties in such proceedings that wished to request a hearing or submit alternatives by the latter date have done so, and all but one of those cases has since been resolved.[2] Therefore, these sections are no longer needed; their removal does not represent a substantive change to the regulations.

Some commenters raised concerns that there would be no comment opportunity on alternative conditions and prescriptions in pending cases where review under the National Environmental Policy Act (NEPA) had already been completed when the interim final rules were issued. They suggested that, for such cases, the regulations require reissuance or supplementation of the NEPA document. Under 7 CFR 1.674, 43 CFR 45.74, and 50 CFR 221.74, the Department must consider evidence and supporting material provided by any license party or otherwise reasonably available to it, including information on the environmental effects of conditions, prescriptions, and alternatives. On a case-by-case basis, FERC should consider whether supplemental NEPA analysis is appropriate under 40 CFR 1502.9.

[2] Timely hearing requests filed by PacifiCorp with respect to its Condit Hydroelectric Project remain pending before Interior and Commerce. The Departments have notified PacifiCorp that they will establish a time frame for the hearing process if and when FERC reinstates the proceeding to evaluate PacifiCorp's 1991 license application.

7 CFR 1.604 What deadlines apply to the trial-type hearing and alternatives processes?

43 CFR 45.4 What deadlines apply to the trial-type hearing and alternatives processes?

50 CFR 221.4 What deadlines apply to the trial-type hearing and alternatives processes?

In place of the removed interim regulations dealing with pending applications (discussed above), the revised interim final regulations include tables summarizing the steps in the trial-type hearing and alternatives processes and indicating the deadlines generally applicable to each step. The regulations state that, if the deadlines in the tables are in any way inconsistent with the deadlines as set by other sections of the regulations or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

For example, under 7 CFR 1.603, 43 CFR 45.3, or 50 CFR 221.3, a deadline as shown in the table may be extended because it falls on a Saturday, Sunday, or holiday, or because the ALJ has granted a motion to extend it. See also 7 CFR 1.631(c), 43 CFR 45.31(c), and 50 CFR 221.31(c). The deadlines in the table may also be extended if the hearing requester and the Department agree to a stay to allow for settlement negotiations under 7 CFR 1.624, 43 CFR 45.24, or 50 CFR 221.24, discussed below.

7 CFR 1.610 Who may represent a party, and what requirements apply to a representative?

43 CFR 45.10 Who may represent a party, and what requirements apply to a representative?

50 CFR 221.10 Who may represent a party, and what requirements apply to a representative?

Three minor changes have been made to these sections regarding representation of a party in the hearing process. Environmental organizations objected that the regulations did not allow them to designate one organization to represent another, as they have done in the past. In response to this comment, paragraph (b)(3) has been revised to change ''officer or full-time employee'' to ''officer or agent,'' leaving it up to an organization to decide what type of agent it wishes to designate to represent its interests.

Paragraph (c) has been revised to clarify that an individual representing himself or herself must file a notice or appearance, as must any other representative of a party.

And a new paragraph (d) has been added to expressly authorize the administrative law judge (ALJ) to require a party that has more than one representative to designate a lead representative for service of documents under 7 CFR 1.613, 43 CFR 45.13, or 50 CFR 221.13. This authority was implicit in the interim rules.

7 CFR 1.611 What are the form and content requirements for documents under §§ 6.610 through 1.660?

43 CFR 45.11 What are the form and content requirements for documents under this subpart?

50 CFR 221.11 What are the form and content requirements for documents under this subpart?

Two minor changes have been made to these regulations. Paragraph (a)(2) has been revised to state that service copies of a document may be printed on both sides of a page, to save paper. And paragraph (a)(4) has been revised to increase the minimum font size from 10 to 11 points to improve readability.

7 CFR 1.612 Where and how must documents be filed?

43 CFR 45.12 Where and how must documents be filed?

50 CFR 221.12 Where and how must documents be filed?

Paragraph (b) of these regulations has been revised to specify that an original and two copies of any document must be filed with the appropriate office under paragraph (a). This change will facilitate the expedited hearing process. Under paragraph (b)(2), supporting materials, which may be burdensome to copy, may be submitted in the form of a hard-copy original and an electronic copy on compact disc or other suitable media.

Several commenters suggested that the Departments revise the regulations to allow parties to file documents electronically, using email or FERC's eFiling system. The Departments agree that, in many circumstances, the electronic transmission of documents is a preferable means of providing documents to another party. As a result, the revised regulations in 7 CFR 1.613, 43 CFR 45.13, and 50 CFR 221.13 allow for electronic *service* of documents on a party who consents to such service. However, the Departments and their ALJ offices do not currently have the capacity or resources to accept electronically and print off the large volume of documents typically filed in connection with a trial-type hearing.

The Departments disagree with the commenters' suggestion to use FERC's

eFiling system because EPAct places the responsibility of administering the trial-type hearing process exclusively with the Departments. In addition, the Departments do not believe it is advisable to rely for filing on an electronic system of another agency over which the Departments have no control. Given the tight time frames involved, any technical problems or other issues that rendered FERC's eFiling system unavailable even for a limited time could prove disruptive to the trial-type hearing process.

Paragraph (d) dealing with nonconforming documents has been revised by deleting the second sentence concerning minor defects, which had stated that parties may be notified of ''minor'' technical defects and given a chance to correct them. Commenters objected that no definition of a ''minor'' defect was provided, thus presenting a risk of inconsistent and subjective interpretations. Commenters proposed the following definition: ''For this purpose, 'minor' means that the filing is substantively in compliance with the requirements for the filing.'' HRC comments at 57.

This proposed definition fails to provide additional clarity and has not been adopted. Rather than trying to catalogue possible defects as ''minor'' or ''major,'' the Departments have deleted the second sentence. The revised interim final regulation thus puts parties on notice that non-conforming documents may be rejected, thereby helping to ensure compliance with technical filing requirements. The form, content, and filing requirements in the regulations are straightforward and clear, and the Departments expect compliance for documents to be accepted. It remains within the Departments' discretion to determine the appropriate remedy for failure to comply with these requirements.

7 CFR 1.613 What are the requirements for service of documents?

43 CFR 45.13 What are the requirements for service of documents?

50 CFR 221.13 What are the requirements for service of documents?

These regulations have been revised in response to comments advocating the use of electronic means of service.

Use of FERC's service procedures. Several commenters proposed that the Departments allow parties to use FERC's eService and eSubscription systems to ensure a cost-effective and reliable means of effectuating service on other parties. The Departments have adopted this suggestion to a limited extent.

For service on *license parties* as required under paragraphs (a)(1) and (a)(2)(ii) of these sections, the revised regulations authorize service under FERC's procedures at 18 CFR 385.2010(f)(3) for those license parties that have agreed to receive electronic service. For service on *hearing parties* under paragraph (a)(3), the use of FERC's procedures is not authorized. In the Departments' experience, the number of hearing parties generally is substantially less than the number of license parties. This limited approach balances the interests in cost-effective means of service on a large number of parties with the Departments' interest in retaining control over the administration of the trial-type hearing process, for which the Departments are exclusively responsible under EPAct. The latter interest predominates for most of the hearing process, when service is limited to the much smaller number of hearing parties.

Service by other electronic means. Service on either *license parties* or *hearing parties* is also authorized under paragraph (c) of these regulations, which has been expanded in two ways.

First, paragraph (c)(4) has been revised in 7 CFR 1.613 and 50 CFR 221.13 and has been added to 43 CFR 45.13. Under this paragraph, service may be made by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method. This provision, which is modeled on Rule 5(b) of the Federal Rules of Civil Procedure (FRCP), takes the place of former paragraph (c)(4)(ii) both in 7 CFR 1.613 and 50 CFR 221.13, which required the person served by electronic mail to acknowledge receipt of the document.

Second, the introductory language in paragraph (c) has been revised to allow the ALJ to order methods of service other than those enumerated in paragraphs (c)(1) through (c)(4), upon agreement of the parties.

Service via Internet posting. Commenters suggested that the Departments allow parties to post documents filed in support of a hearing request on a Web site to reduce service costs associated with those sometimes voluminous documents. Other commenters suggested that the Departments place electronic or scanned copies of all materials received during the trial-type hearing onto a public Internet site to make the documents more accessible to other interested parties. The Departments do not adopt this suggestion due to the time and resource constraints during the trial-type hearing. Parties who wish to place documents on public Internet sites are not prohibited from doing so, but such posting will not substitute for service under these regulations.

Timing of service. Commenters proposed that the Departments revise the regulations to clarify that all served documents must arrive by 5 p.m. on the filing date. The Departments disagree with the commenters' proposal and preserve the requirement established in the interim final rules. This requirement provides that service is effected when a party initiates the transmission of a document through one of the specified methods of service at the same time the document is delivered or sent for filing. This requirement ensures that parties receive served documents in a cost-effective and timely fashion. Indeed, unless a document was served by hand-delivery or facsimile, the commenters' proposal would require parties to serve a document a day or more *in advance* of filing in order to have service copies arrive by 5 p.m. on the filing date. This would unnecessarily shorten the already tight regulatory time frames.

Service on the Department. Comments were received requesting that the regulations be clarified with respect to timing of service and agency personnel to be served. With respect to timing, paragraphs (a)(1) through (a)(3) have been revised to specify that documents to be served must be delivered or sent to the other parties at the same time the documents are delivered or sent for filing.

With respect to agency personnel to be served, the Departments do not believe that any changes to the regulations are needed. Under paragraph (a)(1), a request for a hearing must be served on each license party; FERC's service list for the license proceeding will identify the persons or entities to be served and their addresses. Under paragraph (a)(2), a notice of intervention and response must be served on the Departmental entity that developed the preliminary condition or prescription; the preliminary condition or prescription will identify the persons or entities to be served and their addresses. Subsequent documents in the hearing process will be served on the Departmental representatives identified in the Department's answer or notice under 7 CFR 1.625, 43 CFR 45.25, and 50 CFR 221.25.

7 CFR 1.620 What supporting information must the Forest Service provide with its preliminary conditions?

43 CFR 45.20 What supporting information must a bureau provide with its preliminary conditions or prescriptions?

50 CFR 221.20 What supporting information must NMFS provide with its preliminary conditions or prescriptions?

Some commenters suggested amending these sections to require that the agency rationale for its preliminary conditions or prescriptions include a clear and concise statement of the material facts relied upon and an ''analysis of the project's impacts on the resources the agency administers.'' HRC comments at 33.

The Departments agree that the rationale for a preliminary condition or prescription must contain sufficient information to enable license parties to identify disputed issues of material fact in light of the relevant legal standards under the FPA. The Departments' rationales also generally identify the nature of project-related impacts on agency-managed resources that their conditions or prescriptions are designed to address. However, EPAct is not reasonably interpreted to require the Departments to catalogue every fact considered in developing a preliminary condition or prescription. Accordingly, the Departments are not amending the regulatory text on this point.

7 CFR 1.621 How do I request a hearing?

43 CFR 45.21 How do I request a hearing?

50 CFR 221.21 How do I request a hearing?

The Departments received comments on various aspects of these regulations, including the time for filing hearing requests, page limits, and reliance on new evidence.

Time for filing hearing requests generally. Commenters suggested that the Departments extend the deadline for filing hearing requests because, in their view, the interim regulations do not provide parties with sufficient time to prepare such requests or attempt an informal resolution of contested issues. Specifically, the commenters suggested that the Departments extend the deadline for filing hearing requests from 30 days to 45 days to be consistent with FERC's ILP, which provides parties with 45 days to respond to preliminary conditions and prescriptions. Additionally, these commenters argued that, since FERC's ILP-prescribed deadlines may not be met in certain cases, the Departments should extend the deadline for filing hearing requests instead of conforming the trial-type hearing process to the ILP schedule.

The Departments disagree with this proposal (except in cases where the Department is issuing conditions or prescriptions pursuant to reservations of authority, as discussed below). As the commenters recognize, the Departments have tried ''to conform the trial-type hearing to the ILP schedule'' (EEI/NHA comments at 21). Even though FERC's ILP schedule provides parties with 45 days to submit comments on preliminary conditions and prescriptions, the 30-day deadline for filing trial-type hearing requests is necessary both to fit the hearing process within the time frame established by FERC for each license proceeding, as required by EPAct, and to provide intervenors and the Department with sufficient time to evaluate hearing requests and prepare responses before the matter is referred to an ALJ. The 30-day deadline applies to any request for a hearing on a preliminary condition or prescription submitted to FERC before the license is issued.

Time for filing hearing requests as related to the exercise of reserved authority. Some commenters complained that the interim regulations do not include an express, separate timetable for requesting a hearing or proposing alternatives in response to a Department's exercise of reserved authority under 7 CFR 1.601(d)(2), 43 CFR 45.1(d)(2), or 50 CFR 221.1(d)(2). Under these circumstances, parties may have less advance notice concerning the justification for and content of any proposed conditions or prescriptions. The Departments agree that a separate timetable should be provided.

Accordingly, paragraph (a)(2) of these regulations has been revised to provide a longer period of time—60 days as compared to 30 days—for a license party to request a hearing on disputed issues of material fact with respect to a preliminary condition or prescription in situations where the Department is exercising its reserved authority after the license has been issued.

Time for filing hearing requests as related to preliminary versus modified conditions and prescriptions. Industry commenters took differing positions on whether the trial-type hearing should be held to address disputed issues of fact at the preliminary or modified condition/prescription stage. Some commenters supported holding trial-type hearings at the preliminary stage, acknowledging that doing so is appropriate in most cases, is consistent with FERC's licensing timetable, and will help inform the NEPA process. Other commenters stated that hearings are more appropriately held after modified conditions or prescriptions are submitted. Commenters also requested that the regulations provide for trial-type hearings at the modified stage if the modifications are based on new facts that did not exist or were not anticipated at the preliminary stage, or if the agency submits an entirely new condition or prescription at the modified stage.

As set forth in the interim final rules, the trial-type hearing procedures were carefully crafted to work within FERC's time frame, as required by Congress, while affording interested parties an opportunity to present evidence on disputed issues of material fact with respect to the Departments' mandatory conditions and prescriptions. 70 FR at 69806. Holding a hearing after submission of preliminary conditions and prescriptions allows for resolution of disputed factual issues at the most relevant time—before the Department completes necessary modifications to the conditions or prescriptions, before the close of the NEPA comment period, and before completion of the final environmental impact statement (EIS).

This approach also promotes efficiency by allowing the Departments to assess all relevant information—including any ALJ opinion, comments on FERC's NEPA document, and alternative conditions or prescriptions with supporting information—and to modify the conditions or prescriptions in one coordinated effort.

Providing for trial-type hearings solely at the modified stage is not a reasonable or efficient use of resources. Issuance of an ALJ opinion *after* conditions and prescriptions have already been modified could require the Departments to revise and resubmit conditions and prescriptions, thereby adding an additional step and additional time to the process. This second round of revisions would delay license issuance in most cases. Indeed, under current practice, the Departments submit modified conditions and prescriptions 60 days after the close of the NEPA comment period, with FERC's final EIS being issued just 90 days later. An ALJ opinion resolving disputed facts on modified conditions and prescriptions would almost certainly be issued after FERC's completion of the final NEPA document.

The Departments disagree with comments that holding an adversarial hearing at the preliminary stage will jeopardize the possibility of settlement. The Departments' experience has been that several cases have settled after

hearing requests were filed at the preliminary condition or prescription stage.

The revised interim final regulations therefore continue the approach taken in the interim regulations of scheduling the trial-type hearing process immediately following the issuance of preliminary conditions and prescriptions. Nevertheless, the Departments acknowledge that exceptional circumstances may arise where facts not in existence and not anticipated at an earlier stage necessitate a new preliminary condition or prescription. This circumstance would be handled on a case-by-case basis, in coordination with FERC as necessary.

Page limits for hearing requests. Some commenters objected that the page limits for hearing request are too restrictive, and they requested that the limit for describing disputed issues of material fact be increased from two pages to five pages and that the limit for witness and exhibit identification be increased from one page to three pages. The Departments believe that the page limits set forth in the interim regulations are generally appropriate and provide sufficient space for parties to identify disputed issues, particularly in light of the expedited nature of the proceeding. The Departments further note that they are bound by the same page limits in submitting an answer. See 7 CFR 1.622, 43 CFR 45.22, and 50 CFR 221.22.

Nevertheless, having considered this comment and the purpose of the rule, the Departments have concluded that the required list of specific citations to supporting information and the list of exhibits need not be included in the page restrictions. The rule has been revised accordingly for the hearing request and the notice of intervention and response. See 7 CFR 1.621(d), 43 CFR 45.21(d), 50 CFR 221.21(d) and 7 CFR 1.622(d), 43 CFR 45.22(d), 50 CFR 221.22(d). This change will provide the parties with additional space to describe the disputed issues of material fact and to summarize expected witness testimony.

Reliance on new evidence. Other commenters suggested that the final rules require parties who wish to submit new evidence when requesting a trial-type hearing or in support of an alternative condition or prescription to show good cause for not having previously submitted the information in the license proceeding record. Otherwise, these commenters argued, parties would have an incentive ''to 'hide the ball' from others and disrupt proceedings at the last minute,'' which may create delays or unfair advantage. HRC Comments at 30.

While the Departments share the commenters' interest in ensuring an expeditious and fair trial-type hearing, we disagree with the proposal to include a ''good cause'' requirement. Such a requirement could harm the Department's ability to rely on relevant information from the parties, such as newly completed studies, that might assist the Department in evaluating conditions and fishway prescriptions. Moreover, such a requirement may run counter to the parties' and the Department's interests in ensuring a ''full and accurate disclosure of the facts.'' 7 CFR 1.651(a), 43 CFR 45.51(a), 50 CFR 221.51(a).

Service by electronic means. Consistent with the changes to 7 CFR 1.613(c), 43 CFR 45.13(c), and 50 CFR 221.13(c), a new paragraph (b)(4) has been added to these regulations, requiring a hearing requester to state whether or not it consents to service by electronic means and, if so, by what means.

7 CFR 1.622 How do I file a notice of intervention and response?

43 CFR 45.22 How do I file a notice of intervention and response?

50 CFR 221.22 How do I file a notice of intervention and response?

Commenters objected that the 15-day period provided in the interim regulations for filing a notice of intervention and response to a hearing request was too short, pointing out that the Departments have 30 days to file their answers under interim 7 CFR 1.624(a), 43 CFR 45.24(a), and 50 CFR 221.24(a). While the Departments need the additional time to coordinate with each other and with the respective ALJ offices regarding the possible consolidation of related hearing requests, the Departments agree that a 15-day intervention and response period is very tight.

As revised, paragraph (a)(1)(ii) of these regulations gives license parties 20 days for filing a notice of intervention and response, thus adding 5 days to the overall hearing process. A diagram of the trial-type hearing process under these revised interim final rules is found in the discussion of 7 CFR 1.660, 43 CFR 45.60, and 50 CFR 221.60, below.

Paragraph (a)(2) has also been revised, to clarify the permissible scope of a notice of intervention and response.

Paragraph (b)(3) has been added, requiring an intervenor to state whether or not it consents to service by electronic means and, if so, by what means.

Finally, paragraph (d) has been revised to specify that citations to scientific studies, literature, and other documented information do not count against the page limits for the response.

7 CFR 1.623 Will hearing requests be consolidated?

43 CFR 45.23 Will hearing requests be consolidated?

50 CFR 221.23 Will hearing requests be consolidated?

These sections, including the section headings, have been revised slightly to focus on the substance rather than the timing of the Departments' interagency coordination regarding multiple hearing requests. A decision on consolidation of hearing requests must still be made before the Departments file their responses under revised 7 CFR 1.625, 43 CFR 45.25, and 50 CFR 221.25; but it is not necessary to specify the timing of steps within the interagency coordination process.

The introductory language to paragraph (c) has also been revised to clarify that two or more hearing requests may be consolidated only in part, which could be appropriate if they have only some issues in common.

Some commenters proposed that the regulations provide for consecutive rather than simultaneous 90-day hearings for those cases that the Departments do not consolidate. Similarly, they proposed that a consolidated hearing involving two Departments last up to 180 days and a consolidated hearing involving three Departments last up to 270 days. The Departments do not agree that EPAct affords this level of flexibility regarding timing.

EPAct requires that any trial-type hearing be conducted within the time frame established by FERC for each license proceeding. To fulfill this requirement, trial-type hearings are generally completed 180 days or so before completion of the final NEPA document and license issuance. Those 180 days are needed to complete several procedural steps, including the comment period on FERC's draft NEPA document, submission of revised alternatives, review of comments on the draft NEPA document, preparation of the alternatives analysis, modification of conditions or prescriptions, issuance of FERC's final NEPA document, and license issuance. Many if not all of these steps are dependent on receipt of the ALJ's decision.

Increasing the overall time frame for hearings from 90 to 180 or 270 days—either through consecutive 90-day hearings or one extended consolidated

hearing—would push back these subsequent steps and raise a significant potential for delay in license issuance, a result Congress expressly sought to avoid. The revised interim final regulations do not adopt the commenters' proposals.

Some commenters questioned the authority of the Departments to consolidate hearing requests, thereby giving an ALJ for one Department the authority to decide disputed issues of material fact for another. This issue is addressed below in connection with 7 CFR 1.660(d), 43 CFR 45.60(d), and 50 CFR 221.60(d).

7 CFR 1.624 Can a hearing process be stayed to allow for settlement discussions?

43 CFR 45.24 Can a hearing process be stayed to allow for settlement discussions?

50 CFR 221.24 Can a hearing process be stayed to allow for settlement discussions?

These sections are new and reflect the Departments' experience in implementing the interim final rules, which did not contain any provision for a stay of the hearing process. As noted previously, the Departments have been able to settle several cases after hearing requests were filed. However, in other cases, the Departments found that settlement might have been possible, but once the hearing request was referred to the ALJ, the expedited hearing schedule left little time for further settlement discussions. Under these revised interim final regulations, before a case is referred to the ALJ, the hearing requester and the Department may agree to stay the hearing process for a limited period of time, not to exceed 120 days, to allow for settlement discussions. The Department's agreement to a stay will be based on its judgment as to the likelihood of achieving settlement within the period of the potential stay.

If necessary, the relevant Department and hearing requester(s) may request that FERC revise the time frame established for the license proceeding to accommodate the stay period and any subsequent hearing process that may be necessary if negotiations fail. FERC's regulations at 18 CFR 5.29(g) provide that FERC will consider such requests on a case-by-case basis. However, during our consultation process on these rules, FERC staff noted that the ILP is designed to allow for collaboration and coordination early in the process, with the goal that disagreements are worked out prior to the NEPA document stage. FERC staff expressed concern that allowance of stays of the trial-type hearing proceeding could encourage participants to wait until this late date to work out their differences.

A stay would not affect the deadline for filing a notice of intervention and response, so that the hearing requester and the Department will be aware of other parties' interest in the case.

7 CFR 1.625 How will the Forest Service respond to any hearing requests?

43 CFR 45.25 How will the bureau respond to any hearing requests?

50 CFR 221.25 How will NMFS respond to any hearing requests?

These sections have been renumbered because of the insertion of the stay provisions just discussed. Revisions to paragraph (a) adjust the deadline for the Departments to file their answers to accommodate the change made to 7 CFR 1.622(a)(1)(ii), 43 CFR 45.22(a)(1)(ii), and 50 CFR 221.22(a)(1)(ii) regarding notices of intervention and responses and the addition of 7 CFR 1.624, 43 CFR 45.24, and 50 CFR 221.24 regarding stays. The 50 days allowed for the Department's answer runs from the deadline for filing a hearing request, and it therefore includes the additional 5 days allowed above for filing a notice of intervention and response. Thus, the increase from 45 to 50 days in paragraph (a) will not further extend the overall hearing process.

Paragraph (b)(3) has been added in response to comments. It requires the Department to provide a copy of any scientific studies, literature, and other documented information it relies on that are not already in the license proceeding record, as is required of the other parties by 7 CFR 1.621(b)(3), 43 CFR 45.21(b)(3), and 50 CFR 221.21(b)(3) and by 7 CFR 1.622(b)(2), 43 CFR 45.22(b)(2), and 50 CFR 221.22(b)(2).

Paragraph (b)(4) has also been added, requiring the Department to state whether or not it consents to service by electronic means and, if so, by what means.

The Departments received comments on various aspects of these regulations, including the content of the answer, filing a notice in lieu of an answer, and potential methods for avoiding an evidentiary hearing.

Content of the answer. Some commenters suggested amending 7 CFR 1.624(b), 43 CFR 45.24(b), and 50 CFR 221.24(b) to require the Department to indicate in its answer whether it would stipulate to facts as alleged by any intervenor, and not just to facts as alleged by the hearing requester. Adoption of this suggestion would require the Department to review all facts alleged in any notice of intervention and response and take a specific position on each.

The Departments disagree that the regulations should be changed. The primary function of the answer is to present the Department's position on whether the hearing request raises issues that are factual, material, and in dispute. The answer may narrow the issues for a hearing or avoid one altogether if there is no disagreement between the primary parties (the hearing requester and the party Department) as to the facts. Given that intervenors cannot raise new issues, it is not necessary to respond to a notice of intervention and response in the same way as to a hearing request.

Further, reviewing every allegation raised in notices of intervention and responses would likely require extensive effort at the same time the Department is reviewing the hearing request, consulting with other Departments regarding consolidation, assembling exhibits and identifying witnesses, and preparing an answer or notice. Nothing precludes a Department from noting its position on statements in other filings, if doing so may narrow the issues for hearing. Since the regulations allow any party to the licensing proceeding to file a hearing request, intervenors are not prejudiced by this decision not to adopt the commenters' suggestion.

Filing a notice in lieu of an answer. The same commenters objected to the interim rule provision allowing the Department to file a notice in lieu of an answer, arguing that the Department should be required to file an answer in all cases, and offering revised regulatory language to that effect. The proposed revisions have not been adopted. Developing a formal answer in cases where the agency agrees that the issues are factual, material, and in dispute would not be an efficient use of agency resources. In those situations, the regulations provide that the agency will file a notice in lieu of answer and may also file a list of exhibits and witnesses. 7 CFR 1.625(e), 43 CFR 45.25(e), 50 CFR 221.25(e).

These commenters also stated that, if an answer remains permissive rather than mandatory, ''a Department's failure to file an answer should be deemed a denial of the hearing request for failure to raise a disputed issue of material fact.'' HRC comments at 35. It appears from the context that by ''denial'' the commenters mean rejection of the hearing request. As discussed below, the Departments favor leaving the

determination of which issues warrant a hearing to an independent ALJ.

Avoidance of evidentiary hearing through use of a ''paper hearing.'' The commenters also requested that this section be revised to state that the Department is not required to refer a case for hearing if no disputed issues of material fact exist or if any such issues can be resolved through a ''paper hearing'' or other procedure. The commenters would require the hearing requester to demonstrate that formal procedures such as cross-examination ''will produce a fuller and truer disclosure of the facts than a paper hearing process.'' HRC comments at 28. The Departments do not believe such an approach would be consistent with EPAct.

EPAct section 241 expressly entitles any party to the FERC license proceeding to ''a determination on the record, after opportunity for an agency trial-type hearing . . . on any disputed issues of material fact'' relating to mandatory conditions and prescriptions. Importantly, section 241 requires that the Departments' implementing regulations provide hearing parties the opportunity to undertake discovery and cross-examine witnesses. Thus, Congress did not contemplate that a '' 'paper hearing' or other procedures'' would suffice.

Avoidance of evidentiary hearing where no disputed issues of material fact exist. The commenters similarly proposed that the Department not be required to refer a case for hearing where ''the answer determines that there are no disputed issues of material fact.'' HRC comments at 38–40. These commenters would rely on the answer process to allow the Department to narrow or dispose of issues for hearing prior to referral to the ALJ. Other commenters supported giving the ALJ sole authority to determine whether disputed issues of material fact exist.

HRC's approach would grant the Department a gatekeeper role in determining what issues actually go to hearing. Although failure to raise a disputed issue of material fact should result in dismissal of a hearing request or component issue, the Departments believe that this determination is more appropriately left to an independent ALJ. Thus, unless the hearing process is stayed for a limited time for settlement negotiations under 7 CFR 1.624, 43 CFR 45.24, 50 CFR 221.24, the regulations require referral of any hearing request, answer, and intervention to the appropriate ALJ's office, which can then determine the existence of disputed issues of material fact. This approach benefits all parties by providing necessary transparency and avoiding any appearance of bias in making the important threshold determination of whether particular issues warrant a hearing.

Avoidance of evidentiary hearing by adoption of a proposed alternative condition or prescription. In the November 17, 2005, interim final rule, the Departments indicated that they would endeavor to review proposed alternatives at the earliest possible time and that, in some cases, review of a proposed alternative could ''preclude the need for a hearing.'' 70 FR at 69807. HRC asked for clarification as to whether the Departments contemplated formally adopting a proposed alternative on an expedited basis to avoid a hearing. The commenters stated that they oppose what they term ''fast-track adoption of a proposed alternative in order to forgo a hearing,'' suggesting that such an action would be inconsistent with the Departments' obligation to consider the information specified in the regulations for analyzing alternatives. HRC Comments at 70. They also suggested that public comment should be sought prior to any decision to forgo a hearing.

In response to this comment, the Departments have considered their cumulative experience thus far with early evaluation of alternatives in connection with hearing requests filed under the interim final rule. As explained below (in discussing 7 CFR 1.671, 43 CFR 45.71, and 50 CFR 221.71), early, informal evaluation of proposed alternatives in conjunction with hearing requests has led to several successful settlements. The resulting condition or prescription may differ from both the Department's preliminary condition or prescription and any proposed alternative. In revising its condition or prescription pursuant to a settlement, the Department would have to follow any applicable requirements for considering available information. Nothing in the FPA requires a Department to seek public comment on a settlement that avoids the need for a hearing. The Departments believe that developing conditions and prescriptions that achieve resource protection while avoiding litigation furthers the goals of the FPA (and particularly the EPAct amendments) and should be encouraged where feasible.

7 CFR 1.626 What will the Forest Service do with any hearing requests?

43 CFR 45.26 What will DOI do with any hearing requests?

50 CFR 221.26 What will NMFS do with any hearing requests?

Revisions to paragraph (b) of these regulations (renumbered like the previous section) track the changes to 7 CFR 1.612(b)(1), 43 CFR 45.12(b)(1), and 50 CFR 221.12(b)(1) concerning the number of copies.

Paragraph (c)(4) has been revised to require the referral notice to specify the effective date of the referral, which will be the basis for computing other time periods during the hearing process—see 7 CFR 1.630, 43 CFR 45.30, and 50 CFR 221.30 concerning docketing; 7 CFR 1.640(a), 43 CFR 45.40(a), and 50 CFR 221.40(a) concerning the prehearing conference; 7 CFR 1.641(d), 43 CFR 45.41(d), and 50 CFR 221.41(d) concerning discovery motions; and 7 CFR 1.660(a)(2), 43 CFR 45.60(a)(2), and 50 CFR 221.60(a)(2) concerning the ALJ's decision. This change will eliminate the confusion that occasionally arose under the interim regulations as to the date on which a referral notice was ''issued.''

The interim final regulations provide that the Department receiving a hearing request will refer it to an appropriate ALJ office for a hearing by sending a ''referral'' package, which includes a ''referral notice.'' See 7 CFR 1.625(b)(5), 43 CFR 45.25(b)(5), 50 CFR 221.25(b)(5). The referral notice must include, among other things, ''the date on which [the agency] is referring the case for docketing.'' 7 CFR 1.625(c), 43 CFR 45.25(c), 50 CFR 221.25(c). In establishing deadlines for key milestones in the hearing procedure (such as docketing of the case by the ALJ, filing motions, setting the initial prehearing conference, etc.), a number of provisions refer to the ''issuance of the referral notice'' as the triggering event for calculating deadlines. See, *e.g.,* 7 CFR 1.630; 43 CFR 45.30; 50 CFR 221.30.

Because the interim final regulations used slightly varying terminology throughout and did not define the ''issuance'' date, there was a potential for confusion as to how deadlines should be calculated. Despite the provision noting that the referral notice should state the date on which the agency ''is referring'' the case, there was potential to construe the triggering date as being either the date the notice was sent from the referring agency, the date it was received by the ALJ, or (if different) the date stated as the

''effective date'' on the notice itself. This led to confusion where, for example, an agency wished to send out the referral package in advance to ensure timely receipt by the ALJ, while avoiding accelerating the dates in the hearing process (such as sending the package by Federal Express on a Friday for receipt by the ALJ's office by the deadline the following Monday). The approach of specifying in the text of the referral notice an ''effective'' date that was different from the date the package was sent from the agency was expressly approved by the Coast Guard ALJ presiding in the Santee-Cooper Project trial-type hearing. See Order Memorializing Prehearing Conference at 1–2 (FERC Project Number 199, license applicant South Carolina Public Service Authority) (September 15, 2006).

Corresponding changes have been made to various other provisions of the revised interim final regulations. These changes are intended to make clear that, where any provision sets forth a period of time after referral of the case within which an act or event must take place, the trigger for calculating the due date will be the ''effective date'' stated in the text of the referral notice. This may or may not be the same as the date the notice was written, the date it was sent out from the Department, or the date it was received by the ALJ. This approach is consistent with the intent of the original regulations. If the text of the referral notice does not set forth an ''effective date,'' then the effective date will be the date shown as the date the notice was sent out from the Department.

7 CFR 1.631 What are the powers of the ALJ?

43 CFR 45.31 What are the powers of the ALJ?

50 CFR 221.31 What are the powers of the ALJ?

The introductory language to these regulations has been revised to include the phrase, ''relating to any . . . Department's condition or prescription that has been referred to the ALJ for hearing,'' previously found in interim 7 CFR 1.631(i), 43 CFR 45.31(i), and 50 CFR 221.31(i). That phrase properly covers the entire hearing process, not merely the ALJ's decision.

Paragraph (b) has been revised to affirm the authority of the ALJ to issue subpoenas under 7 CFR 1.647, 43 CFR 45.47, and 50 CFR 221.47. *See Childers* v. *Carolina Power & Light Co.,* No. 98–77 (Dept. of Labor Admin. Review Board, Dec. 29, 2000), 2000 DOL Adm.Rev.Bd. LEXIS 123, 2000 WL 1920346.

Paragraph (c) has been added to allow the ALJ to shorten or enlarge the time periods set forth in the hearing process regulations generally. Several interim regulations specified that the ALJ could change the time period otherwise applicable, while others did not. The revised interim final regulations omit those context-specific authorizations in favor of this general authority of the ALJ to adjust time periods as necessary to effectively manage the hearing process. However, the revised interim final regulations state that the ALJ cannot extend the time period for rendering a decision on the disputed issues of material fact past the deadline set in 7 CFR 1.660(a)(2), 43 CFR 45.60(a)(2), or 50 CFR 221.60(a)(2), except in the extraordinary situation where the ALJ must be replaced under 7 CFR 1.632, 43 CFR 45.32, or 50 CFR 221.32 dealing with unavailability or 7 CFR 1.633, 43 CFR 45.33, or 50 CFR 221.33 dealing with disqualification.

Some commenters suggested that the regulations be amended to state expressly that the ALJ is authorized only to issue a decision limited to disputed issues of material fact and may not address the propriety of the Department's condition or prescription. Specifically, the commenters recommended that language from preamble to the interim final rules (70 FR at 69814) be incorporated into the regulations.

The Departments find that the regulations already adequately state this principle, and thus regulatory changes are not needed. While the commenters focused on the provisions at 7 CFR 1.631(i), 43 CFR 45.31(i), and 50 CFR 221.31(i), a separate provision of the regulations at 7 CFR 1.660(b), 43 CFR 45.60(b), and 50 CFR 221.60(b) specifies the content of an ALJ decision. That section provides that an ALJ decision must contain ''findings of fact on all disputed issues of material fact'' (paragraph (b)(1)) and only those ''conclusions of law necessary to make the findings of fact'' (paragraph (b)(2)). Paragraph (b)(3) then specifies, ''The decision [of the ALJ] will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be adopted or rejected.'' The experience of the Departments to date is that ALJs well understand the limitations on their authority under EPAct.

These commenters suggested further that 7 CFR 1.631(j), 43 CFR 45.31(j), and 50 CFR 221.31(j) be amended to specify that the ALJ is empowered, not just to ''[t]ake any action authorized by law,'' but in particular, to ''summarily dispose of a proceeding, or part of a proceeding,'' as provided under a comparable provision in the FERC procedural regulations, citing 18 CFR 385.504(b)(9). The commenters suggested that a new provision be added that lays out the procedures for summary disposition, either on motion of a party or at the initiative of the ALJ, following the example of the FERC regulations at 18 CFR 385.217.

The Departments agree that ALJs have the inherent authority to summarily dispose of a proceeding that fails to raise legitimate disputed issues of material fact; failure to raise such issues means the ALJ lacks jurisdiction to hear the matter. ALJs have recognized and used this authority in ruling on motions to dismiss in trial-type-hearings conducted under the interim final rules. The Departments conclude that adding language to the regulations to make this authority explicit would be beneficial and thus are adding a new paragraph (j) expressly setting forth this authority.

However, the Departments find it unnecessary to add a provision to these regulations comparable to 18 CFR 385.217. The term ''disputed issue of material fact'' has a distinct legal meaning in the context of these regulations, and whether or not such issues have been presented determines whether the ALJ has jurisdiction to hear any part of the matter. The inquiry is governed by the particular definition of ''material fact'' and related parameters set forth in these regulations. It would be confusing to litigants to set forth a new provision that uses a similar phrase in a different context (''genuine issue of fact material to the decision of a proceeding or part of a proceeding''), as the referenced FERC provision (or FRCP 56) does.

7 CFR 1.635 What are the requirements for motions?

43 CFR 45.35 What are the requirements for motions?

50 CFR 221.35 What are the requirements for motions?

Paragraph (a)(2)(iii) in the interim regulations imposed a 10-page limit for motions, but the regulations contained no page limit for responses. The revised interim final regulations increase the page limit for motions in paragraph (a)(2)(iii) to 15 pages, including supporting arguments, and impose the same page limit for responses to motions in paragraph (c).

7 CFR 1.640 What are the requirements for prehearing conferences?

43 CFR 45.40 What are the requirements for prehearing conferences?

50 CFR 221.40 What are the requirements for prehearing conferences?

Two minor changes have been made to these sections. As mentioned previously, paragraph (a) has been revised to set the date for the initial prehearing conference at about 20 days after the effective date—rather than after ''issuance''—of the referral notice under 7 CFR 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4). And the list of topics to be covered in the initial prehearing conference under paragraph (a)(1)(iv) has been revised by adding the exchange of exhibits that will be offered as evidence under 7 CFR 1.654, 43 CFR 45.54, and 50 CFR 221.54.

Some commenters suggested that parties to a trial-type hearing be required to make ''all reasonable efforts'' to resolve procedural disputes before the pre-hearing conference, which they reason is critical to the effective conduct of that conference. HRC Comments at 47. The Departments believe the existing requirement that parties make ''a good faith effort'' is sufficient.

The same commenters suggested that the scope of the prehearing conference be limited to issues raised in each party's hearing requests or intervention and response. The commenters reasoned that this limitation is necessary to ensure that parties are not burdened with discussing matters beyond their expertise.

The Departments agree with this proposal in part and have revised paragraph (d) to provide that ''(e)ach party's representative must be fully prepared for a discussion of all issues *pertinent to that party that are* properly before the conference, both procedural and substantive.'' To promote administrative efficiency and judicial economy, ALJs must have the discretion to address any issue properly before the prehearing conference, and each party's representative must be fully prepared to discuss issues raised by the ALJ that are pertinent to that party.

These commenters further stated that parties to a trial-type hearing should always have the option of participating in the prehearing conference via telephone. They argued that prohibiting participation by telephone could create an unfair advantage for parties that have a greater ability to travel.

The revised interim final rule confirms that the prehearing conference will ordinarily be held via telephone, but preserves the flexibility established in the interim final rules for the ALJ to set the venue for a prehearing conference. This flexibility is important for cases where the ALJ and the parties would benefit from participating in a prehearing conference in person. The ALJ must retain the discretion to make this determination. In-person prehearing conferences may be justified in various circumstances, including cases where parties are located in close geographic proximity or where a large number of parties must interact with each other and the ALJ to resolve procedural and substantive issues.

Finally, the commenters suggested that the final rules allow a party who shows ''good cause'' for not attending a prehearing conference to object to any agreements or orders resulting from the prehearing conference. HRC Comments at 48–49. The commenters reasoned that parties are given only a few days' notice prior to the prehearing conference and may not be able to attend due to preexisting or unforeseen circumstances, such as lack of resources, travel delays, or medical emergencies.

The ALJ's ability to manage attendance at the prehearing conference is critical to ensuring timely resolution of issues in these expedited trial-type hearings. The revised interim final rules do not adopt the commenters' suggestion, but preserve the ALJ's discretion to accommodate a party who fails to attend a prehearing conference by not waiving that party's objection to any agreements or orders resulting from the conference. Parties may notify the ALJ if they have concerns about the schedule for the prehearing conference or will be unable to attend.

7 CFR 1.641 How may parties obtain discovery of information needed for the case?

43 CFR 45.41 How may parties obtain discovery of information needed for the case?

50 CFR 221.41 How may parties obtain discovery of information needed for the case?

Minor editorial changes have been made to paragraphs (a)(1), (a)(2), (g), and (h)(1) in these regulations for greater clarity. The latter three changes are intended to clarify that paragraphs (g) and (h) are not separate bases for discovery but are subject to and further qualify the general provisions in paragraphs (a) and (b) applicable to all discovery requests.

As mentioned previously, paragraph (d) has been revised to set the deadline for discovery motions at 7 days after the effective date—rather than after the ''issuance''—of the referral notice under 7 CFR 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

Paragraph (h)(4) has been added to provide that, unless otherwise agreed to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours. This limitation is modeled on FRCP 30(d)(2).

Some commenters recommended that discovery be authorized to begin immediately upon referral of a case to an ALJ, and argued that requiring authorization from an ALJ or agreement of the parties (as the current regulations do) needlessly limits discovery rights. The commenters recommended that the Departments adopt the approach of the FERC regulations at 18 CFR 385.402(a) and 385.403(a), which authorize discovery to begin without the need for ALJ involvement unless there are discovery disputes.

The Departments disagree that the regulations should be changed. As noted in the preamble to the interim final rules, discovery procedures must be limited in this specialized trial-type hearing context to fit within the expedited time frame mandated by section 241 of EPAct. See 70 FR at 69812. In addition, discovery must be carefully managed to ensure that it is appropriate in light of the particular history of the underlying licensing proceeding. In most cases, the licensing proceeding will have been ongoing for a number of years, and the parties will be familiar with the key documents and issues that have been developed. Further, the Department will have already filed an administrative record to support its preliminary condition or prescription, thus making wide-ranging discovery unnecessary.

Moreover, the current regulations already provide for discovery to begin promptly and continue for an adequate time. Where the parties agree, discovery may begin right away, without a need for an authorizing order of the ALJ. Any discovery motions must be expeditiously filed, within 7 days of referral of the case to the ALJ. This prompt filing enables the parties to begin as soon as possible to formulate their discovery requests and to review one another's discovery requests. See 7 CFR 1.641(d), 43 CFR 45.41(d), 50 CFR 221.41(d).

The regulations further require the parties to make a good faith effort to reach agreement regarding discovery prior to the prehearing conference. See 7 CFR 1.640(d)(2), 43 CFR 45.40(d)(2), 50 CFR 221.40(d)(2). Because the scope

of discovery is necessarily limited, as discussed above, the default date for the close of discovery (25 days after the prehearing conference, see 7 CFR 1.641(i), 43 CFR 45.41(i), 50 CFR 221.41(i)) should ordinarily be sufficient. However, the revised interim final regulations allow the ALJ to adjust the dates for key events, such as the prehearing conference and close of discovery, where appropriate.

These commenters also suggested that the Departments should model the trial-type hearing discovery procedures on the FERC rules at 18 CFR part 385, subpart D. The Departments do not find it necessary to adopt procedures developed in the much broader FERC context. For the reasons discussed above, the limited procedures under these regulations are appropriate and adequately flexible for expedited trial-type hearing proceedings.

Moreover, contrary to the commenters' suggestions, the procedures for initiating discovery under these regulations are not more onerous than FERC's. Discovery under the FERC procedures is not necessarily automatic, as Rule 410 of the FERC procedures states that a presiding officer ''may, by order, *deny or limit* discovery'' in order, among other things, to ''protect a participant or other person from undue annoyance, burden, harassment or oppression'' and ''prevent undue delay in the proceeding.'' 18 CFR 385.410(c) (emphasis added). See also 18 CFR 402(a) (scope and right of discovery is dependent upon any relevant orders of the presiding officer). Further, similar to the requirement in the Departments' regulations that discovery issues be addressed at the prehearing conference, the FERC regulations provide that the presiding officer may hold a ''discovery conference'' for the purpose of resolving disputes or ''scheduling discovery.''

The mechanisms included in these regulations are also similar to those under the FRCP. See Rule 26(d) (providing that, for most kinds of cases, parties are prohibited from directing discovery requests to other parties prior to conferring with other parties to develop a proposed discovery plan under Rule 26(f)).

For these reasons, no changes to the discovery provisions are needed.

7 CFR 1.642 When must a party supplement or amend information it has previously provided?

43 CFR 45.42 When must a party supplement or amend information it has previously provided?

50 CFR 221.42 When must a party supplement or amend information it has previously provided?

Paragraph (b)(1) of these regulations has been revised to give the parties 10 days after the completion of discovery to update their witness and exhibit lists, as compared to 5 days in the interim regulations. The same change has been made to 7 CFR 1.652(a)(1)(iii), 43 CFR 45.52(a)(1)(iii), and 50 CFR 221.52(a)(1)(iii) concerning the submission of written testimony. The additional time will assist the parties in preparing their cases for trial.

This change will add 5 days to the overall hearing process, in addition to the 5 days added by 7 CFR 1.622(a)(1)(ii), 43 CFR 45.22(a)(1)(ii), and 50 CFR 221.22(a)(1)(ii) concerning notices of intervention and responses. A diagram of the trial-type hearing process under these revised interim final rules is found in the discussion of 7 CFR 1.660, 43 CFR 45.60, and 50 CFR 221.60, below.

7 CFR 1.643 What are the requirements for written interrogatories?

43 CFR 45.43 What are the requirements for written interrogatories?

50 CFR 221.43 What are the requirements for written interrogatories?

A new paragraph (a)(2) has been added to these regulations, stating that, unless the parties agree otherwise, a party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause. This limitation is modeled on FRCP 33(a).

7 CFR 1.644 What are the requirements for depositions?

43 CFR 45.44 What are the requirements for depositions?

50 CFR 221.44 What are the requirements for depositions?

Some commenters suggested that the regulations pose unnecessary hurdles to parties wishing to participate in a deposition via telephonic conference call, to record a deposition on videotape, or to offer testimony during the trial via telephone. They stated that the regulations, as written, allow parties to block others from participating in depositions and at the hearing via telephone, which may prejudice parties who lack the means to participate in person. The commenters stated that no party should be allowed to veto another's ability to participate by conference call or video conference, and the ALJ should not be allowed to prohibit witnesses from submitting testimony by telephone or video, in light of advances in technology.

Specifically, the commenters suggested that the language ''if agreed to by the parties, or approved in the ALJ's order'' in paragraph (c)(4) of these regulations be struck from the provision regarding the participation in depositions by telephonic means and that the phrase ''subject to any conditions the parties may agree to or the ALJ may impose'' in paragraph (g) be struck from the provision regarding recording of depositions on videotape. The commenters also recommended that the phrase ''the ALJ may by order allow'' be struck from 7 CFR 1.652(c), 43 CFR 45.52(c), and 50 CFR 221.52(c) and be replaced with the phrase ''the ALJ will allow'' in the provision regarding allowing witness testimony by telephonic conference call during the trial.

The Departments disagree that the regulations need to be amended. As written, the regulations do not prevent parties from participating in depositions via telephonic conference call, from recording depositions on videotape, or from offering testimony during the trial via telephone or video recording. Rather, the regulations offer parties the opportunity to address such matters by agreement. If the parties are unable to agree, the regulations appropriately allow the ALJ to manage these matters within his or her discretion, with input from the parties as appropriate. Because the ALJ will be in the best position to evaluate the parties' relative abilities to participate and the other needs in the case (need for expedition versus need for live testimony, availability of technologies, costs, etc.), this issue is best addressed on a case-by-case basis, as the current regulations contemplate.

7 CFR 1.647 What are the requirements for subpoenas and witness fees?

43 CFR 45.47 What are the requirements for subpoenas and witness fees?

50 CFR 221.47 What are the requirements for subpoenas and witness fees?

Minor editorial changes have been made to paragraph (a)(1) and (a)(2) of these regulations to clarify that, while it is up to each party to decide whether or

not it wishes to have a subpoena issued, a party may obtain a subpoena only by filing a motion with the ALJ.

7 CFR 1.650 When and where will the hearing be held?

43 CFR 45.50 When and where will the hearing be held?

50 CFR 221.50 When and where will the hearing be held?

As revised, paragraph (a) of these regulations states that the hearing will be held at the time and place set during the prehearing conference, generally within 25 days after the completion of discovery, an increase from the 15 days provided in the interim regulations. This 25-day period includes the 5 days previously added by 7 CFR 1.642(b)(1), 43 CFR 45.42(b)(1), and 50 CFR 221.42(b)(1) concerning updated witness and exhibit lists, so the net increase is a further 5 days, to assist the parties in preparing their cases for trial.

Thus, the regulatory changes discussed to this point add a total of 15 days to the overall hearing process: 5 days for the notice of intervention and response under 7 CFR 1.622(a)(1)(ii), 43 CFR 45.22(a)(1)(ii), and 50 CFR 221.22(a)(1)(ii); 5 days for the updated witness and exhibit lists under 7 CFR 1.642(b)(1), 43 CFR 45.42(b)(1), and 50 CFR 221.42(b)(1); and 5 days for the start of the hearing under 7 CFR 1.650, 43 CFR 45.50, and 50 CFR 221.50. See the trial-type hearing process diagram in the discussion of 7 CFR 1.660, 43 CFR 45.60, and 50 CFR 221.60, below.

Some commenters observed that the interim regulations are silent on the location of the trial-type hearing, other than stating that the location will be decided at the prehearing conference. They suggested that each hearing be held in a field location commonly used by the parties to discuss matters concerning the hydropower project that is the subject of the hearing or, if such a locale is not possible, in Washington, DC. The commenters thus recommended that paragraph (a) of these regulations be amended to include as a final sentence, ''A location local to the project and convenient to the parties will be preferred.'' HRC Comments at 46.

The Departments agree that the hearings should be held in a location that is convenient to the parties whenever possible. However, no change in the regulatory language is necessary. As the rule is currently written, the ALJ has discretion to manage hearing locations. As the ALJs have done in prior cases, the Departments expect that an ALJ will take into consideration factors such as convenience to the parties and to the ALJ, the location of witnesses, and the availability of adequate hearing facilities when determining the location of a hearing.

7 CFR 1.651 What are the parties' rights during the hearing?

43 CFR 45.51 What are the parties' rights during the hearing?

50 CFR 221.51 What are the parties' rights during the hearing?

Paragraph (a) of these regulations has been revised to clarify that the parties' right to present evidence is qualified by the requirements of other regulations governing the parties' initial pleadings and prehearing submissions.

7 CFR 1.652 What are the requirements for presenting testimony?

43 CFR 45.52 What are the requirements for presenting testimony?

50 CFR 221.52 What are the requirements for presenting testimony?

Two changes have been made to these sections with respect to written direct testimony. First, paragraph (a) has been revised to distinguish between direct testimony for each party's initial case and direct rebuttal testimony. As revised, the regulations provide that all direct testimony for each party's initial case must be prepared and submitted in written form; it will be up to the ALJ to decide whether to allow rebuttal testimony, and if so, whether to require that it be submitted in written form also.

Second, as previously mentioned, paragraph (a)(1)(iii) has been revised to increase from 5 days to 10 days the time that the parties have to submit their written testimony. These are the same additional 5 days provided by revised 7 CFR 1.642(b)(1), 43 CFR 45.42(b)(1), and 50 CFR 221.42(b)(1) concerning updated witness and exhibit lists, and they do not further extend the overall hearing process.

7 CFR 1.657 Who has the burden of persuasion, and what standard of proof applies?

43 CFR 45.57 Who has the burden of persuasion, and what standard of proof applies?

50 CFR 221.57 Who has the burden of persuasion, and what standard of proof applies?

The interim regulations specified that the standard of proof applicable to a trial-type hearing is a preponderance of the evidence. The interim final rule did not address the issue of which party bears the burden of proof, other than to request comments on that question. 70 FR at 69813.

Commenters generally supported the rule with respect to the standard of proof; and they agreed that the burden of persuasion should be assigned, in accordance with 5 U.S.C. 556(d), to the party that is ''the proponent of [the] rule or order.'' They disagreed, however, as to which party is the ''proponent.''

According to EEI/NHA, ''In the mandatory conditioning context, the proponent is the Department that seeks to impose a condition on a license.'' EEI/NHA comments at 19. PacifiCorp and Southern Co. filed comments agreeing with EEI/NHA. According to HRC, on the other hand,

> The hearing requester is undoubtedly the proponent of a final decision by the ALJ resolving disputed issues of material facts in the requester's favor. While the Secretary's filing of mandatory conditions gives rise to the dispute, the conditions themselves are not the subject of the hearing. The conditions, and whether they are supported by substantial evidence, are only reviewable under FPA section 313[,] 16 U.S.C. 825*l*. As such, the Secretary is not the proponent of an order by the ALJ in the agency trial-type hearing. Rather, the proponent is the hearing requester.

HRC comments at 32. CBD and GYC filed similar comments on this issue. Other commenters argued that the hearing requester bears the burden of proof that a disputed issue of material fact exists and then the burden shifts to the Department to support its condition or prescription.

The question of which party bears the burden of persuasion has been addressed in six proceedings initiated under the interim final rules. Each of six independent ALJs, including at least one from each Department, concluded that the hearing requester bears the burden of persuasion. *Idaho Power Co.* v. *Bureau of Land Management,* No. DCHD 2006–01 (DOI, May 3, 2006); *In re Idaho Power Co. Hells Canyon Complex,* No. 06–0001 (USDA, May 31, 2006); *In re Klamath Hydroelectric Project,* No. 2006–NMFS–0001 (USCG, July 6, 2006); *Public Service Co. of New Hampshire* v. *U.S. Fish and Wildlife Service,* No. DCHD–2006–02 (DOI, Aug. 9, 2006); *In re Santee Cooper Hydroelectric Project,* No. 2006–NMFS–0001 (USCG, Sept. 15, 2006); *Avista Corp.* v. *Bureau of Indian Affairs,* DCHD–2007–01 (DOI, Nov. 1, 2006).

The Departments concur with HRC and the unanimous position of the ALJs on this issue. That position is consistent with the general rule that the burden of persuasion lies with the party seeking relief. See *Schaffer* v. *Weast,* 546 U.S. 49 (2005) (characterizing 5 U.S.C. 556(d) as applying the general rule and placing the burden of persuasion on parents

challenging an individualized education plan for their child, not on the school district that proposed the plan).

A hearing request under EPAct section 241 is a challenge to the factual basis for a Department's preliminary condition or prescription. The validity of the condition or prescription is not itself at issue, as EPAct allows for a hearing only on disputed issues of material fact, and the ALJ has no authority to adopt, modify, or reject a preliminary condition or prescription. *See* 7 CFR 1.660(b)(3), 43 CFR 45.60(b)(3), 50 CFR 221.60(b)(3). The requester seeks a decision from the ALJ that the facts are different from those assumed by the Department in its preliminary condition or prescription. The requester is thus the party seeking relief, the proponent of the order in the trial-type hearing, and the party that bears the burden of persuasion.

The revised interim final regulations add a new paragraph (a) concerning the burden of persuasion and retain the standard of proof from the interim regulations in paragraph (b). The combined effect of the burden of persuasion and the standard of proof is that, in order for the hearing requester to prevail on any given issue, it must establish by a preponderance of the evidence that the facts are as the requester asserts, rather than as the Department asserts. If the ALJ finds that it is more likely than not that the facts are as the Department asserts, or that the evidence is so closely balanced that there is no preponderance in either direction, the requester will have failed to meet its burden of persuasion and the Department's factual assertions on the issue will stand.

7 CFR 1.659 What are the requirements for post-hearing briefs?

43 CFR 45.59 What are the requirements for post-hearing briefs?

50 CFR 221.59 What are the requirements for post-hearing briefs?

Paragraph (a)(1) of these regulations has been revised to increase the time that the parties have to file their post-hearing briefs from 10 days to 15 days. This change will add 5 days to the overall hearing process, beyond the 15 days added by regulatory changes discussed previously. See the trial-type hearing process diagram, below.

7 CFR 1.660 What are the requirements for the ALJ's decision?

43 CFR 45.60 What are the requirements for the ALJ's decision?

50 CFR 221.60 What are the requirements for the ALJ's decision?

Commenters raised a number of issues related to these regulations, including the timing and finality of the ALJ's decision and the ability of an ALJ from one Department to render a decision for another Department.

Timing of the ALJ's decision in relation to the TTH process. The interim regulations provided that the ALJ must issue a decision within 30 days after the close of the hearing or 90 days after issuance of the referral notice, whichever occurs first. As explained in the preamble to the interim final rules, the Departments interpreted EPAct's requirement of ''an agency trial-type hearing of no more than 90 days'' as mandating that the portion of the overall hearing process from referral to the ALJ to final decision be completed within 90 days. This, in turn, necessitated a highly compressed schedule for the prehearing conference, discovery, written testimony, and post-hearing briefing, so that the ALJ could meet the 90-day deadline for issuing a decision.

The Departments received numerous comments about the tight time frames in the interim regulations and also received several suggestions for revisions extending certain procedural steps. In particular, several commenters argued that the time for the ALJ's decision should fall outside the 90-day hearing time frame. EEI/NHA argued that the Departments had misconstrued the statute on this issue:

> [T]he extraordinarily compressed hearing schedule is inconsistent with the plain language of section 241, which provides that a ''determination on the record,'' *i.e.,* the ALJ's decision, shall occur ''after opportunity for agency trial-type hearing . . . .'' Therefore, the statute expressly requires that the ALJ's ''determination on the record'' be made after completion of the hearing, not during the hearing process itself.

EEI/NHA Comments at 12. EEI/NHA buttressed their argument by relying on the distinction between hearings, which are governed by one section of the APA, 5 U.S.C. 556, and decisions, which are governed by another, 5 U.S.C. 557. Reading EPAct and the APA together, EEI/NHA concluded that

> the rule should be revised to require that only the hearing process itself, as defined by section 556 of the APA, be conducted within the 90-day limit. It is plainly inconsistent with the structure of the APA to include the briefing and decision-making process within the 90-day limit.

EEI/NHA Comments at 14. Commenters also argued that the 90-day hearing clock should exclude discovery, begin to run with the submission of written direct testimony, and close after rebuttal testimony and cross-examination.

The Departments agree in part. The provisions of EPAct and the APA that the commenters cite do provide a basis for considering the post-hearing briefing and decision stages of the hearing process to be outside the 90-day requirement. However, other provisions of EPAct militate against EEI/NHA's expansive view that the 90-day period should not begin until discovery and other prehearing stages have been completed, and that the briefing and decision stages should extend for 75 days beyond the end of the 90-day period.

First, EPAct required the three Departments to ''establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses.'' A schedule that allowed 90 days just for the taking of evidence at the hearing could hardly be considered ''expedited.'' Moreover, the statute's specific mention of discovery indicates that Congress intended the 90 days to cover both prehearing and hearing procedures.

Second, EEI/NHA cites APA section 557 to support its argument that post-trial briefing should not be considered part of the 90-day hearing process, but rather part of the ''decision.'' EEI/NHA notes that this separate section addressing decisions specifically affords parties the opportunity to offer proposed findings of fact and conclusions. The relevant APA section, however, is 557(c), which expressly applies only to ''a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees.'' 5 U.S.C. 557(c). The ALJ's opinion in an EPAct trial-type hearing does not fall within any of these decisional categories. The preamble to the interim final rules recognized that the EPAct trial-type hearing decision is not the type contemplated by section 557(c). 70 FR at 69814. And at least one ALJ has recognized the unique nature of EPAct trial-type hearings, noting in the burden of proof context that the hearing provisions of the APA ''do not however directly or clearly apply to the postures of the parties in this unique new proceeding authorized by the EPAct.'' *Avista Corp.* at 6.

Third, EPAct section 241 requires that the trial-type hearing be conducted ''within the time frame established by

[FERC] for each license proceeding.'' A hearing process extending more than 6 months after referral of the case to the ALJ, as urged by EEI/NHA, would be difficult to square with this Congressional mandate in many cases. Indeed, as noted previously in connection with 7 CFR 1.623, 43 CFR 45.23, and 50 CFR 221.23, several procedural steps remain to be completed after issuance of the ALJ's opinion; and many, if not all, of these subsequent steps are dependent on receipt of the ALJ's opinion. Excluding discovery and post-trial briefing from the 90-day time frame and expending 90 days solely on the presentation of testimony and evidence would extend the hearing process, push back these subsequent steps, and create delays in the licensing process—a result that Congress clearly sought to avoid.

In any event, EPAct requires the Departments to afford license parties an ''opportunity for an agency trial-type hearing of *no more than* 90 days'' (emphasis added). This language leaves it to the Departments' discretion whether the hearing, even excluding post-hearing briefing and the ALJ's decision, will take the full 90 days or something less than 90 days.

In light of the competing considerations, the Departments have decided to extend some of the time frames in the hearing process that seemed particularly tight. As noted previously, 5 days have been added to the period for filing a notice of intervention and response, which occurs before the case is referred to the ALJ. Five days each have likewise been added to the periods for filing updated witness lists, exhibit lists, and written testimony, for commencing the hearing, and for filing post-hearing briefs, all of which occur after the case has been referred to the ALJ.

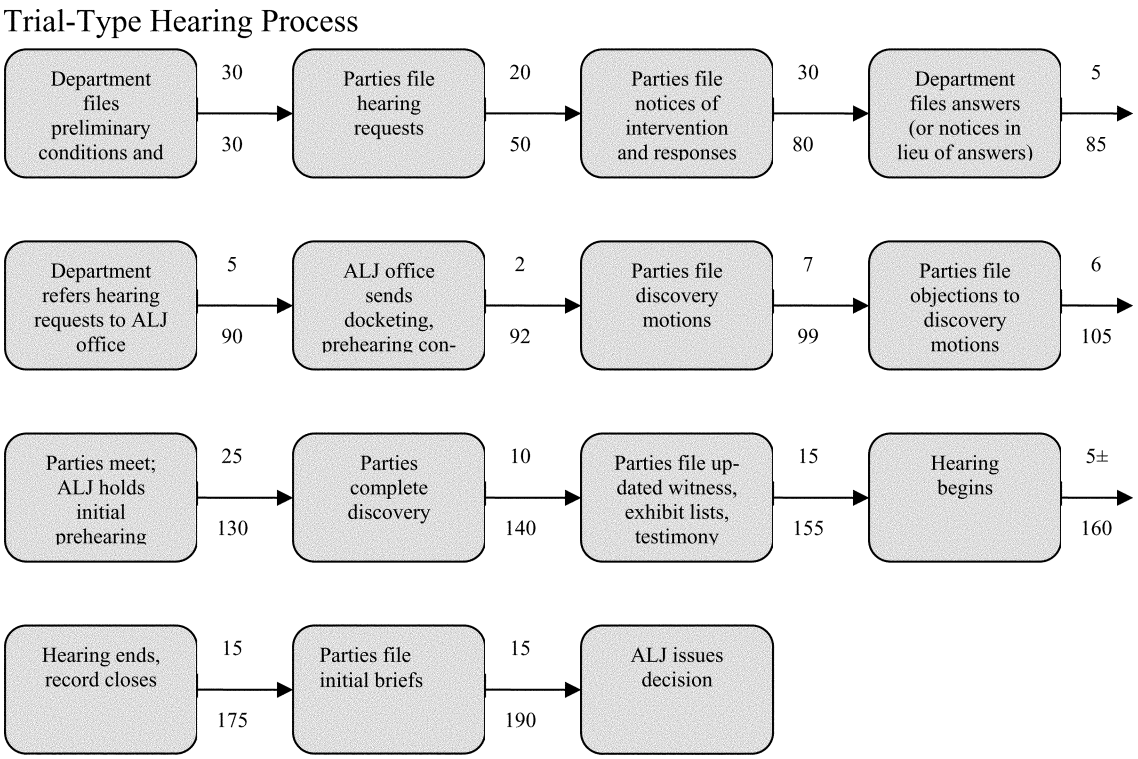
Under this schedule, assuming a 5-day evidentiary hearing, the post-hearing briefs would be filed about 90 days after the case has been referred to the ALJ, as opposed to 75 days under the interim regulations. Under revised 7 CFR 1.660(a)(1), 43 CFR 45.60(a)(1), and 50 CFR 221.60(a)(1), the ALJ would then have 15 days after the deadline for filing the post-hearing briefs, which is 30 days from the close of the hearing, to render his or her decision. This timing means that the ALJ decision would be issued within 105 days after the case was referred to him or her. If necessitated by the length of the evidentiary hearing, the desirability of reply briefs, or other circumstances, the ALJ could extend the deadline for his or her decision under revised 7 CFR 1.631(c), 43 CFR 45.31(c), and 50 CFR 221.31(c), but not past 120 days after the case was referred to the ALJ, under 7 CFR 1.660(a)(2), 43 CFR 45.60(a)(2), and 50 CFR 221.60(a)(2).[3]

Thus, the Departments have decided to keep the (initial) post-hearing briefing within the 90-day schedule; but based on EEI/NHA's argument, have allowed the ALJ 15 to 30 days past the 90-day period to render his or her decision. Even if the ALJ takes the full 30 days, resulting in a decision 120 days after the case was referred, the decision would come before comments are due to FERC on its draft NEPA document under FERC's usual schedule set forth in 18 CFR 5.25(c). Even as extended, therefore, the trial-type hearing can be conducted ''within the time frame established by [FERC] for each license proceeding,'' as required by EPAct.[4]

The following diagram shows the overall trial-type hearing process under the revised interim final rules. The number above each arrow shows the maximum number of days normally allowed from the completion of the previous step to the completion of the next step, while the number below each arrow shows the cumulative number of days from the beginning of the trial-type hearing process to the completion of the next step in the process.

[3] The only exception would be if the ALJ has to be replaced under 7 CFR 1.632, 43 CFR 45.32, or 50 CFR 221.32 dealing with unavailability or 7 CFR 1.633, 43 CFR 45.33, or 50 CFR 221.33 dealing with disqualification.

[4] As noted above, a trial-type hearing process could be stayed for settlement negotiations up to 120 days under revised 7 CFR 1.624, 43 CFR 45.24, or 50 CFR 221.24, further extending the overall hearing process, but only if FERC revises the time frame for the license proceeding to accommodate the stay period and any subsequent hearing process required if settlement discussions fail.



Timing of the ALJ's decision in relation to FERC's NEPA process. The Hoopa Valley Tribe (HVT) raised a concern that, under the regulatory schedule, FERC will prepare its draft EIS at the same time the ALJ is resolving disputed material facts relating to the environment. HVT comments at 2. The Departments acknowledge that, in a given case, the ALJ's resolution of disputed factual issues may affect the timing for completing the NEPA analysis and document. Therefore, on a case-by-case basis, FERC should consider whether supplemental NEPA analysis is appropriate and proceed to supplement when a resolution of disputed factual issues results in substantial changes that are relevant to environmental concerns.

Finality of the ALJ's decision. Some commenters recommended that the regulations be changed to provide that factual findings of an ALJ are advisory to the Secretaries of the Departments involved, rather than final. They contended that the Secretaries may not lawfully recognize an ALJ's finding of facts as binding, particularly where the findings are rendered by the designated ALJ of a different Department in a consolidated case. The commenters also disputed that ALJ findings may be fairly characterized as wholly factual and devoid of substantive legal rulings. Finally, the commenters contended that there is no precedent for the approach taken in the interim rules, and they pointed to the advisory nature of decisions of FERC's Dispute Resolution Panel (under 18 CFR 5.14). Specifically, the commenters suggested amending paragraph (d) of these regulations by changing the title from ''Finality'' to ''Review,'' striking from the first sentence the word ''final,'' and replacing it with the term ''advisory.''

Regardless of what practice is followed for other aspects of the licensing process before FERC, EPAct mandates that disputed issues of material fact with respect to conditions and prescriptions ''*shall be determined* in a single trial-type hearing'' conducted by the relevant Department. 16 U.S.C. 797(e), 811 (emphasis added). The Departments have reasonably construed the statutory language to require that the factual findings of an ALJ be used by the Secretaries of the Departments involved in developing modified conditions and prescriptions.

The Departments' view is supported by the district court's holding in *American Rivers:*

> [T]he Energy Policy Act explicitly provides that '[a]ll disputed issues of material fact raised by any party shall be determined in a single trial-type hearing' and makes no provision for appeals of that determination. By making the ALJ's decision on factual issues final, it appears that the departments are simply interpreting what Congress has mandated and establishing agency procedures for fulfilling this mandate.

2006 WL 2841929, * 7.

The Secretaries' authority to determine whether to issue mandatory conditions and prescribe fishways is not undercut by this approach. While the ALJ may determine specific facts, the resource agencies retain the responsibility of determining the weight and significance to be accorded such facts in finalizing mandatory conditions or prescriptions, in light of the resource agencies' objectives for the resources they manage. The Departments also have an obligation to ensure that their modified conditions and prescriptions are supported by substantial evidence as informed by all relevant information in the administrative record, which may include new information that was not available during the hearing.

The Departments also note that, contrary to the commenter's suggestion, both EPAct and the interim final regulations clearly preserve the Secretaries' discretion to determine whether to issue conditions or prescriptions and how to structure them. The regulations are clear that the ALJ is empowered to render only factual findings. While conclusions of law necessary to reach those findings (such as rulings regarding the admissibility of evidence) may be made, the ALJs may not include substantive legal conclusions with their final determinations.

Nevertheless, to avoid confusion over different possible meanings of the term ''final,'' the Departments have revised

paragraph (d) to state that the ALJ's decision with respect to the disputed issues of material fact ''will not be subject to further administrative review.''

Ability of an ALJ from one Department to render a decision for another Department. With respect to the commenters' objection that an ALJ in one Department may not render findings of fact that would be determinative for another Department, the Departments respond that this would happen only where cases have been consolidated due to the commonality of some of the issues. Consolidation in these circumstances will benefit both the Departments and the parties by avoiding duplication of effort, scheduling conflicts, and the risk of inconsistent results. The court in *American Rivers* recognized consolidation as a valid practice.

As amended by EPAct, FPA sections 4(e) and 18 provide that ''[a]ll disputed issues of material fact raised by any party shall be determined in a single trial-type hearing *to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection* . . . '' 16 U.S.C. 797(e), 811 (emphasis added). Thus, when the Departments decide to consolidate hearing requests under these regulations and refer them to a single ALJ, they are exercising the authority given them by Congress to determine the relevant resource agency to conduct the hearing on their behalf. Such arrangements are also authorized by the Economy Act, 31 U.S.C. 1535.

The interim final rules explained that hearing requests received by NOAA would be referred to an appropriate ALJ office outside the Department of Commerce because neither NOAA nor the Department of Commerce has a staff of ALJs. See 70 FR at 69810. NOAA is taking this opportunity to clarify that, for any trial-type hearings arising with respect to NOAA conditions or prescriptions under FPA sections 4(e) or 18, the United States Coast Guard Office of Administrative Law Judges, within the Department of Homeland Security, is an appropriate forum.

Authority to refer trial-type hearings involving NOAA under the FPA to the Coast Guard's Office of ALJs is set forth at 15 U.S.C. 1541, which provides that,

with respect to any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration, all adjudicatory functions which are required by chapter 5 of Title 5 to be performed by an Administrative Law Judge may be performed by the United States Coast Guard on a reimbursable basis.

Coast Guard ALJs have thus handled proceedings as needed with respect to several hearing requests arising under the interim final regulations.

Other changes. The revised interim final regulations make a few additional changes to 7 CFR 1.660, 43 CFR 45.60, and 50 CFR 221.60. They add a new paragraph (c)(2), requiring the ALJ to prepare a list of all the documents that constitute the complete record for the hearing process and to certify that the list is complete. Under paragraph (c)(3), that list is then sent along with the record to FERC for inclusion in the record for the license proceeding. Two new sentences are added to paragraph (c)(3), specifying what documents should be forwarded to FERC for cases in which a settlement is reached.

7 CFR 1.671 How do I propose an alternative?

43 CFR 45.71 How do I propose an alternative?

50 CFR 221.71 How do I propose an alternative?

As with the change to 7 CFR 1.621(a)(2), 43 CFR 45.21(a)(2), and 50 CFR 221.21(a)(2) discussed above, paragraph (a)(2) of these regulations has been revised to provide a longer period of time—60 days as compared to 30 days—for a license party to submit a proposed alternative condition or prescription to a Department in cases where the Department is exercising its reserved authority after issuance of a license under 7 CFR 1.601(d)(2), 43 CFR 45.1(d)(2), or 50 CFR 221.1(d)(2).

Several commenters requested that the Departments extend the deadline for filing alternative conditions and prescriptions because they believe the interim regulations do not provide sufficient time to prepare alternatives or attempt informal resolution of contested issues. Specifically, these commenters suggested that the Departments extend the existing deadline for filing alternatives from 30 days to 45 days

The Departments have decided to retain a concurrent filing deadline for requests for hearings and proposals of alternative conditions. As explained in the preamble to the interim final rules, the 30-day deadline for filing alternative conditions and prescriptions provides several benefits for the parties, FERC, and the Departments. See 70 FR 69807. Among these benefits are, first, that early submission of proposed alternatives helps ensure that such proposals are available to FERC during the development of its draft NEPA document. Second, the concurrent filing may help inform any settlement negotiations, thus potentially avoiding the need for a trial-type hearing.

Both of these concerns remain relevant and have been reaffirmed in the Departments' experience implementing the interim final regulations. In practice, there have been a number of cases where the relevant parties were able to settle disputes without the need for a trial-type hearing. In several of those cases, the Departments found that having proposed alternatives in hand to review along with the hearing request furthered the goal of identifying conditions and prescriptions that achieved necessary resources protection while avoiding litigation.

Also in practice, parties did not appear to be unduly burdened by the requirement to concurrently file hearing requests with proposed alternatives, as reflected in the number of alternatives filed in a timely manner. We previously noted how proposed alternatives may factor into settlement discussions (see discussion of 7 CFR 1.625, 43 CFR 45.25, and 50 CFR 22.25).

A diagram of the overall alternative condition and prescription process under these revised interim final rules is found in the discussion of 7 CFR 1.673, 43 CFR 45.73, and 50 CFR 221.73, below.

7 CFR 1.672 May I file a revised proposed alternative?

43 CFR 45.72 May I file a revised proposed alternative?

50 CFR 221.72 May I file a revised proposed alternative?

These sections are new. They provide that, within 20 days after issuance of the ALJ's decision in a trial-type hearing, a license party may file a revised alternative condition or prescription, if two conditions are met. First, the party must have previously filed a proposed alternative under 7 CFR 1.671, 43 CFR 45.71, or 50 CFR 221.71. And second, the revised proposed alternative must be designed to respond to one or more specific findings of fact by the ALJ.

These sections afford an opportunity to license parties who have previously proposed an alternative to submit a revised alternative, if the facts as found by the ALJ following the trial-type hearing are different from those assumed by the party as the basis for its original alternative. The revised proposed alternative must identify the specific ALJ findings that it addresses and how the revised alternative differs from the original alternative. Filing a revised alternative will constitute a withdrawal of the original alternative.

7 CFR 1.673 When will the Forest Service file its modified condition or prescription?

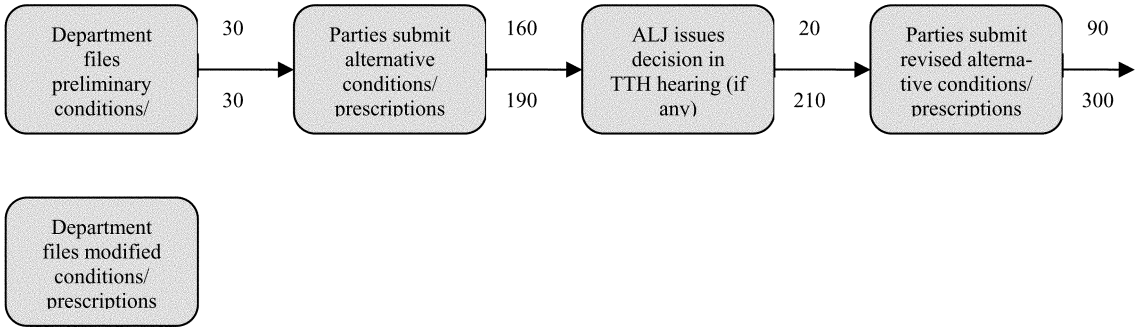
43 CFR 45.73 When will the bureau file its modified condition or prescription?

50 CFR 221.73 When will NMFS file its modified condition or prescription?

These sections have been redesignated because of the insertion of the revised proposed alternative provisions just discussed. They have also been renamed to focus on the timing of the Department's filing of its modified condition or prescription. Under paragraph (a), the Department will generally take action on any proposed alternative and file its modified condition or prescription within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c) unless additional time is needed to complete supplemental analysis of the modified condition or prescription. This will typically be 75–90 days after the deadline for the parties to file revised alternatives under 7 CFR 1.672, 45 CFR 45.72, or 50 CFR 221.72, depending on when the ALJ decision is issued and any necessary supplemental analysis is completed. However, under new paragraph (b), if the Department needs additional time to complete the steps set forth in paragraph (a), it will so inform FERC within that same 60-day period. *See City of Tacoma.*

The following diagram shows the overall alternative condition and prescription process under the revised rules. The number above each arrow shows the maximum number of days normally allowed from the completion of the previous step to the completion of the next step, while the number below each arrow shows the cumulative number of days from the beginning of the alternatives process to the completion of the next step in the process.

Alternative Condition and Prescription Process



HRC suggested that the regulations expressly provide instructions to parties who wish to submit comments regarding proposed alternative conditions or prescriptions. It noted that the regulations already obligate the Departments to consider ''evidence and supporting material provided by any license party,'' comments on the preliminary condition or prescription, and comments on FERC's draft or final NEPA documents. HRC suggested that the list of material to be considered in reviewing an alternative implies that any comments received on alternatives will be considered, without specifying how that should be done.

HRC proposed that paragraph (a) of these regulations be amended to expressly include comments received on the proposed alternative. It further recommended that a new paragraph (e) be added to provide a discrete comment period on alternative conditions and prescriptions. Such comments, HRC suggested, should be accepted from any member of the public, whether or not they are parties to the license proceeding. According to HRC, the Departments cannot rely solely on comments submitted to the FERC on the draft NEPA document.

Finally, HRC suggested adding a completely new section (to come after 7 CFR 1.671, 43 CFR 45.71, and 50 CFR 221.71) to address how comments on the proposed alternative may be submitted. It suggested that the regulations include: A 60-day comment period on proposed alternatives; filing and service requirements for comments similar to those for proposed alternatives; a requirement that parties provide specific citations to scientific studies, literature, and other documents and to supply copies of materials not already in the licensing proceeding; and a statement that parties may also file comments on the FERC NEPA document addressing the proposed alternative within the time frame established by FERC.

The Departments disagree that a specific comment process for alternatives is needed. The statute lays out specific criteria for acceptance of an alternative, and the existing regulations require that the proponent submit information on each of the criteria. The regulations also require that alternatives and supporting documents be served on each party to the license proceeding, so that interested parties will have notice. Any license party is free to submit comments, either supporting or opposing a proposed alternative; and the Departments will consider comment materials timely submitted by all parties.

As discussed below, the Departments are amending the regulations at 7 CFR 1.674, 43 CFR 45.74, and 50 CFR 221.74 to clarify that they will consider information regarding alternatives submitted by any license party by the close of the FERC NEPA comment period.

7 CFR 1.674 How will the Forest Service analyze a proposed alternative and formulate its modified condition?

43 CFR 45.74 How will the bureau analyze a proposed alternative and formulate its modified condition or prescription?

50 CFR 221.74 How will NMFS analyze a proposed alternative and formulate its modified condition or prescription?

Paragraph (a) of these regulations (redesignated like the previous section), has been revised slightly to clarify that a Department's burden in reviewing any proposed alternatives is to consider evidence and supporting material provided by any license party or otherwise *reasonably* available to the

Department, recognizing that the Department has a limited time to complete its review and prepare the required written analysis.

As mentioned above, a new paragraph (c) has been added to specify that the Department will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c). Given the complexity of the issues and the volume of material to be analyzed in the typical case, the Departments cannot reasonably be expected to continue to accept and incorporate new information right up until the FERC filing deadline for modified conditions and prescriptions.

Finally, paragraph (d) (as redesignated) has been revised to specify that, if an alternative submitted by a license party under 7 CFR 1.671, 43 CFR 45.71, or 50 CFR 221.71 was subsequently withdrawn, the Department will include in its statement to FERC an explanatory notation that a proposed alternative was voluntarily withdrawn. This provision responds to GAO's recommendation that the Department provide additional information in cases where an alternative was withdrawn, *e.g.,* as the result of settlement negotiations with the Department.

The Departments received comments on various aspects of these regulations, including the consideration to be given alternative conditions and prescriptions, the meaning of ''substantial evidence,'' ''adequate protection,'' and ''cost,'' and the applicability of FPA section 33.

Consideration of alternatives. Some commenters proposed regulatory revisions to this section clarifying that the Department has the right to reject alternatives that do not meet the FPA section 33 criteria for resource protection, cost, and improved project operation, and specifying that the Department must consider all proposed alternatives at the same time. These concepts are already captured by EPAct and these regulations, including the regulatory time frames for submitting and considering alternatives. No additional regulatory language or clarification is necessary.

The same commenters also proposed a two-tiered approach under which alternatives not meeting the section 33 criteria for required acceptance would be moved into a category of alternatives that the Department ''may consider.'' HRC comments at 66. According to this proposal, where multiple alternatives have been submitted that do not meet the statutory criteria for required acceptance, ''[a]ll of these alternatives are then compared to the original condition the Department proposed, and the Department makes a determination as to which best protects the resource.'' HRC comments at 66.

The commenters' proposal appears to impose a new substantive standard for selection of ''second tier'' alternatives—a standard that Congress did not require. These regulations are limited to implementing the specific requirements of section 33. No regulation is needed to address Departmental action where an alternative fails to meet the statutory criteria, as the Departments retain discretion to consider all record documents. The commenters' proposed revisions have not been adopted.

Substantial evidence. Some commenters stated their assumption that the term ''substantial evidence'' in paragraph (b) refers only to the Department's obligation to base any conditions and prescriptions on substantial evidence. To clarify, it is incumbent on the proponent of an alternative to provide the supporting information required by 7 CFR 1.671(b), 43 CFR 45.71(b), or 50 CFR 221.71(b) for the Secretary to consider in determining whether the statutory criteria are met.

Adequate protection. Some commenters suggested that this section clarify the criteria of ''adequate protection'' as specified in EPAct and paragraph (b)(2)(i) of these regulations for adoption of alternative conditions under section 33. They argued that, in light of Endangered Species Act regulations, ''adequate protection'' includes both conservation and recovery of threatened and endangered species.

The ''adequate protection'' standard in section 33(a)(2) applies specifically to the alternatives analysis process for conditions under FPA section 4(e). Section 4(e) in turn authorizes the Secretaries of the Interior, Commerce, and Agriculture to condition hydropower licenses on provisions deemed ''necessary for the *adequate protection* and utilization'' of Federal reservations under their jurisdiction. 16 U.S.C. 797(e) (emphasis added).

Determining what constitutes ''adequate protection'' when developing section 4(e) conditions falls within the sole authority and discretion of the relevant Secretary, and the answer will vary among cases and reservations depending on a variety of factors. Similarly, the relevant Secretary has sole authority and discretion to determine if a proposed alternative condition rises to the level of ''adequate protection.'' As such, the Departments do not believe that further clarification is feasible or necessary.

Cost. The commenters also suggested that determining whether alternative conditions and prescriptions ''cost significantly less to implement'' under section 33 and paragraph (b)(1)(i) of these regulations not be limited to short-term economic considerations, but also include consideration of both the long-term costs of lost resources and the benefits of protection. The Departments agree that the section 33 alternatives process should examine costs in a broader context than simply short-term economic costs to the project operator. No regulatory revision is required, however, to effectuate this point.

Applicability of FPA section 33. Under paragraph (c)(1) of the interim rules, when the Department files its modified condition or prescription, it must also file a written statement explaining the basis for the condition or prescription and the reasons for not adopting any alternative. Under paragraph (d) of the interim rules, the written statement must demonstrate that the Department gave equal consideration to the effects of the modified condition or prescription and any alternative not adopted on energy supply, distribution, cost, and use; flood control; navigation; water supply; air quality; and the preservation of other aspects of environmental quality. Revised versions of these provisions are now found in paragraphs (d) and (e).

Some commenters argued that the plain language of FPA section 33(a)(4) and (b)(4) must be interpreted to require that the Department file a written statement explaining the basis for its condition or prescription and show that it gave ''equal consideration'' to the factors identified in the statute whether or not a party has submitted a proposed alternative condition or prescription. Some commenters further suggested that a statement must be prepared for both preliminary and modified (final) conditions and prescriptions.

The operative statutory language states,

> The Secretary concerned shall submit into the public record of the Commission proceeding with any condition under section 4(e) or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely

manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

16 U.S.C. 823d(a)(4). The language at section 823d(b)(4) (regarding fishway prescriptions) is substantially identical.

The Departments disagree that the statute requires a written statement demonstrating ''equal consideration'' of the statutory factors in cases where no alternatives have been submitted. In determining the plain meaning of statutory language, the reviewing body

> should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a ''fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.''

Food and Drug Admin. v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000), quoting *Davis* v. *Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989).

Section 33 is entitled ''Alternative conditions and prescriptions,'' and it lays out a sequential series of steps for considering proposed alternatives and reaching a final determination. Section 33(a)(l) permits any party to a hydropower license proceeding to propose an alternative condition. Under section 33(a)(2), the Secretary must accept an alternative if it ''(A) provides for the adequate protection and utilization of the reservation; and (B) will either, as compared to the condition initially [deemed necessary] by the Secretary[,] (i) cost significantly less to implement; or (ii) result in improved operation of the project works for electricity production.'' 16 U.S.C. 823d(a)(2).

When evaluating an alternative, section 33(a)(3) directs the Secretary to consider evidence otherwise available concerning ''the implementation costs or operational impacts for electricity production of a proposed alternative.'' And section 33(a)(4) directs the Secretary to submit a statement ''with any condition under section 4(e) or alternative condition [the Secretary] accepts'' to demonstrate that the Secretary ''gave equal consideration to the effects of the condition adopted and alternatives not accepted.'' 16 U.S.C. 823d(a)(4). Again, the language at section 823d(b) (regarding fishway prescriptions) is substantially identical.

Thus, a contextual analysis of section 33 shows that the equal consideration requirement is triggered by the submission of an alternative condition or prescription. The requirement does not apply at the preliminary condition or prescription stage, since no alternatives have been submitted at that stage. And it does not apply at the modified condition or prescription stage, unless a license party has proposed an alternative.

This contextual analysis of section 33 is buttressed by an important practical consideration. In the absence of an alternative that has been proposed and supported by a license party under 7 CFR 1.671(b), 43 CFR 45.71(b), or 50 CFR 221.71(b), the Departments will generally lack sufficient information about the factors listed in section 33(a)(4) and (b)(4)—energy supply, distribution, cost, and use; flood control; navigation; water supply; air quality; and other aspects of environmental quality—to provide a meaningful equal consideration statement.

Nevertheless, the Departments as a matter of course submit written explanations of the basis for their conditions or prescriptions, together with record materials supporting those conditions or prescriptions. See redesignated 7 CFR 1.674(c)(1)(i), (2); 43 CFR 45.74(c)(1)(i), (2); or 50 CFR 221.74(c)(1)(i), (2). And as a matter of policy, in cases where a Department determines that it has sufficient information and staff resources to provide a meaningful analysis of the statutory factors even in the absence of an alternative, it may do so. No changes to the regulations are needed in response to the commenters' concern.

V. General Comments

A. Disputed Issues of Material Fact

As noted previously, some commenters urged that the final rules provide additional guidance on the types of issues that are appropriate for resolution in a trial-type hearing under EPAct. A ''disputed issue of material fact'' must meet three fundamental requirements: The matter raised must (1) concern a ''fact,'' (2) be ''material,'' and (3) be ''disputed.'' These are distinct inquiries, and all three must be fully considered by an ALJ.

Factuality

In the context of ordinary litigation, an issue of fact is one that would typically be left to a jury in a proceeding where a jury is the trier of fact. *See* William W. Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 FRD. 465, 470 (1984). Schwarzer explains:

> The dictionaries define a fact as a thing done, an action performed, or an event or occurrence. One can safely say, therefore, that a dispute over whether a thing was done or an event occurred is an issue of fact. Such facts, which may be called historical facts, are jury issues.

Id.

While this statement provides a useful starting point, the analogy to jury facts may be somewhat confusing in the context of EPAct trial-type hearings because the ALJ is the factfinder. And while Federal litigation may involve a range of issues from purely factual to purely legal, with some mixed issues, trial-type hearings under these rules are limited to resolving ''disputed issues of material fact.'' Clear and specialized standards must be applied to hearing requests under these regulations.

To determine whether an issue is ''factual'' for purposes of these regulations, it helps to first distinguish matters of fact from matters of law and policy. Substantive legal issues are excluded from the scope of the hearing. ALJs are empowered to render legal conclusions only to the extent necessary to facilitate the presentation of evidence and conduct of the trial on the underlying factual issues. See 7 CFR 1.60(b)(1)(ii), 43 CFR 45.60(b)(1)(ii), 50 CFR 221.60(b)(1)(ii); 70 FR at 69814.

It would not be appropriate, for example, to hold a hearing on whether or not a measure that the Secretary is considering prescribing would constitute a ''fishway,'' which is a term that has been partially defined by Congress. Public Law 102–486, § 1701(b), 106 Stat. 3008 (1992). Nor is the ALJ empowered to decide what substantive standards must be met to justify the Secretary's exercise of discretion under sections 4(e) and 18 (*e.g.,* what level of impacts to resources from the existing project must be demonstrated to uphold a condition or prescription), or whether the Secretary's condition or prescription is ''reasonable'' or is supported by substantial evidence in the record. Such legal issues can be raised later, in any judicial review of a final FERC license, pursuant to 16 U.S.C. 825*l.* The EPAct trial-type hearing process does not substitute for or preempt judicial review of final agency decisions, which will be available only after the FERC license has been issued.

Matters of policy are also not appropriate for a trial-type hearing. Examples of such matters include what types and levels of adverse effects to a species from a project would be ''acceptable,'' or what kinds of mitigation measures may be desirable or ''necessary'' to protect a resource. These

are not matters of fact, but rather matters of policy judgment committed to the discretion of the Departments, in light of their management objectives for the resource. Under EPAct and these regulations, the Departments retain the prerogative to make these ultimate decisions in light of their policies; the ALJ may not appropriately address those issues. See 7 CFR 1.660(b)(3), 43 CFR 45.60(b)(3), 50 CFR 221.60(b)(3).

Having ruled out legal and policy issues, it is next useful to consider whether an issue presented may be either proved or disproved by a preponderance of the evidence. Good examples of factual inquiries that lend themselves to resolution via trial-type hearings are set forth in the November 2005 preamble—whether a fishery was historically warm water or cold water, and whether fish historically were present above a dam. 70 FR at 69809. Using the framework discussed above, these are clearly ''historical facts'' (or ''jury facts''). Such issues may be resolved based on available evidence and do not involve attempts to predict what may happen in the future.

Materiality

To be appropriate for resolution, a factual issue must be ''material'' to a Secretary's consideration of the preliminary condition or prescription, *i.e.,* it must be of the type that lawfully ''may affect a Department's decision whether to affirm, modify, or withdraw [the] condition or prescription.'' 7 CFR 1.602, 43 CFR 45.2, 50 CFR 221.2. The inquiry is thus particular to the preliminary condition or prescription issued and the factual areas considered in the development of that condition or prescription. As an initial matter, the best indicators of the kinds of factual issues that may affect the Department's ultimate decision are the factors identified in the preliminary condition or prescription and supporting justification. A factual issue not closely related to one of those factors would not be material in the absence of a showing that resolution of the issue would affect the Department's ultimate decision. Similarly, issues that relate to the larger licensing proceeding and will be determined by FERC are not ''material'' to the Department's decision and are not appropriate for a trial-type hearing.

In addition to the Department's stated basis for the preliminary condition or prescription, the ALJ must be aware of the relevant legal framework governing the exercise of conditioning and prescriptive authority. Only factual issues that involve the kinds of considerations that the Secretary may legally take into account should be viewed as potentially affecting the Secretary's ultimate decision. In other words, whether an issue of fact is ''material'' must be decided with reference to the substantive law governing the Department's exercise of authority under the FPA. *See Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (FRCP 56 context) (''As to materiality, the substantive law will identify which facts are material'').

Other issues that are not material to a Department's preliminary condition or prescription include those that blur the distinction between the EPAct trial-type hearing process and the separate alternatives process created under new FPA section 33. Trial-type hearings are limited to resolving disputed issues of material fact relating to a Department's own preliminary condition or prescription. Where the hearing requester's purpose is to establish facts that may support an alternative proposed under the distinct section 33 process, but that do not otherwise affect the Department's ultimate decision whether to affirm, modify, or withdraw its preliminary prescription or condition, then the issue raised is not ''material'' to that condition or prescription.

Such matters must be resolved by the relevant Department through the section 33 process, and the ALJ should not make findings that would preempt the Department's review. For example, it would be inappropriate to ask the ALJ to resolve whether an alternative method of passing fish would be more desirable or more effective than the method prescribed by the Secretary.

Dispute

EPAct provides for a hearing only where specific material facts are actually in dispute. The implementing regulations thus require that a hearing requester specifically identify the factual statements made or relied upon by an agency that are disputed. 7 CFR 1.621(b)(2)(i), 43 CFR 45.(b)(2)(i), 50 CFR 221.21(b)(2)(i). Further, the agency has the option of stipulating to the facts as presented in the hearing request. 7 CFR 1.621(b)(1)(i), 43 CFR 45.(b)(1)(i), 50 CFR 221.24(b)(1)(i). Such a stipulation will mean that there is no dispute to be resolved through a trial-type hearing.

B. Separation of Functions

Some commenters argued that the Departments should maintain a separation of functions during the EPAct section 241 trial-type hearing. Section 241 trial-type hearings are conducted by each Department's independent adjudicative body—the Office of Hearings and Appeals for the Department of the Interior, the Office of Administrative Law Judges for the Department of Agriculture, and the United States Coast Guard's Office of Administrative Law Judges for the Department of Commerce. Each of these ALJ offices is an independent entity with its own staff that is entirely separate from the conditioning or prescribing agency. Departmental staff that develop conditions or prescriptions or participate in the trial-type hearing have no more input into the ALJ's decision-making than the other parties to the hearing process and are subject to the same prohibition on ex parte communication. 7 CFR 1.634, 43 CFR 45.34, 50 CFR 221.34. The final rule therefore does not need a provision regarding separation of functions in section 241 trial-type hearings.

Citing 5 U.S.C. 554(d)(2), these commenters further argued that Departmental staff involved in preparing preliminary conditions or prescriptions and representing the agency in the trial-type hearing are barred by the APA's separation of functions provision from advising senior staff and officials on any decision related to modified conditions, prescriptions, or section 33 alternatives.

The Departments disagree. Section 554 provides that in every case of *adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .* and an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, *participate or advise in the decision, recommended decision, or agency review pursuant to section 557* of this title, except as witness or counsel in public proceedings. 5 U.S.C. 554(a), (d)(2) (emphasis added).

A Department's decision whether and how to modify the preliminary conditions or prescriptions does not constitute ''an adjudication required by statute to be determined on the record after opportunity for an agency hearing.'' See 2 K. Davis, Administrative Law Treatise § 10:7 (1979). Although FPA section 33 establishes specific criteria for considering alternatives, neither EPAct nor the FPA requires the Departments to conduct an on-the-record hearing for this separate and distinct phase.[5] Similarly, in accordance

[5] The fact that EPAct requires a trial-type hearing for disputed issues of material fact does not alter this conclusion. The regulations make clear that the trial-type hearing and the decision to modify are two distinct proceedings: The hearing is strictly limited to resolving disputed issues of fact underlying the preliminary conditions; the ALJ's

with FERC regulations, the Departments have long provided modified conditions and prescriptions based on additional information, but they are under no statutory requirement to provide an on-the-record hearing when they do so. 18 CFR 4.34 (b)(4), 5.24(d), 5.25(d).

Moreover, section 554(d)(2) only bars participation in decisions or agency reviews pursuant to 5 U.S.C. 557. Section 557 by its terms applies to initial hearing decisions or recommendations by a qualified presiding employee with the potential for subsequent agency review. Modifying preliminary conditions or prescriptions involves no such hearing, no presiding employee, and no initial or recommended decision. Instead, the Department conducts the appropriate review and analysis and provides modified conditions or prescriptions to FERC with accompanying written findings. 7 CFR 1.673, 43 CFR 45.73, 50 CFR 221.73. Accordingly, section 554 does not apply to the Departments' decision whether and how to modify preliminary conditions or prescriptions.

EEI and NHA cite *Amos Treat & Co., Inc.* v. *SEC,* 306 F.2d 260, 266–67 (D.C. Cir. 1962) and *American Gen. Ins. Co.* v. *FTC,* 589 F.2d 462 (9th Cir. 1979), for the proposition that any participation by agency staff in a decision to modify conditions is necessarily unfair. EEI/NHA Comments at 20–21. In each cited case, however, the agency employee who investigated or prosecuted an issue went on to become the decisionmaker on the same issues in the same proceeding. Such cases do not apply here, where a Department's decision to modify conditions or prescriptions does not address the same specific matters addressed by the ALJ. Indeed, as noted above, the ALJ is prohibited from offering an opinion on how to modify the preliminary conditions and the ALJ's hearing order is final.[6] Courts have consistently rejected arguments of unfairness relating to multiple agency functions in cases involving such distinct phases of a proceeding. *See, e.g., Withrow* v. *Larkin,* 421 U.S. 35 (1975); *RSR Corp.* v. *FTC,* 656 F.2d 718 (D.C. Cir. 1981); *Porter County* v. *NRC,* 606 F.2d 1363 (D.C. Cir. 1979); *Pangburn* v. *CAB,* 311 F.2d 349 (1st Cir. 1962).

order is final, with no opportunity for administrative review; and the regulations specifically prohibit the ALJ from offering an opinion on how to modify the preliminary conditions. See 7 CFR 1.660(b), (d), 43 CFR 45.60(b), (d), 50 CFR 221.60(b); 70 FR 69807.

[6] See 7 CFR 1.660(b), (d), 43 CFR 45.60(b), (d), 50 CFR 221.60(b), (d); 70 FR 69807.

C. Ex Parte Communication

Some commenters argued that the section 33 alternatives process constitutes a quasi-judicial proceeding and thus should be subject to the APA's prohibition on ex parte communications. Under 5 U.S.C. 557(d)(1), no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.

As discussed previously, section 557 by its terms applies only to on-the-record hearings required by statute. Section 33 calls for a process of agency analysis subject to specific statutory criteria, but neither EPAct nor the FPA requires the Departments to conduct an on-the-record hearing when considering alternative conditions and prescriptions. As such, the APA's prohibition on ex parte communication does not apply to the section 33 alternatives process.

VI. Consultation With FERC

Pursuant to EPAct's requirement that the agencies promulgate rules implementing EPAct section 241 ''in consultation with the Federal Energy Regulatory Commission,'' the agencies have consulted with FERC regarding the content of these revised interim final rules.

VII. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

The rules in this document are significant. Although these rules will not have an adverse effect or an annual effect of $100 million or more on the economy, OMB has determined that the expedited trial-type hearing and alternatives processes represent a novel approach to public participation and administrative review and have interagency implications. Therefore, OMB has reviewed these rules under Executive Order 12866.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability; to reduce uncertainty; and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further than regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. These revised interim final rules have been developed in a manner consistent with these requirements.

B. Regulatory Flexibility Act

As noted previously, the court in *American Rivers* v. *U.S. Department of the Interior,* 2006 WL 2841929 (W.D. Wash. 2006), upheld the Departments' November 17, 2005, interim final rules, holding that they were exempt from the APA's notice and comment requirements because they were procedural and interpretative in nature. These revised interim final rules are likewise procedural and interpretative in nature and do not require publication of a notice of proposed rulemaking. As a result, they are exempt from the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

Even if these rules were not exempt, they will not have a significant economic effect on a substantial number of small entities, for the reasons explained in the preamble to the November 17, 2005, interim final rules, 70 FR 69815–16. Because these rules are exempt, a regulatory flexibility analysis is not required and, thus, none was prepared.

C. Small Business Regulatory Enforcement Fairness Act

These rules are not major under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2).

1. As explained above, these rules will not have an annual effect on the economy of $ 100 million or more.

2. These rules will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. A hearing process for disputed issues of material fact with respect to the Departments' conditions and prescriptions will not affect costs or prices.

3. These rules will not have significant, adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. Implementing the 2005 amendments to the FPA by establishing the hearing procedures in these rules should have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability

of United States-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.,* The Departments find that:

1. These rules will not have a significant or unique effect on State, local, or Tribal governments or the private sector.

2. These rules will not produce an unfunded Federal mandate of $100 million or more on State, local, or Tribal governments in the aggregate or on the private sector in any year; *i.e.,* they do not constitute a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The opportunity for a hearing will be available to a State, local, or Tribal government only if it is a party to the license proceeding and chooses to participate in the hearing process. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act is not required.

E. Takings (E.O. 12630)

In accordance with Executive Order 12630, the Departments conclude that these rules will not have significant takings implications. The conditions and prescriptions included in hydropower licenses relate to operation of hydropower facilities on resources not owned by the applicant, *i.e.,* public waterways and/or reservations. Therefore, these rules will not result in a taking of private property, and a takings implication assessment is not required.

F. Federalism (E.O. 13132)

In accordance with Executive Order 13132, the Departments find that these rules do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. There is no foreseeable effect on States from establishing hearing procedures for disputed issues of material fact regarding Departmental conditions and prescriptions. The rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The rules will not preempt State law. Therefore, a Federalism Assessment is not required.

G. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order (E.O.) 12988, the Departments have determined that these rules will not unduly burden the judicial system and that they meet the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. The rules provide clear language as to what is allowed and what is prohibited. Litigation regarding FERC hydropower licenses currently begins with a rehearing before FERC and then moves to Federal appeals court. By offering a trial-type hearing on disputed issues of material fact with respect to conditions and prescriptions developed by the Departments, the rules will likely result in a decrease in the number of proceedings that are litigated before FERC and in court.

H. Paperwork Reduction Act

With respect to the hearing process, these rules are exempt from the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (PRA), because they will apply to the conduct of agency administrative proceedings involving specific individuals and entities. 44 U.S.C. 3518(c); 5 CFR 1320.4(a)(2). However, with respect to the alternatives process, these rules contain provisions that would collect information from the public, and therefore require approval from OMB under the PRA. According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in these rules and approved it under OMB control number 1094–0001. This approval expires November 30, 2015.

The purpose of the information collection in this rulemaking is to provide an opportunity for license parties to propose an alternative condition or prescription. Responses to this information collection are voluntary. At the time of our request for OMB approval in 2009, we estimated that an average of 62 alternatives would be submitted per year over the next 3 years. We estimated that the average burden for preparing and submitting an alternative would be 200 hours; thus, the total information collection burden was estimated to be 12,400 hours per year.

I. National Environmental Policy Act

The Departments have analyzed their respective rules in accordance with NEPA, Council on Environmental Quality (CEQ) regulations, 40 CFR part 1500, and the Departments' internal NEPA guidance. CEQ regulations, at 40 CFR 1508.4, define a ''categorical exclusion'' as a category of actions that a department has determined normally do not, individually or cumulatively, have a significant effect on the human environment, and, therefore in the absence of extraordinary circumstances, neither an environmental assessment nor an environmental impact statement is required. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3.

Each Department has determined that these rules are categorically excluded from further environmental analysis under NEPA in accordance with its own authorities, listed below. These rules promulgate regulations of an administrative and procedural nature relating to trial-type hearings and the submission and analysis of alternatives as mandated under FPA, as amended by EPAct. They do not individually or cumulatively have a significant impact on the human environment and, therefore, neither an EA nor an EIS under NEPA is required. The relevant authorities for each Department are as follows:

Agriculture: 7 CFR 1b.3(b); Forest Service Handbook 1909.15, 31.12.

Interior: 43 CFR part 46.

Commerce: NOAA Administrative Order 216–6, sections 5.05 and 6.03c3(i).

J. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in Executive Order 13175, the Departments have assessed the impact of these rules and have determined that they do not directly affect federally recognized Indian tribes or 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; therefore the Departments will continue to consult with tribal governments when developing section 4(e) conditions and section 18 prescriptions needed to address the management of those resources.

K. Effects on the Nation's Energy Supply (E.O. 13211)

In accordance with Executive Order 13211, the Departments find that these rules will not have substantial direct effects on energy supply, distribution, or use, including shortfall in supply or price increase. Analysis by FERC has found that, on average, installed capacity increased through licensing by 4.06 percent, and the average annual generation loss, attributable largely to increased flows to protect aquatic resources, was 1.59 percent. (Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and

Recommendations Pursuant to Section 603 of the Energy Act of 2000, prepared by the staff of the Federal Energy Regulatory Commission, May 2001.) Since the licensing process itself has such a modest energy impact, these rules, which affect only the Departments' administrative review procedures, are not expected to have a significant impact under the Executive Order (*i.e.,* reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity).

L. Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act, Public Law 106–554.

M. Clarity of These Regulations

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects

7 CFR Part 1

Administrative practice and procedure, Fisheries, Hydroelectric power, Indians—lands, National forests, National parks, National wildlife refuge system, Public land, Waterways, Wildlife.

43 CFR Part 45

Administrative practice and procedure, Fisheries, Hydroelectric power, Indians—lands, National forests, National parks, National wildlife refuge system, Public land, Waterways, Wildlife.

50 CFR Part 221

Administrative practice and procedure, Fisheries, Hydroelectric power, Indians—lands, National forests, National parks, National wildlife refuge system, Public land, Waterways, Wildlife.

Dated: March 10, 2015.

Robert F. Bonnie,

Undersecretary—Natural Resources and Environment, U.S. Department of Agriculture.

Kristen J. Sarri,

Principal Deputy Assistant Secretary—Policy, Management and Budget, U.S. Department of the Interior.

Dated: December 15, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

For the reasons set forth in the preamble, the Departments of Agriculture, the Interior, and Commerce amend titles 7, 43, and 50 of the Code of Federal Regulations as follows:

Title 7—Department of Agriculture

PART 1—ADMINISTRATIVE REGULATIONS

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

■ 2. Revise subpart O to read as follows:

Subpart O—Conditions in FERC Hydropower Licenses

Authority: 16 U.S.C. 797(e), 811, 823d.

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General Provisions

§ 1.601 What is the purpose of this subpart, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in §§ 1.601 through 1.660 contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions that the Department of Agriculture, Forest Service (Forest Service) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions is granted by FPA section 4(e), 16 U.S.C. 797(e), which authorizes the Secretary of Agriculture to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC).

(2) The hearing process under this part does not apply to recommendations that the Forest Service may submit to FERC under FPA section 10(a), 16 U.S.C. 803(a).

(3) The FPA also grants the Department of Commerce and the Department of the Interior the authority to develop mandatory conditions and prescriptions for inclusion in a hydropower license. Where the Forest Service and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 1.623:

(i) A hearing conducted under this subpart will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this subpart will be conducted by one of the other Departments, pursuant to 43 CFR 45.1 *et seq.* or 50 CFR 221.1 *et seq.,* as applicable.

(4) The regulations in §§ 1.601 through 1.660 will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 1.660(a).

(b) *Alternatives process.* The regulations in §§ 1.670 through 1.674 contain rules of procedure applicable to the submission and consideration of alternative conditions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by the Forest Service under section 4(e).

(c) *Reserved authority.* Where the Forest Service has notified or notifies FERC that it is reserving its authority to develop one or more conditions at a later time, the hearing and alternatives processes under this subpart for such conditions will be available if and when the Forest Service exercises its reserved authority.

(d) *Applicability.* (1) This subpart applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions have been or are filed with FERC before FERC issues the license.

(2) This subpart also applies to any exercise of the Forest Service's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

§ 1.602 What terms are used in this subpart?

As used in this subpart:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under this subpart.

Alternative means a condition that a license party other than the Forest Service or another Department develops as an alternative to a preliminary condition from the Forest Service or another Department, under FPA sec. 33, 16 U.S.C. 823d.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

Forest Service means the USDA Forest Service.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Hearing Clerk means the Hearing Clerk, OALJ, USDA, 1400 Independence Ave., SW., Washington, DC 20250; phone: 202–720–4443, facsimile: 202–720–9776.

Intervention means a process by which a person who did not request a hearing under § 1.621 can participate as a party to the hearing under § 1.622.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

Modified condition or prescription means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

NEPA document means an environmental document as defined at 40 CFR 1508.10 to include an environmental assessment, environmental impact statement (EIS), finding of no significant impact, and notice of intent to prepare an EIS. Such documents are issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq., and the CEQ Regulations Implementing the Procedural Requirements of NEPA (40 CFR parts 21500–1508).*

NFS means the National Forest System and refers to:

(1) Federal land managed by the Forest Service; and

(2) The Deputy Chief of the National Forest System, located in the Forest Service's Washington, DC, office.

Office of Administrative Law Judges (OALJ) is the office within USDA in which ALJs conduct hearings under the regulations in this subpart.

Party means, with respect to USDA's hearing process:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 1.621; or

(ii) Either 43 CFR 45.21 or 50 CFR 221.21, with respect to a hearing process consolidated under § 1.623;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 1.622; or

(ii) Either 43 CFR 45.22 or 50 CFR 221.22, with respect to a hearing process consolidated under § 1.623;

(3) The Forest Service; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 1.623.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State,

Tribal, county, district, territorial, or local government or agency.

Preliminary condition or prescription means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 1.610.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

Secretary means the Secretary of Agriculture or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2637.211(a).

USDA means the United States Department of Agriculture.

You refers to a party other than a Department.

§ 1.603 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 1.621, a notice of intervention and response under § 1.622, an answer under § 1.625, or any document under §§ 1.670 through 1.674.

(2) An extension of time to file any other document under this subpart may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 1.635 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the decision under § 1.660.

§ 1.604 What deadlines apply to the trial-type hearing and alternatives processes?

(a) The following table summarizes the steps in the trial-type hearing process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files request for hearing	30	Within 30 days after Forest Service files preliminary condition(s) with FERC.	1.621(a).
(3) Any other license party files notice of intervention and response.	50	Within 20 days after deadline for filing requests for hearing.	1.622(a).
(4) NFS refers case to ALJ office for hearing and issues referral notice to parties.	85	Within 55 days after deadline for filing requests for hearing.	1.626(a).
(5) Parties may meet and agree to discovery (optional step).	86–91	Before deadline for filing motions seeking discovery ..	1.641(a).
(6) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference.	90	Within 5 days after effective date of referral notice	1.630.
(7) Party files motion seeking discovery from another party.	92	Within 7 days after effective date of referral notice	1.641(d).
(8) Other party files objections to discovery motion or specific portions of discovery requests.	99	Within 7 days after service of discovery motion	1.641(e).
(9) Parties meet to discuss discovery and hearing schedule.	100–104	Before date set for initial prehearing conference	1.640(d).
(10) ALJ conducts initial prehearing conference	105	On or about 20th day after effective date of referral notice.	1.640(a).
(11) ALJ issues order following initial prehearing conference.	107	Within 2 days after initial prehearing conference	1.640(g).
(12) Party responds to interrogatories from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.643(c).
(13) Party responds to requests for documents, etc., from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.645(c).
(14) Parties complete all discovery, including depositions, as authorized by ALJ.	130	Within 25 days after initial prehearing conference	1.641(i).
(15) Parties file updated lists of witnesses and exhibits.	140	Within 10 days after deadline for completion of discovery.	1.642(b).
(16) Parties file written direct testimony	140	Within 10 days after deadline for completion of discovery.	1.652(a).
(17) Parties complete prehearing preparation and ALJ commences hearing.	155	Within 25 days after deadline for completion of discovery.	1.650(a).
(18) ALJ closes hearing record	160	When ALJ closes hearing	1.658.
(19) Parties file post-hearing briefs	175	Within 15 days after hearing closes	1.659(a).
(20) ALJ issues decision	190	Within 30 days after hearing closes	1.660(a).

(b) The following table summarizes the steps in the alternatives process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart, the deadlines as set by those other sections control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files alternative condition(s)	30	Within 30 days after Forest Service files preliminary condition(s) with FERC.	1.671(a).
(3) ALJ issues decision on any hearing request	190	Within 30 days after hearing closes (see previous table).	1.660(a).
(4) License party files revised alternative condition(s) if authorized.	210	Within 20 days after ALJ issues decision	1.672(a).
(5) Forest Service files modified condition(s) with FERC.	300	Within 60 days after the deadline for filing comments on FERC's draft NEPA document.	1.673(a).

Hearing Process

Representatives

§ 1.610 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or agent, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a Federal, State, Tribal, county, district, territorial, or local government or component.

(c) *Appearance.* An individual representing himself or herself and any other representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 1.611;

(2) Include the name and address of the party on whose behalf the appearance is made;

(3) If the representative is an attorney, include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Lead representative.* If a party has more than one representative, the ALJ may require the party to designate a lead representative for service of documents under § 1.613.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

Document Filing and Service

§ 1.611 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under §§ 1.610 through 1.660 must:

(1) Measure 8½ by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8½ by 11 inches and attached to the document;

(2) Be printed on just one side of the page (except that service copies may be printed on both sides of the page);

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 11 point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document filed under §§ 1.610 through 1.660 must begin with a caption that sets forth:

(1) The name of the case under §§ 1.610 through 1.660 and the docket number, if one has been assigned;

(2) The name and docket number of the license proceeding to which the case under §§ 1.610 through 1.660 relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document filed under §§ 1.610 through 1.660 must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that the document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 1.612 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under §§ 1.610 through 1.660 must be filed with the appropriate office, as follows:

(1) Before NFS refers a case for docketing under § 1.626, any documents must be filed with NFS by directing them to the ''Deputy Chief, NFS.''

(i) For delivery by regular mail, address to USDA Forest Service, Attn: Lands Staff, Mail Stop 1124, 1400 Independence Ave. SW., Washington, DC 20250–1124.

(ii) For delivery by hand or private carrier, deliver to USDA Forest Service, Yates Bldg. (4 SO), 201 14th Street SW., Washington, DC (SW. corner of 14th Street and Independence Ave. SW.); phone (202) 205–1248; facsimile (703) 605–5117. Hand deliverers must obtain an official date-time-stamp from Lands Staff.

(2) The Forest Service will notify the parties of the date on which NFS refers a case for docketing under § 1.626. After that date, any documents must be filed with:

(i) The Hearing Clerk, if OALJ will be conducting the hearing. The Hearing Clerk's address, telephone number, and facsimile number are set forth in § 1.602; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the

hearing. The name, address, telephone number, and facsimile number of the appropriate hearings component will be provided in the referral notice from the Forest Service.

(b) *Method of filing.* (1) A document must be filed with the appropriate office under paragraph (a) of this section using one of the following methods:

(i) By hand delivery of the original document and two copies;

(ii) By sending the original document and two copies by express mail or courier service; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document and two copies are sent by regular mail on the same day.

(2) Parties are encouraged, and may be required by the ALJ, to supplement any filing by providing the appropriate office with an electronic copy of the document on compact disc or other suitable media. With respect to any supporting material accompanying a request for hearing, a notice of intervention and response, or an answer, the party may submit in lieu of an original and two hard copies:

(i) An original; and

(ii) One copy on a compact disc or other suitable media.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected.

§ 1.613 What are the requirements for service of documents?

(a) *Filed documents.* Any document related to a case under §§ 1.610 through 1.660 must be served at the same time the document is delivered or sent for filing. Copies must be served as follows:

(1) A complete copy of any request for a hearing under § 1.621 must be delivered or sent to FERC and each license party, using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service.

(2) A complete copy of any notice of intervention and response under § 1.622 must be:

(i) Delivered or sent to FERC, the license applicant, any person who has filed a request for hearing under § 1.621, and the Forest Service office that submitted the preliminary conditions to FERC, using one of the methods of service in paragraph (c) of this section; and

(ii) Delivered or sent to any other license party using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service, or by regular mail.

(3) A complete copy of any answer or notice under § 1.625 and any other document filed by any party to the hearing process must be delivered or sent to every other party to the hearing process, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the Hearing Clerk or ALJ.* A complete copy of any notice, order, decision, or other document issued by the Hearing Clerk or the ALJ under §§ 1.610 through 1.660 must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise agreed to by the parties and ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

(2) By sending the document by express mail or courier service for delivery on the next business day;

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By sending the document, including all attachments, by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method set forth in paragraph (c) of this section (including another electronic means, if the party to be served has consented to that means in writing).

(d) *Certificate of service.* A certificate of service must be attached to each document filed under §§ 1.610 through 1.660. The certificate must be signed by the party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

Initiation of Hearing Process

§ 1.620 What supporting information must the Forest Service provide with its preliminary conditions?

(a) *Supporting information.* (1) When the Forest Service files its preliminary conditions with FERC, it must include a rationale for each condition, explaining why the Forest Service deems the condition necessary for the adequate protection and utilization of the affected NFS lands, and an index to the Forest Service's administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, the Forest Service must:

(i) File them with FERC at the time it files its preliminary conditions; and

(ii) Provide copies to the license applicant.

(b) *Service.* The Forest Service will serve copies of its preliminary conditions on each license party.

§ 1.621 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any preliminary condition filed by the Forest Service, you must:

(1) Be a license party; and

(2) File with NFS, at the appropriate address provided in § 1.612(a)(1), a written request for a hearing:

(i) For a case under § 1.601(d)(1), within 30 days after the Forest Service files a preliminary condition with FERC; or

(ii) For a case under § 1.601(d)(2), within 60 days after the Forest Service files a preliminary condition with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence;

(2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by the Forest Service under § 1.620(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous; and

(iii) The basis for your opinion that any factual dispute is material.

(3) With respect to any scientific studies, literature, and other

documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request; and

(4) A statement indicating whether or not you consent to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(2) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 1.622 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with NFS, at the appropriate address provided in § 1.612(a)(1), a notice of intervention and a written response to any request for a hearing within 20 days after the deadline in § 1.621(a)(2).

(2) A notice of intervention and response must be limited to one or more of the issues of material fact raised in the hearing request and may not raise additional issues.

(b) *Content.* In your notice of intervention and response you must explain your position with respect to the issues of material fact raised in the hearing request under § 1.621(b).

(1) If you agree with the information provided by the Forest Service under § 1.620(a) or by the requester under § 1.621(b), your response may refer to the Forest Service's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under § 1.621(b).

(3) Your notice of intervention and response must also indicate whether or not you consent to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section (excluding citations to scientific studies, literature, and other documented information supporting your opinions) may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 1.623 Will hearing requests be consolidated?

(a) *Initial Department coordination.* If NFS has received a copy of a hearing request, it must contact the other Departments and determine:

(1) Whether any of the other Departments has also filed a preliminary condition or prescription relating to the license with FERC; and

(2) If so, whether the other Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Where more than one Department has received a hearing request, the Departments involved must decide jointly:

(1) Whether the cases should be consolidated for hearing under paragraphs (c)(3)(ii) through (iv) of this section; and

(2) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) All or any portion of the following may be consolidated for hearing, if the Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

§ 1.624 Can a hearing process be stayed to allow for settlement discussions?

(a) Prior to referral to the ALJ, the hearing requester and the Forest Service may by agreement stay the hearing process under this subpart for a period not to exceed 120 days to allow for settlement discussions, if the stay period and any subsequent hearing process (if required) can be accommodated within the time frame established for the license proceeding.

(b) Any stay of the hearing process will not affect the deadline for filing a notice of intervention and response, if any, pursuant to § 1.622(a)(1)(ii).

§ 1.625 How will the Forest Service respond to any hearing requests?

(a) *General.* NFS will determine whether to answer any hearing request under § 1.621 on behalf of the Forest Service.

(b) *Content.* If NFS answers a hearing request:

(1) For each of the numbered factual issues listed under § 1.621(b)(1), NFS's answer must explain the Forest Service's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That the Forest Service is willing to stipulate to the facts as alleged by the requester;

(ii) That the Forest Service believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That the Forest Service believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That the Forest Service agrees that the issue is factual, material, and in dispute.

(2) NFS's answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under § 1.623 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact

information for the appropriate Department hearings component.

(3) If the Forest Service plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, a copy of each item must be provided with NFS's answer.

(4) NFS's answer must also indicate whether or not the Forest Service consents to service by electronic means under § 1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* NFS's answer must also contain a list of the Forest Service's witnesses and exhibits that the Forest Service intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, the Forest Service must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, the Forest Service must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If NFS elects not to answer a hearing request:

(1) The Forest Service is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) The Forest Service may file a list of witnesses and exhibits with respect to the request only as provided in § 1.642(b); and

(3) NFS must include with its case referral under § 1.623 a notice in lieu of answer containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under § 1.623, and the statement required by paragraph (b)(4) of this section.

§ 1.626 What will the Forest Service do with any hearing requests?

(a) *Case referral.* Within 55 days after the deadline in § 1.621(a)(2) or 35 days after the expiration of any stay period under § 1.624, whichever is later, NFS will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by USDA, NFS will refer the case to the OALJ.

(2) If the hearing is to be conducted by another Department, NFS will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) Two copies of any preliminary condition under § 1.620;

(2) The original and one copy of any hearing request under § 1.621;

(3) The original and one copy of any notice of intervention and response under § 1.622;

(4) The original and one copy of any answer or notice in lieu of answer under § 1.625; and

(5) The original and one copy of a referral notice under paragraph (c) of this section.

(c) *Notice.* At the time NFS refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The effective date of the case referral to the appropriate Department hearings component.

(d) *Delivery and service.* (1) NFS must refer the case to the appropriate Department hearings component by one of the methods identified in § 1.612(b)(1)(i) and (b)(1)(ii).

(2) The Forest Service must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in § 1.613(c)(1) and (c)(2).

§ 1.627 What regulations apply to a case referred for a hearing?

(a) If NFS refers the case to the OALJ, these regulations will continue to apply to the hearing process.

(b) If NFS refers the case to the Department of Interior's Office of Hearing and Appeals, the regulations at 43 CFR 45.1 *et seq.* will apply from that point on.

(c) If NFS refers the case to the Department of Commerce's designated ALJ office, the regulations at 50 CFR 221.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§ 1.630 What will OALJ do with a case referral?

Within 5 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4):

(a) The Hearing Clerk must:

(1) Docket the case;

(2) Assign an ALJ to preside over the hearing process and issue a decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case; and

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 1.640. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 1.631 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process relating to Forest Service's or other Department's condition or prescription that has been referred to the ALJ for hearing, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas under § 1.647;

(c) Shorten or enlarge time periods set forth in these regulations, except that the deadline in § 1.660(a)(2) can be extended only if the ALJ must be replaced under § 1.632 or 1.633;

(d) Rule on motions;

(e) Authorize discovery as provided for in §§ 1.641 through 1.647;

(f) Hold hearings and conferences;

(g) Regulate the course of hearings;

(h) Call and question witnesses;

(i) Exclude any person from a hearing or conference for misconduct or other good cause;

(j) Summarily dispose of any hearing request or issue as to which the ALJ determines there is no disputed issue of material fact;

(k) Issue a decision consistent with § 1.660(b) regarding any disputed issue of material fact; and

(l) Take any other action authorized by law.

§ 1.632 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 1.631, the Hearing Clerk will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 1.633 Under what circumstances may the ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's decision, any party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a decision.

§ 1.634 What is the law governing ex parte communications?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

§ 1.635 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after the Hearing Clerk issues a docketing notice under § 1.630.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be reduced to writing.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of §§ 1.610 through 1.613 with respect to form, content, filing, and service; and

(iii) Not exceed 15 pages, including all supporting arguments.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this part, any other party may file a response to a written motion within 10 days after service of the motion. The response may not exceed 15 pages, including all supporting arguments. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

Prehearing Conferences and Discovery

§ 1.640 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the notice under § 1.630, on or about the 20th day after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under § 1.641 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing;

(iv) To set deadlines for submission of written testimony under § 1.652 and exchange of exhibits to be offered as evidence under § 1.654; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation.* (1) Each party's representative must be fully prepared to discuss all issues pertinent to that party that are properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

(i) To meet in person, by telephone, or by other appropriate means; and

(ii) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(e) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(f) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(g) *Order.* Within 2 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

§ 1.641 How may parties obtain discovery of information needed for the case?

(a) *General.* By agreement of the parties or with the permission of the ALJ, a party may obtain discovery of information to assist the party in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories as provided in § 1.643;

(2) Depositions of witnesses as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the ALJ during a prehearing conference or in a written order under § 1.640(g). The ALJ may authorize discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the information sought:
(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;
(ii) Is not already in the license proceeding record or otherwise obtainable by the party;
(iii) Is not cumulative or repetitious; and
(iv) Is not privileged or protected from disclosure by applicable law;
(3) That the scope of the discovery is not unduly burdensome;
(4) That the method to be used is the least burdensome method available;
(5) That any trade secrets or proprietary information can be adequately safeguarded; and
(6) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable.
(c) *Motions.* A party may initiate discovery:
(1) Pursuant to an agreement of the parties; or
(2) By filing a motion that:
(i) Briefly describes the proposed method(s), purpose, and scope of the discovery;
(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and
(iii) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).
(d) *Timing of motions.* A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).
(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.
(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (6) of this section.
(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).
(1) If a party wants to discover such materials, it must show:
(i) That it has substantial need of the materials in preparing its own case; and
(ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.
(2) In ordering discovery of such materials when the required showing has been made, the ALJ must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.
(g) *Experts.* Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert through the methods set out in paragraph (a) of this section concerning any relevant matters that are not privileged. Such discovery will be permitted only if:
(1) The expert is expected to be a witness at the hearing; or
(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:
(i) That it has a compelling need for the information; and
(ii) That it cannot practicably obtain the information by other means.
(h) *Limitations on depositions.* (1) A party may depose an expert or non-expert witness only if the party shows that the witness:
(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or
(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.
(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.
(3) A party may depose a senior Department employee only if the party shows:
(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and
(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her government duties.
(4) Unless otherwise stipulated to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours.
(i) *Completion of discovery.* All discovery must be completed within 25 days after the initial prehearing conference.

§ 1.642 When must a party supplement or amend information it has previously provided?

(a) *Discovery.* A party must promptly supplement or amend any prior response to a discovery request if it learns that the response:
(1) Was incomplete or incorrect when made; or
(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.
(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under § 1.621(c), § 1.622(c), or § 1.625(c).
(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under § 1.621(c), § 1.622(c), or § 1.625(c).
(c) *Failure to disclose.* (1) A party will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose under § 1.621(c), § 1.622(c), or § 1.625(c), or paragraph (a) or (b) of this section.
(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.
(3) A party may object to the admission of evidence under paragraph (c)(1) of this section before or during the hearing.
(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (3) of this section:
(i) The prejudice to the objecting party;
(ii) The ability of the objecting party to cure any prejudice;
(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;
(iv) The importance of the evidence; and
(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 1.643 What are the requirements for written interrogatories?

(a) *Motion; limitation.* Except upon agreement of the parties:
(1) A party wishing to propound interrogatories must file a motion under § 1.641(c); and
(2) A party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause.
(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

(1) Grant the motion and approve the use of some or all of the proposed interrogatories; or

(2) Deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on such records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

§ 1.644 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 1.641(c). Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

(c) *Arrangements.* If the parties agree to or the ALJ approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the ALJ's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the ALJ's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross-examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense.

(2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording.* The testimony at a deposition may be recorded on videotape, subject to any conditions or restrictions that the parties may agree to or the ALJ may impose, at the expense of the party requesting the recording.

(1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(4) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the videotape to any party that requests it, at the requesting party's expense; and

(ii) Attach to the videotape a statement identifying the case and the deponent and certifying the authenticity of the video recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 1.653.

§ 1.645 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion.* Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 1.641(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

§ 1.646 What sanctions may the ALJ impose for failure to comply with discovery?

(a) Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under § 1.642(a).

(b) The ALJ may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to

support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

§ 1.64 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may request by written motion that the ALJ issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may request a subpoena for a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) The reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to Federal employees who are called as witnesses by the Forest Service or another Department.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires production of information during discovery that is not discoverable; or

(iii) Requires disclosure of irrelevant, privileged, or otherwise protected information.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

Hearing, Briefing, and Decision

§ 1.650 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 1.640, generally within 25 days after the date set for completion of discovery.

(b) On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 1.651 What are the parties' rights during the hearing?

Each party has the following rights during the hearing, as necessary to assure full and accurate disclosure of the facts:

(a) To present testimony and exhibits, consistent with the requirements in §§ 1.621(c), 1.622(c), 1.625(c), 1.642(b), and 1.652;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 1.652 What are the requirements for presenting testimony?

(a) *Written direct testimony.* Unless otherwise ordered by the ALJ, all direct hearing testimony for each party's initial case must be prepared and submitted in written form. The ALJ will determine whether rebuttal testimony, if allowed, must be submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 10 days after the date set for completion of discovery; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the ALJ, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The ALJ may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the ALJ.

(2) The ALJ will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The ALJ may issue a subpoena under § 1.647 directing a witness to testify by telephonic conference call.

§ 1.653 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under § 1.644 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the ALJ.

(2) The ALJ will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Videotaped deposition.* If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 1.654 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (b) through (d) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 1.655 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of § 1.642(b), the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence must concisely state the grounds. A ruling on every objection must appear in the record.

§ 1.656 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing will be transcribed verbatim.

(1) The Forest Service will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the OALJ on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as practicable after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 1.657 Who has the burden of persuasion, and what standard of proof applies?

(a) Any party who has filed a request for a hearing has the burden of persuasion with respect to the issues of material fact raised by that party.

(b) The standard of proof is a preponderance of the evidence.

§ 1.658 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 1.656(b).

§ 1.659 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 15 days after the close of the hearing.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 1.660 What are the requirements for the ALJ's decision?

(a) *Timing.* The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under § 1.658; or

(2) 120 days after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(b) *Content.* (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be accepted or rejected.

(c) *Service.* Promptly after issuing his or her decision, the ALJ must:

(1) Serve the decision on each party to the hearing;

(2) Prepare a list of all documents that constitute the complete record for the hearing process (including the decision) and certify that the list is complete; and

(3) Forward to FERC the complete record for the hearing process, along with the certified list prepared under paragraph (c)(2) of this section, for inclusion in the record for the license proceeding. Materials received in electronic form, *e.g.,* as attachments to electronic mail, should be transmitted to FERC in electronic form. However, for cases in which a settlement was reached prior to a decision, the entire record need not be transmitted to FERC. In such situations, only the initial pleadings (hearing requests with attachments, any notices of intervention and response, answers, and referral notice) and any dismissal order of the ALJ need be transmitted.

(d) *Finality.* The ALJ's decision under this section with respect to the disputed issues of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825*l*(b).

Alternatives Process

§ 1.670 How must documents be filed and served under this subpart?

(a) *Filing.* (1) A document under this subpart must be filed using one of the methods set forth in § 1.612(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service.* (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be delivered or sent to each license party and FERC, using:

(i) One of the methods of service in § 1.613(c); or

(ii) Regular mail.

(2) The provisions of § 1.613(d) regarding a certificate of service apply to service under this subpart.

§ 1.671 How do I propose an alternative?

(a) *General.* To propose an alternative condition, you must:

(1) Be a license party; and

(2) File a written proposal with NFS, at the appropriate address provided in § 1.612(a)(1):

(i) For a case under § 1.601(d)(1), within 30 days after the Forest Service files its preliminary conditions with FERC; or

(ii) For a case under § 1.601(d)(2), within 60 days after the Forest Service files its proposed conditions with FERC.

(b) *Content.* Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to the Forest Service's preliminary condition;

(2) An explanation of how the alternative will provide for the adequate protection and utilization of the reservation;

(3) An explanation of how the alternative, as compared to the preliminary condition, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (*e.g.,* regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 1.672 May I file a revised proposed alternative?

(a) Within 20 days after issuance of the ALJ's decision under § 1.660, you may file with NFS, at the appropriate address provided in § 1.612(a)(1), a revised proposed alternative condition if:

(1) You previously filed a proposed alternative that met the requirements of § 1.671; and

(2) Your revised proposed alternative is designed to respond to one or more findings of fact by the ALJ.

(b) Your revised proposed alternative must:

(1) Satisfy the content requirements for a proposed alternative under § 1.671(b); and

(2) Identify the specific ALJ finding(s) to which the revised proposed alternative is designed to respond and how the revised proposed alternative differs from the original alternative.

(c) Filing a revised proposed alternative will constitute a withdrawal of the previously filed proposed alternative.

§ 1.673 When will the Forest Service file its modified condition?

(a) Except as provided in paragraph (b) of this section, if any license party proposes an alternative to a preliminary condition or prescription under § 1.671,the Forest Service will do the following within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c):

(1) Analyze under § 1.674 any alternative condition proposed under § 1.671 or 1.672; and

(2) File with FERC:

(i) Any condition the Forest Service adopts as its modified condition; and

(ii) The Forest Service's analysis of the modified condition and any proposed alternative.

(b) If the Forest Service needs additional time to complete the steps set forth in paragraphs (a)(1) and (2) of this section, it will so inform FERC within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c).

§ 1.674 How will the Forest Service analyze a proposed alternative and formulate its modified condition?

(a) In deciding whether to accept an alternative proposed under § 1.671 or § 1.672, the Forest Service must consider evidence and supporting material provided by any license party or otherwise reasonably available to the Forest Service, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on the Forest Service's preliminary condition;

(3) Any ALJ decision on disputed issues of material fact issued under § 1.660 with respect to the preliminary condition;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under § 1.671 or § 1.672.

(b) The Forest Service must accept a proposed alternative if the Forest

Service determines, based on substantial evidence provided by any license party or otherwise available to the Forest Service, that the alternative:

(1) Will, as compared to the Forest Service's preliminary condition:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will provide for the adequate protection and utilization of the reservation.

(c) For purposes of paragraphs (a) and (b) of this section, the Forest Service will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's NEPA document under 18 CFR 5.25(c).

(d) When the Forest Service files with FERC the condition that the Forest Service adopts as its modified condition under § 1.673(a)(2), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition;

(ii) If the Forest Service is not accepting any pending alternative, its reasons for not doing so; and

(iii) If any alternative submitted under § 1.671 was subsequently withdrawn by the license party, that the alternative was withdrawn; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(e) The written statement under paragraph (d)(1) of this section must demonstrate that the Forest Service gave equal consideration to the effects of the condition adopted and any alternative not accepted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 1.675 Has OMB approved the information collection provisions of this subpart?

Yes. This subpart contains provisions in §§ 1.670 through 1.674 that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

Title 43—Department of the Interior

■ 3. Part 45 is revised to read as follows:

PART 45—CONDITIONS AND PRESCRIPTIONS IN FERC HYDROPOWER LICENSES

Subpart A—General Provisions

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Authority: 16 U.S.C. 797(e), 811, 823d.

Subpart A—General Provisions

§ 45.1 What is the purpose of this part, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in subparts A and B of this part contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions and prescriptions that the Department of the Interior (DOI) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions and prescriptions is granted by FPA sections 4(e) and 18, 16 U.S.C. 797(e) and 811, which authorize the Secretary of the Interior to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) and to prescribe fishways.

(2) The hearing process under this part does not apply to provisions that DOI may submit to FERC under any

authority other than FPA section 4(e) and 18, including recommendations under FPA section 10(a) or (j), 16 U.S.C. 803(a), (j), or terms and conditions under FPA section 30(c), 16 U.S.C. 823a(c).

(3) The FPA also grants the Department of Agriculture and the Department of Commerce the authority to develop mandatory conditions, and the Department of Commerce the authority to develop mandatory prescriptions, for inclusion in a hydropower license. Where DOI and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 45.23:

(i) A hearing conducted under this part will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this part will be conducted by one of the other Departments, pursuant to 7 CFR 1.601 *et seq.* or 50 CFR 221.1 *et seq.,* as applicable.

(4) The regulations in subparts A and B of this part will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 45.60(a).

(b) *Alternatives process.* The regulations in subparts A and C of this part contain rules of procedure applicable to the submission and consideration of alternative conditions and prescriptions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by DOI under section 4(e) or a fishway prescribed by DOI under section 18.

(c) *Reserved authority.* Where DOI has notified or notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions at a later time, the hearing and alternatives processes under this part for such conditions or prescriptions will be available if and when DOI exercises its reserved authority.

(d) *Applicability.* (1) This part applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions or prescriptions have been or are filed with FERC before FERC issues the license.

(2) This part also applies to any exercise of DOI's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

§ 45.2 What terms are used in this part?

As used in this part:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under subpart B of this part.

Alternative means a condition or prescription that a license party other than a bureau or Department develops as an alternative to a preliminary condition or prescription from a bureau or Department, under FPA sec. 33, 16 U.S.C. 823d.

Bureau means any of the following organizations within DOI that develops a preliminary condition or prescription: The Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, or National Park Service.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

DOI means the Department of the Interior, including any bureau, unit, or office of the Department, whether in Washington, DC, or in the field.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Hearings Division means the Departmental Cases Hearings Division, Office of Hearings and Appeals, Department of the Interior, 301 South West Temple Street, Suite 6.300, Salt Lake City, UT 84101, telephone 801–524–5344, facsimile number 801–524–5539.

Intervention means a process by which a person who did not request a hearing under § 45.21 can participate as a party to the hearing under § 45.22.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

Modified condition or prescription means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

NEPA document means an environmental assessment or environmental impact statement issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

OEPC means the Office of Environmental Policy and Compliance, Department of the Interior, 1849 C Street NW., Mail Stop 2462, Washington, DC 20240, telephone 202–208–3891, facsimile number 202–208–6970.

Party means, with respect to DOI's hearing process under subpart B of this part:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 45.21; or

(ii) Either 7 CFR 1.621 or 50 CFR 221.21, with respect to a hearing process consolidated under § 45.23;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 45.22; or

(ii) Either 7 CFR 1.622 or 50 CFR 221.22, with respect to a hearing process consolidated under § 45.23;

(3) Any bureau whose preliminary condition or prescription has been filed with FERC; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 45.23.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State, Tribal, county, district, territorial, or local government or agency.

Preliminary condition or prescription means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 45.10.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

Secretary means the Secretary of the Interior or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2637.211(a).

You refers to a party other than a Department.

§ 45.3 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 45.21, a notice of intervention and response under § 45.22, an answer under § 45.25, or any document under subpart C of this part.

(2) An extension of time to file any other document under subpart B of this part may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 45.35 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the decision under § 45.60.

§ 45.4 What deadlines apply to the trial-type hearing and alternatives processes?

(a) The following table summarizes the steps in the trial-type hearing process under subpart B of this part and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this part or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

Process step	Process day	Must generally be completed	See section
(1) DOI files preliminary condition(s) or prescription(s) with FERC.	0	.....	45.20.
(2) License party files request for hearing	30	Within 30 days after DOI files preliminary condition(s) or prescription(s) with FERC.	45.21(a).
(3) Any other license party files notice of intervention and response.	50	Within 20 days after deadline for filing requests for hearing.	45.22(a).
(4) Bureau may file answer	80	Within 50 days after deadline for filing requests for hearing.	45.25(a).
(5) OEPC refers case to ALJ office for hearing and issues referral notice to parties.	85	Within 55 days after deadline for filing requests for hearing.	45.26(a).
(6) Parties may meet and agree to discovery (optional step).	86–91	Before deadline for filing motions seeking discovery ...	45.41(a).
(7) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference.	90	Within 5 days after effective date of referral notice	45.30.
(8) Party files motion seeking discovery from another party.	92	Within 7 days after effective date of referral notice	45.41(d).
(9) Other party files objections to discovery motion or specific portions of discovery requests.	99	Within 7 days after service of discovery motion	45.41(e).
(10) Parties meet to discuss discovery and hearing schedule.	100–104	Before date set for initial prehearing conference	45.40(d).
(11) ALJ conducts initial prehearing conference	105	On or about 20th day after effective date of referral notice.	45.40(a).
(12) ALJ issues order following initial prehearing conference.	107	Within 2 days after initial prehearing conference	45.40(g).
(13) Party responds to interrogatories from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	45.43(c).
(14) Party responds to requests for documents, etc., from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	45.45(c).
(15) Parties complete all discovery, including depositions, as authorized by ALJ.	130	Within 25 days after initial prehearing conference	45.41(i).
(16) Parties file updated lists of witnesses and exhibits	140	Within 10 days after deadline for completion of discovery.	45.42(b).
(17) Parties file written direct testimony	140	Within 10 days after deadline for completion of discovery.	45.52(a).
(18) Parties complete prehearing preparation and ALJ commences hearing.	155	Within 25 days after deadline for completion of discovery.	45.50(a).
(19) ALJ closes hearing record	160	When ALJ closes hearing	45.58.
(20) Parties file post-hearing briefs	175	Within 15 days after hearing closes	45.59(a).
(21) ALJ issues decision	190	Within 30 days after hearing closes	45.60(a).

(b) The following table summarizes the steps in the alternatives process under subpart C of this part and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this part, the deadlines as set by those other sections control.

Process step	Process day	Must generally be completed	See section
(1) DOI files preliminary condition(s) or prescription(s) with FERC.	0	.....	45.20.
(2) License party files alternative condition(s) or prescription(s).	30	Within 30 days after DOI files preliminary condition(s) or prescription(s) with FERC.	45.71(a).
(3) ALJ issues decision on any hearing request	190	Within 30 days after hearing closes (see previous table).	45.60(a).
(4) License party files revised alternative condition(s) or prescription(s) if authorized.	210	Within 20 days after ALJ issues decision	45.72(a).
(5) DOI files modified condition(s) or prescription(s) with FERC.	300	Within 60 days after the deadline for filing comments on FERC's draft NEPA document.	45.73(a).

Subpart B—Hearing Process

Representatives

§ 45.10 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or agent, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a Federal, State, Tribal, county, district, territorial, or local government or component.

(c) *Appearance.* An individual representing himself or herself and any other representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 45.11;

(2) Include the name and address of the party on whose behalf the appearance is made;

(3) If the representative is an attorney, include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Lead representative.* If a party has more than one representative, the ALJ may require the party to designate a lead representative for service of documents under § 45.13.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

Document Filing and Service

§ 45.11 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under this subpart must:

(1) Measure 8½ by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8½ by 11 inches and attached to the document;

(2) Be printed on just one side of the page (except that service copies may be printed on both sides of the page);

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 11 point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document filed under this subpart must begin with a caption that sets forth:

(1) The name of the case under this subpart and the docket number, if one has been assigned;

(2) The name and docket number of the license proceeding to which the case under this subpart relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document filed under this subpart must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that the document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 45.12 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with the appropriate office, as follows:

(1) Before OEPC refers a case for docketing under § 45.26, any documents must be filed with OEPC. OEPC's address, telephone number, and facsimile number are set forth in § 45.2.

(2) OEPC will notify the parties of the date on which it refers a case for docketing under § 45.26. After that date, any documents must be filed with:

(i) The Hearings Division, if DOI will be conducting the hearing. The Hearings Division's address, telephone number, and facsimile number are set forth in § 45.2; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the hearing. The name, address, telephone number, and facsimile number of the appropriate hearings component will be provided in the referral notice from OEPC.

(b) *Method of filing.* (1) A document must be filed with the appropriate office under paragraph (a) of this section using one of the following methods:

(i) By hand delivery of the original document and two copies;

(ii) By sending the original document and two copies by express mail or courier service; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document and two copies are sent by regular mail on the same day.

(2) Parties are encouraged, and may be required by the ALJ, to supplement any filing by providing the appropriate

office with an electronic copy of the document on compact disc or other suitable media. With respect to any supporting material accompanying a request for hearing, a notice of intervention and response, or an answer, the party may submit in lieu of an original and two hard copies:

(i) An original; and

(ii) One copy on a compact disc or other suitable media.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected.

§ 45.13 What are the requirements for service of documents?

(a) *Filed documents.* Any document related to a case under this subpart must be served at the same time the document is delivered or sent for filing. Copies must be served as follows:

(1) A complete copy of any request for a hearing under § 45.21 must be delivered or sent to FERC and each license party, using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service.

(2) A complete copy of any notice of intervention and response under § 45.22 must be:

(i) Delivered or sent to FERC, the license applicant, any person who has filed a request for hearing under § 45.21, and any bureau, using one of the methods of service in paragraph (c) of this section; and

(ii) Delivered or sent to any other license party using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service, or by regular mail.

(3) A complete copy of any answer or notice under § 45.25 and any other document filed by any party to the hearing process must be delivered or sent on every other party to the hearing process, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the Hearings Division or ALJ.* A complete copy of any notice, order, decision, or other document issued by the Hearings Division or the ALJ under this subpart must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise agreed to by the parties and ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

(2) By sending the document by express mail or courier service for delivery on the next business day;

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By sending the document, including all attachments, by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method set forth in paragraph (c) of this section (including another electronic means, if the party to be served has consented to that means in writing).

(d) *Certificate of service.* A certificate of service must be attached to each document filed under this subpart. The certificate must be signed by the party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

Initiation of Hearing Process

§ 45.20 What supporting information must DOI provide with its preliminary conditions or prescriptions?

(a) *Supporting information.* (1) When DOI files a preliminary condition or prescription with FERC, it must include a rationale for the condition or prescription and an index to the administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, DOI must:

(i) File them with FERC at the time it files the preliminary condition or prescription;

(ii) Provide copies to the license applicant; and

(iii) In the case of a condition developed by the Bureau of Indian Affairs, provide copies to the affected Indian tribe.

(b) *Service.* DOI will serve a copy of its preliminary condition or prescription on each license party.

§ 45.21 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any preliminary condition or prescription filed by DOI, you must:

(1) Be a license party; and

(2) File with OEPC, at the address provided in§ 45.2, a written request for a hearing:

(i) For a case under § 45.1(d)(1), within 30 days after DOI files a preliminary condition or prescription with FERC; or

(ii) For a case under § 45.1(d)(2), within 60 days after DOI files a preliminary condition or prescription with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence;

(2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by DOI under § 45.20(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous; and

(iii) The basis for your opinion that any factual dispute is material.

(3) With respect to any scientific studies, literature, and other documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request; and

(4) A statement indicating whether or not you consent to service by electronic means under § 45.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided

under paragraph (b)(2) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 45.22 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with OEPC, at the address provided in§ 45.2, a notice of intervention and a written response to any request for a hearing within 20 days after the deadline in § 45.21(a)(2).

(2) A notice of intervention and response must be limited to one or more of the issues of material fact raised in the hearing request and may not raise additional issues.

(b) *Content.* In your notice of intervention and response you must explain your position with respect to the issues of material fact raised in the hearing request under § 45.21(b).

(1) If you agree with the information provided by DOI under § 45.20(a) or by the requester under § 45.21(b), your response may refer to DOI's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under § 45.21(b).

(3) Your notice of intervention and response must also indicate whether or not you consent to service by electronic means under § 45.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section (excluding citations to scientific studies, literature, and other documented information supporting your opinions) may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 45.23 Will hearing requests be consolidated?

(a) *Initial Department coordination.* Any bureau that has received a copy of a hearing request must contact the other bureaus and Departments and determine:

(1) Whether a preliminary condition or prescription relating to the license has been filed with FERC on behalf of any other bureau or Department; and

(2) If so, whether the other bureau or Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Where more than one bureau or Department has received a hearing request, the bureaus or Departments involved must decide jointly:

(1) Whether the cases should be consolidated for hearing under paragraphs (c)(3)(ii) through (iv) of this section; and

(2) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) All or any portion of the following may be consolidated for hearing, if the bureaus and Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

§ 45.24 Can a hearing process be stayed to allow for settlement discussions?

(a) Prior to referral to the ALJ, the hearing requester and the Department may by agreement stay the hearing process under this subpart for a period not to exceed 120 days to allow for settlement discussions, if the stay period and any subsequent hearing process (if required) can be accommodated within the time frame established for the license proceeding.

(b) Any stay of the hearing process will not affect the deadline for filing a notice of intervention and response, if any, pursuant to § 45.22(a)(1)(ii).

§ 45.25 How will the bureau respond to any hearing requests?

(a) *General.* Within 50 days after the deadline in § 45.21(a)(2) or 30 days after the expiration of any stay period under § 45.24, whichever is later, the bureau may file with OEPC an answer to any hearing request under § 45.21.

(b) *Content.* If the bureau files an answer:

(1) For each of the numbered factual issues listed under § 45.21(b)(1), the answer must explain the bureau's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That the bureau is willing to stipulate to the facts as alleged by the requester;

(ii) That the bureau believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That the bureau believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That the bureau agrees that the issue is factual, material, and in dispute.

(2) The answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under § 45.23 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact information for the appropriate Department hearings component.

(3) If the bureau plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, it must provide a copy with its answer.

(4) The answer must also indicate whether or not the bureau consents to service by electronic means under § 45.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* The bureau's answer must also list the witnesses and exhibits that it intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, the bureau must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, the bureau must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If the bureau elects not to file an answer to a hearing request:

(1) The bureau is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) The bureau may file a list of witnesses and exhibits with respect to the request only as provided in § 45.42(b); and

(3) The bureau must file a notice containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under § 45.23, and the statement required by paragraph (b)(4) of this section.

§ 45.26 What will DOI do with any hearing requests?

(a) *Case referral.* Within 55 days after the deadline in § 45.21(a)(2) or 35 days after the expiration of any stay period under § 45.24, whichever is later, OEPC will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by DOI, OEPC will refer the case to the Hearings Division.

(2) If the hearing is to be conducted by another Department, OEPC will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) Two copies of any preliminary condition or prescription under § 45.20;

(2) The original and one copy of any hearing request under § 45.21;

(3) The original and one copy of any notice of intervention and response under § 45.22;

(4) The original and one copy of any answer under § 45.25; and

(5) The original and one copy of a referral notice under paragraph (c) of this section.

(c) *Notice.* At the time OEPC refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The effective date of the case referral to the appropriate Department hearings component.

(d) *Delivery and service.* (1) OEPC must refer the case to the appropriate Department hearings component by one of the methods identified in § 45.12(b)(1)(i) and (ii).

(2) OEPC must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in § 45.13(c)(1) and (2).

§ 45.27 What regulations apply to a case referred for a hearing?

(a) If OEPC refers the case to the Hearings Division, the regulations in this subpart will continue to apply to the hearing process.

(b) If OEPC refers the case to the United States Department of Agriculture's Office of Administrative Law Judges, the regulations at 7 CFR 1.601 *et seq.* will apply from that point on.

(c) If OEPC refers the case to the Department of Commerce's designated ALJ office, the regulations at 50 CFR 221.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§ 45.30 What will the Hearings Division do with a case referral?

Within 5 days after the effective date stated in the referral notice under § 45.26(c)(4), 7 CFR 1.626(c)(4), or 50 CFR 221.26(c)(4):

(a) The Hearings Division must:

(1) Docket the case;

(2) Assign an ALJ to preside over the hearing process and issue a decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case; and

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 45.40. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 45.31 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process relating to any bureau's or other Department's condition or prescription that has been referred to the ALJ for hearing, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas under § 45.47;

(c) Shorten or enlarge time periods set forth in these regulations, except that the deadline in § 45.60(a)(2) can be extended only if the ALJ must be replaced under § 45.32 or 45.33;

(d) Rule on motions;

(e) Authorize discovery as provided for in this subpart;

(f) Hold hearings and conferences;

(g) Regulate the course of hearings;

(h) Call and question witnesses;

(i) Exclude any person from a hearing or conference for misconduct or other good cause;

(j) Summarily dispose of any hearing request or issue as to which the ALJ determines there is no disputed issue of material fact;

(k) Issue a decision consistent with § 45.60(b) regarding any disputed issue of material fact; and

(l) Take any other action authorized by law.

§ 45.32 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 45.31, the Hearings Division will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 45.33 Under what circumstances may the ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's decision, any party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a decision.

§ 45.34 What is the law governing ex parte communications?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

§ 45.35 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after the Hearings Division issues a docketing notice under § 45.30.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be reduced to writing.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of this subpart with respect to form, content, filing, and service; and

(iii) Not exceed 15 pages, including all supporting arguments.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this part, any other party may file a response to a written motion within 10 days after service of the motion. The response may not exceed 15 pages, including all supporting arguments. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

Prehearing Conferences and Discovery

§ 45.40 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the notice under § 45.30, on or about the 20th day after the effective date stated in the referral notice under § 45.26(c)(4), 7 CFR 1.626(c)(4), or 50 CFR 221.26(c)(4).

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under § 45.41 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing;

(iv) To set deadlines for submission of written testimony under § 45.52 and exchange of exhibits to be offered as evidence under § 45.54; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation.* (1) Each party's representative must be fully prepared to discuss all issues pertinent to that party that are properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

(i) To meet in person, by telephone, or by other appropriate means; and

(ii) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(e) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(f) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(g) *Order.* Within 2 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

§ 45.41 How may parties obtain discovery of information needed for the case?

(a) *General.* By agreement of the parties or with the permission of the ALJ, a party may obtain discovery of information to assist the party in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories as provided in § 45.43;

(2) Depositions of witnesses as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the ALJ during a prehearing conference or in a written order under § 45.40(g). The ALJ may authorize discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not already in the license proceeding record or otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law;

(3) That the scope of the discovery is not unduly burdensome;

(4) That the method to be used is the least burdensome method available;

(5) That any trade secrets or proprietary information can be adequately safeguarded; and

(6) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable.

(c) *Motions.* A party may initiate discovery:

(1) Pursuant to an agreement of the parties; or

(2) By filing a motion that:

(i) Briefly describes the proposed method(s), purpose, and scope of the discovery;

(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and

(iii) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after the effective date stated in the referral notice under § 45.26(c)(4), 7 CFR 1.626(c)(4), or 50 CFR 221.26(c)(4).

(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (6) of this section.

(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).

(1) If a party wants to discover such materials, it must show:

(i) That it has substantial need of the materials in preparing its own case; and

(ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(2) In ordering discovery of such materials when the required showing has been made, the ALJ must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(g) *Experts.* Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert through the methods set out in paragraph (a) of this section concerning any relevant matters that are not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at the hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:

(i) That it has a compelling need for the information; and

(ii) That it cannot practicably obtain the information by other means.

(h) *Limitations on depositions.* (1) A party may depose an expert or non-expert witness only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her government duties.

(4) Unless otherwise stipulated to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours.

(i) *Completion of discovery.* All discovery must be completed within 25 days after the initial prehearing conference.

§ 45.42 When must a party supplement or amend information it has previously provided?

(a) *Discovery.* A party must promptly supplement or amend any prior response to a discovery request if it learns that the response:

(1) Was incomplete or incorrect when made; or

(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.

(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under § 45.21(c), § 45.22(c), or § 45.25(c).

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under § 45.21(c), § 45.22(c), or § 45.25(c).

(c) *Failure to disclose.* (1) A party will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose under § 45.21(c), § 45.22(c), or § 45.25(c), or paragraphs (a) or (b) of this section.

(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) A party may object to the admission of evidence under paragraph (c)(1) of this section before or during the hearing.

(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 45.43 What are the requirements for written interrogatories?

(a) *Motion; limitation.* Except upon agreement of the parties:

(1) A party wishing to propound interrogatories must file a motion under § 45.41(c); and

(2) A party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause.

(b) *ALJ order.* The ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

(1) Grant the motion and approve the use of some or all of the proposed interrogatories; or

(2) Deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on such records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from

which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

§ 45.44 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 45.41(c). Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *ALJ order.* The ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

(c) *Arrangements.* If the parties agree to or the ALJ approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the ALJ's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the ALJ's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross-examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense.

(2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording.* The testimony at a deposition may be recorded on videotape, subject to any conditions or restrictions that the parties may agree to or the ALJ may impose, at the expense of the party requesting the recording.

(1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(4) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the videotape to any party that requests it, at the requesting party's expense; and

(ii) Attach to the videotape a statement identifying the case and the deponent and certifying the authenticity of the video recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 45.53.

§ 45.45 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion.* Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 45.41(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *ALJ order.* The ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

§ 45.46 What sanctions may the ALJ impose for failure to comply with discovery?

(a) Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under § 45.42(a).

(b) The ALJ may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

§ 45.47 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may request by written motion that the ALJ issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may request a subpoena for a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide

significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) The reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to Federal employees who are called as witnesses by a bureau or other Department.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires production of information during discovery that is not discoverable; or

(iii) Requires disclosure of irrelevant, privileged, or otherwise protected information.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

Hearing, Briefing, and Decision

§ 45.50 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 45.40, generally within 25 days after the date set for completion of discovery.

(b) On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 45.51 What are the parties' rights during the hearing?

Each party has the following rights during the hearing, as necessary to assure full and accurate disclosure of the facts:

(a) To present testimony and exhibits, consistent with the requirements in §§ 45.21(c), 45.22(c), 45.25(c), 45.42(b), and 45.52;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 45.52 What are the requirements for presenting testimony?

(a) *Written direct testimony.* Unless otherwise ordered by the ALJ, all direct hearing testimony for each party's initial case must be prepared and submitted in written form. The ALJ will determine whether rebuttal testimony, if allowed, must be submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 10 days after the date set for completion of discovery; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the ALJ, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The ALJ may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the ALJ.

(2) The ALJ will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The ALJ may issue a subpoena under § 45.47 directing a witness to testify by telephonic conference call.

§ 45.53 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under § 45.44 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the ALJ.

(2) The ALJ will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Videotaped deposition.* If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 45.54 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (b) through (d) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 45.55 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of § 45.42(b), the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence must concisely state the grounds. A ruling on every objection must appear in the record.

§ 45.56 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing will be transcribed verbatim.

(1) The Hearings Division will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the Hearings Division on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript Corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as practicable after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 45.57 Who has the burden of persuasion, and what standard of proof applies?

(a) Any party who has filed a request for a hearing has the burden of persuasion with respect to the issues of material fact raised by that party.

(b) The standard of proof is a preponderance of the evidence.

§ 45.58 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 45.56(b).

§ 45.59 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 15 days after the close of the hearing.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 45.60 What are the requirements for the ALJ's decision?

(a) *Timing.* The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under § 45.58; or

(2) 120 days after the effective date stated in the referral notice under § 45.26(c)(4), 7 CFR 1.626(c)(4), or 50 CFR 221.26(c)(4).

(b) *Content.* (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be accepted or rejected.

(c) *Service.* Promptly after issuing his or her decision, the ALJ must:

(1) Serve the decision on each party to the hearing;

(2) Prepare a list of all documents that constitute the complete record for the hearing process (including the decision) and certify that the list is complete; and

(3) Forward to FERC the complete record for the hearing process, along with the certified list prepared under paragraph (c)(2) of this section, for inclusion in the record for the license proceeding. Materials received in electronic form, *e.g.,* as attachments to electronic mail, should be transmitted to FERC in electronic form. However, for cases in which a settlement was reached prior to a decision, the entire record need not be transmitted to FERC. In such situations, only the initial pleadings (hearing requests with attachments, any notices of intervention and response, answers, and referral

notice) and any dismissal order of the ALJ need be transmitted.

(d) *Finality.* The ALJ's decision under this section with respect to the disputed issues of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825*l*(b).

Subpart C—Alternatives Process

§ 45.70 How must documents be filed and served under this subpart?

(a) *Filing.* (1) A document under this subpart must be filed using one of the methods set forth in § 45.12(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service.* (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be delivered or sent to each license party and FERC, using:

(i) One of the methods of service in § 45.13(c); or

(ii) Regular mail.

(2) The provisions of § 45.13(d) regarding a certificate of service apply to service under this subpart.

§ 45.71 How do I propose an alternative?

(a) *General.* To propose an alternative condition or prescription, you must:

(1) Be a license party; and

(2) File a written proposal with OEPC:

(i) For a case under § 45.1(d)(1), within 30 days after DOI files a preliminary condition or prescription with FERC; or

(ii) For a case under § 45.1(d)(2), within 60 days after DOI files a proposed condition or prescription with FERC.

(b) *Content.* Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to DOI's preliminary condition or prescription;

(2) An explanation of how the alternative:

(i) If a condition, will provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, will be no less protective than the fishway prescribed by DOI;

(3) An explanation of how the alternative, as compared to the preliminary condition or prescription, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (*e.g.,* regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 45.72 May I file a revised proposed alternative?

(a) Within 20 days after issuance of the ALJ's decision under § 45.60, you may file with OEPC a revised proposed alternative condition or prescription if:

(1) You previously filed a proposed alternative that met the requirements of § 45.71; and

(2) Your revised proposed alternative is designed to respond to one or more findings of fact by the ALJ.

(b) Your revised proposed alternative must:

(1) Satisfy the content requirements for a proposed alternative under § 45.71(b); and

(2) Identify the specific ALJ finding(s) to which the revised proposed alternative is designed to respond and how the revised proposed alternative differs from the original alternative.

(c) Filing a revised proposed alternative will constitute a withdrawal of the previously filed proposed alternative.

§ 45.73 When will DOI file its modified condition or prescription?

(a) Except as provided in paragraph (b) of this section, if any license party proposes an alternative to a preliminary condition or prescription under § 45.71, DOI will do the following within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c):

(1) Analyze under § 45.74 any alternative condition or prescription proposed under § 45.71 or 45.72; and

(2) File with FERC:

(i) Any condition or prescription that DOI adopts as its modified condition or prescription; and

(ii) DOI's analysis of the modified condition or prescription and any proposed alternative.

(b) If DOI needs additional time to complete the steps set forth in paragraphs (a)(1) and (a)(2) of this section, it will so inform FERC within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c).

§ 45.74 How will DOI analyze a proposed alternative and formulate its modified condition or prescription?

(a) In deciding whether to accept an alternative proposed under § 45.71 or 45.72, DOI must consider evidence and supporting material provided by any license party or otherwise reasonably available to DOI, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on DOI's preliminary condition or prescription;

(3) Any ALJ decision on disputed issues of material fact issued under § 45.60 with respect to the preliminary condition or prescription;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under § 45.71 or 45.72.

(b) DOI must accept a proposed alternative if it determines, based on substantial evidence provided by any license party or otherwise reasonably available to DOI, that the alternative:

(1) Will, as compared to DOI's preliminary condition or prescription:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will:

(i) If a condition, provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, be no less protective than DOI's preliminary prescription.

(c) For purposes of paragraphs (a) and (b) of this section, DOI will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's NEPA document under 18 CFR 5.25(c).

(d) When DOI files with FERC the condition or prescription that DOI adopts as its modified condition or prescription under § 45.73(a)(2), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition or prescription;

(ii) If DOI is not accepting any pending alternative, its reasons for not doing so; and

(iii) If any alternative submitted under § 45.71 was subsequently withdrawn by the license party, that the alternative was withdrawn; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(e) The written statement under paragraph (d)(1) of this section must demonstrate that DOI gave equal consideration to the effects of the condition or prescription adopted and any alternative not accepted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 45.75 Has OMB approved the information collection provisions of this subpart?

Yes. This rule contains provisions that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

Department of Commerce

50 CFR Chapter II

■ 4. The National Oceanic and Atmospheric Administration revises part 221, title 50, to read as follows:

PART 221—CONDITIONS AND PRESCRIPTIONS IN FERC HYDROPOWER LICENSES

Subpart A—General Provisions

Sec.

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Authority: 16 U.S.C. 797(e), 811, 823d.

Subpart A—General Provisions

§ 221.1 What is the purpose of this part, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in subparts A and B of this part contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions and prescriptions that the Department of Commerce (acting through the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) and other NOAA entities) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions and prescriptions is granted by FPA sections 4(e) and 18, 16 U.S.C. 797(e) and 811, which authorize the Secretary of Commerce to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) and to prescribe fishways.

(2) The hearing process under this part does not apply to provisions that the Department of Commerce may submit to FERC under any authority other than FPA section 4(e) and 18, including recommendations under FPA section 10(a) or (j), 16 U.S.C. 803(a), (j), or terms and conditions under FPA section 30(c), 16 U.S.C. 823a(c).

(3) The FPA also grants the Department of Agriculture and the Department of the Interior the authority to develop mandatory conditions, and the Department of the Interior the authority to develop mandatory prescriptions, for inclusion in a hydropower license. Where the Department of Commerce and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments

agree to consolidate the hearings under § 221.23:

(i) A hearing conducted under this part will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this part will be conducted by one of the other Departments, pursuant to 7 CFR 1.601 *et seq.* or 43 CFR 45.1 *et seq.,* as applicable.

(4) The regulations in subparts A and B of this part will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 221.60(a).

(b) *Alternatives process.* The regulations in subparts A and C of this part contain rules of procedure applicable to the submission and consideration of alternative conditions and prescriptions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by NOAA under section 4(e) or a fishway prescribed by NMFS under section 18.

(c) *Reserved authority.* Where NOAA has notified or notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions at a later time, the hearing and alternatives processes under this part for such conditions or prescriptions will be available if and when NOAA exercises its reserved authority.

(d) *Applicability.* (1) This part applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions or prescriptions have been or are filed with FERC before FERC issues the license.

(2) This part also applies to any exercise of NOAA's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

§ 221.2 What terms are used in this part?

As used in this part:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under subpart B of this part.

Alternative means a condition or prescription that a license party other than NOAA or another Department develops as an alternative to a preliminary condition or prescription from NOAA or another Department, under FPA sec. 33, 16 U.S.C. 823d.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Department of Commerce's designated ALJ office means the ALJ office that is assigned to preside over the hearing process for NOAA.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Intervention means a process by which a person who did not request a hearing under § 221.21 can participate as a party to the hearing under § 221.22.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

Modified condition or prescription means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

NEPA document means an environmental document as defined at 40 CFR 1508.10 to include an environmental assessment, environmental impact statement (EIS), finding of no significant impact, and notice of intent to prepare an EIS. Such documents are issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq., and the CEQ Regulations Implementing the Procedural Requirements of NEPA (40 CFR parts 21500–1508).*

NMFS means the National Marine Fisheries Service, a constituent agency of the Department of Commerce, acting by and through the Assistant Administrator for Fisheries or one of NMFS's six Regional Administrators, as appropriate.

NOAA means the National Oceanic and Atmospheric Administration, a constituent agency of the Department of Commerce, acting by and through its Administrator, the Undersecretary of Commerce for Oceans and Atmosphere or one of its line offices.

Office of Habitat Conservation means the NMFS Office of Habitat Conservation. Address: Chief, Habitat Protection Division, Office of Habitat Conservation, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. Telephone 301–427–8601. Facsimile number 301–713–4305.

Party means, with respect to NOAA's hearing process under subpart B of this part:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 221.21; or

(ii) Either 7 CFR 1.621 or 43 CFR 45.21, with respect to a hearing process consolidated under § 221.23;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 221.22; or

(ii) Either 7 CFR 1.622 or 43 CFR 45.22, with respect to a hearing process consolidated under § 221.23;

(3) NOAA; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 221.23.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State, Tribal, county, district, territorial, or local government or agency.

Preliminary condition or prescription means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under § 221.10.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

Secretary means the Secretary of Commerce or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2637.211(a).

You refers to a party other than a Department.

§ 221.3 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 221.21, a notice of intervention and response under § 221.22, an answer under § 221.25, or any document under subpart C of this part.

(2) An extension of time to file any other document under subpart B of this part may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 221.35 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the decision under § 221.60.

§ 221.4 What deadlines apply to the trial-type hearing and alternatives processes?

(a) The following table summarizes the steps in the trial-type hearing process under subpart B of this part and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this part or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

Process step	Process day	Must generally be completed	See section
(1) NOAA files preliminary condition(s) or prescription(s) with FERC.	0	.....	221.20.
(2) License party files request for hearing	30	Within 30 days after NOAA files preliminary condition(s) or prescription(s) with FERC.	221.21(a).
(3) Any other license party files notice of intervention and response.	50	Within 20 days after deadline for filing requests for hearing.	221.22(a).
(4) NOAA may file answer	80	Within 50 days after deadline for filing requests for hearing.	221.25(a).
(5) Office of Habitat Conservation refers case to ALJ office for hearing and issues referral notice to parties.	85	Within 55 days after deadline for filing requests for hearing.	221.26(a).
(6) Parties may meet and agree to discovery (optional step).	86–91	Before deadline for filing motions seeking discovery	221.41(a).
(7) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference.	90	Within 5 days after effective date of referral notice	221.30.
(8) Party files motion seeking discovery from another party.	92	Within 7 days after effective date of referral notice	221.41(d).
(9) Other party files objections to discovery motion or specific portions of discovery requests.	99	Within 7 days after service of discovery motion	221.41(e).
(10) Parties meet to discuss discovery and hearing schedule.	100–104	Before date set for initial prehearing conference	221.40(d).
(11) ALJ conducts initial prehearing conference	105	On or about 20th day after effective date of referral notice.	221.40(a).
(12) ALJ issues order following initial prehearing conference.	107	Within 2 days after initial prehearing conference	221.40(g).
(13) Party responds to interrogatories from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	221.43(c).
(14) Party responds to requests for documents, etc., from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	221.45(c).
(15) Parties complete all discovery, including depositions, as authorized by ALJ.	130	Within 25 days after initial prehearing conference	221.41(i).
(16) Parties file updated lists of witnesses and exhibits	140	Within 10 days after deadline for completion of discovery.	221.42(b).
(17) Parties file written direct testimony	140	Within 10 days after deadline for completion of discovery.	221.52(a).
(18) Parties complete prehearing preparation and ALJ commences hearing.	155	Within 25 days after deadline for completion of discovery.	221.50(a).
(19) ALJ closes hearing record	160	When ALJ closes hearing	221.58.
(20) Parties file post-hearing briefs	175	Within 15 days after hearing closes	221.59(a).
(21) ALJ issues decision	190	Within 30 days after hearing closes	221.60(a).

(b) The following table summarizes the steps in the alternatives process under subpart C of this part and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this part, the deadlines as set by those other sections control.

Process step	Process day	Must generally be completed	See section
(1) NOAA files preliminary condition(s) or prescription(s) with FERC.	0	.....	221.20.
(2) License party files alternative condition(s) or prescription(s).	30	Within 30 days after NOAA files preliminary condition(s) or prescription(s) with FERC.	221.71(a).
(3) ALJ issues decision on any hearing request	190	Within 30 days after hearing closes (see previous table).	221.60(a).

Process step	Process day	Must generally be completed	See section
(4) License party files revised alternative condition(s) or prescription(s) if authorized.	210	Within 20 days after ALJ issues decision	221.72(a).
(5) NOAA files modified condition(s) or prescription(s) with FERC.	300	Within 60 days after the deadline for filing comments on FERC's draft NEPA document.	221.73(a).

Subpart B—Hearing Process

Representatives

§ 221.10 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or agent, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a Federal, State, Tribal, county, district, territorial, or local government or component.

(c) *Appearance.* An individual representing himself or herself and any other representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 221.11;

(2) Include the name and address of the party on whose behalf the appearance is made;

(3) If the representative is an attorney, include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Lead representative.* If a party has more than one representative, the ALJ may require the party to designate a lead representative for service of documents under § 221.13.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

Document Filing and Service

§ 221.11 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under this subpart must:

(1) Measure 8½ by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8½ by 11 inches and attached to the document;

(2) Be printed on just one side of the page (except that service copies may be printed on both sides of the page);

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 11 point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document filed under this subpart must begin with a caption that sets forth:

(1) The name of the case under this subpart and the docket number, if one has been assigned;

(2) The name and docket number of the license proceeding to which the case under this subpart relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document filed under this subpart must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that the document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 221.12 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with the appropriate office, as follows:

(1) Before NOAA refers a case for docketing under § 221.26, any documents must be filed with the Office of Habitat Conservation. The Office of Habitat Conservation's address, telephone number, and facsimile number are set forth in § 221.2.

(2) NOAA will notify the parties of the date on which it refers a case for docketing under § 221.26. After that date, any documents must be filed with:

(i) The Department of Commerce's designated ALJ office, if the Department of Commerce will be conducting the hearing. The name, address, telephone number, and facsimile number of the designated ALJ office will be provided in the referral notice from NOAA; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the hearing. The name, address, telephone number, and facsimile number of the appropriate hearings component will be provided in the referral notice from NOAA.

(b) *Method of filing.* (1) A document must be filed with the appropriate office under paragraph (a) of this section using one of the following methods:

(i) By hand delivery of the original document and two copies;

(ii) By sending the original document and two copies by express mail or courier service; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document and two copies are sent by regular mail on the same day.

(2) Parties are encouraged, and may be required by the ALJ, to supplement any filing by providing the appropriate office with an electronic copy of the document on compact disc or other suitable media. With respect to any supporting material accompanying a request for hearing, a notice of intervention and response, or an

answer, the party may submit in lieu of an original and two hard copies:

(i) An original; and

(ii) One copy on a compact disc or other suitable media.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected.

§ 221.13 What are the requirements for service of documents?

(a) *Filed documents.* Any document related to a case under this subpart must be served at the same time the document is delivered or sent for filing. Copies must be served as follows:

(1) A complete copy of any request for a hearing under § 221.21 must be delivered or sent to FERC and each license party, using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service.

(2) A complete copy of any notice of intervention and response under § 221.22 must be:

(i) Delivered or sent to FERC, the license applicant, any person who has filed a request for hearing under § 221.21, and NOAA, using one of the methods of service in paragraph (c) of this section; and

(ii) Delivered or sent to any other license party using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service, or by regular mail.

(3) A complete copy of any answer or notice under § 221.25 and any other document filed by any party to the hearing process must be delivered or sent on every other party to the hearing process, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the ALJ.* A complete copy of any notice, order, decision, or other document issued by the ALJ under this subpart must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise agreed to by the parties and ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

(2) By sending the document by express mail or courier service for delivery on the next business day;

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By sending the document, including all attachments, by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method set forth in paragraph (c) of this section (including another electronic means, if the party to be served has consented to that means in writing).

(d) *Certificate of service.* A certificate of service must be attached to each document filed under this subpart. The certificate must be signed by the party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

Initiation of Hearing Process

§ 221.20 What supporting information must NOAA provide with its preliminary conditions or prescriptions?

(a) *Supporting information.* (1) When NOAA files a preliminary condition or prescription with FERC, it must include a rationale for the condition or prescription and an index to NOAA's administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, NOAA must:

(i) File them with FERC at the time it files the preliminary condition or prescription;

(ii) Provide copies to the license applicant; and

(b) *Service.* NOAA will serve a copy of its preliminary condition or prescription on each license party.

§ 221.21 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any preliminary condition or prescription filed by NOAA, you must:

(1) Be a license party; and

(2) File with the Office of Habitat Conservation, at the address provided in § 221.2, a written request for a hearing:

(i) For a case under § 221.1(d)(1), within 30 days after NOAA files a preliminary condition or prescription with FERC; or

(ii) For a case under § 221.1(d)(2), within 60 days after NOAA files a preliminary condition or prescription with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence;

(2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by NOAA under § 221.20(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous; and

(iii) The basis for your opinion that any factual dispute is material.

(3) With respect to any scientific studies, literature, and other documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request; and

(4) A statement indicating whether or not you consent to service by electronic means under § 221.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(2) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 221.22 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with the Office of Habitat Conservation, at the address provided in

§ 221.2, a notice of intervention and a written response to any request for a hearing within 20 days after the deadline in § 221.21(a)(2).

(2) A notice of intervention and response must be limited to one or more of the issues of material fact raised in the hearing request and may not raise additional issues.

(b) *Content.* In your notice of intervention and response you must explain your position with respect to the issues of material fact raised in the hearing request under § 221.21(b).

(1) If you agree with the information provided by NOAA under § 221.20(a) or by the requester under § 221.21(b), your response may refer to NOAA's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under § 221.21(b).

(3) Your notice of intervention and response must also indicate whether or not you consent to service by electronic means under § 221.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section (excluding citations to scientific studies, literature, and other documented information supporting your opinions) may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 221.23 Will hearing requests be consolidated?

(a) *Initial Department coordination.* If NOAA has received a copy of a hearing request, it must contact the other Departments and determine:

(1) Whether any of the other Departments has also filed a preliminary condition or prescription relating to the license with FERC; and

(2) If so, whether the other Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Where more than one Department has received a hearing request, the Departments involved must decide jointly:

(1) Whether the cases should be consolidated for hearing under paragraphs (c)(3)(ii) through (c)(3)(iv) of this section; and

(2) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) All or any portion of the following may be consolidated for hearing, if the Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

§ 221.24 Can a hearing process be stayed to allow for settlement discussions?

(a) Prior to referral to the ALJ, the hearing requester and NOAA may by agreement stay the hearing process under this subpart for a period not to exceed 120 days to allow for settlement discussions, if the stay period and any subsequent hearing process (if required) can be accommodated within the time frame established for the license proceeding.

(b) Any stay of the hearing process will not affect the deadline for filing a notice of intervention and response, if any, pursuant to § 221.22(a)(1)(ii).

§ 221.25 How will NOAA respond to any hearing requests?

(a) *General.* Within 50 days after the deadline in § 221.21(a)(2) or 30 days after the expiration of any stay period under § 221.24, whichever is later, NOAA may file with the Office of Habitat Conservation an answer to any hearing request under § 221.21.

(b) *Content.* If NOAA files an answer:

(1) For each of the numbered factual issues listed under § 221.21(b)(1), the answer must explain NOAA's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That NOAA is willing to stipulate to the facts as alleged by the requester;

(ii) That NOAA believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That NOAA believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That NOAA agrees that the issue is factual, material, and in dispute.

(2) The answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under § 221.23 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact information for the appropriate Department hearings component.

(3) If NOAA plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, it must provide a copy with its answer.

(4) The answer must also indicate whether or not NOAA consents to service by electronic means under § 221.13(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* NOAA's answer must also list the witnesses and exhibits that it intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, NOAA must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, NOAA must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If NOAA elects not to file an answer to a hearing request:

(1) NOAA is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) NOAA may file a list of witnesses and exhibits with respect to the request only as provided in § 221.42(b); and

(3) NOAA must file a notice containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under § 221.23, and the statement required by paragraph (b)(4) of this section.

§ 221.26 What will the Office of Habitat Conservation do with any hearing requests?

(a) *Case referral.* Within 55 days after the deadline in § 221.21(a)(2) or 35 days after the expiration of any stay period under § 221.24, whichever is later, the Office of Habitat Conservation will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by NOAA, the Office of Habitat Conservation will refer the case to the Department of Commerce's designated ALJ office.

(2) If the hearing is to be conducted by another Department, the Office of Habitat Conservation will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) Two copies of any preliminary condition or prescription under § 221.20;

(2) The original and one copy of any hearing request under § 221.21;

(3) The original and one copy of any notice of intervention and response under § 221.22;

(4) The original and one copy of any answer under § 221.25; and

(5) The original and one copy of a referral notice under paragraph (c) of this section.

(c) *Notice.* At the time the Office of Habitat Conservation refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The effective date of the case referral to the appropriate Department hearings component.

(d) *Delivery and service.* (1) The Office of Habitat Conservation must refer the case to the appropriate Department hearings component by one of the methods identified in § 221.12(b)(1)(i) and (b)(1)(ii).

(2) The Office of Habitat Conservation must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in § 221.13(c)(1) and (c)(2).

§ 221.27 What regulations apply to a case referred for a hearing?

(a) If the Office of Habitat Conservation refers the case to the Department of Commerce's designated ALJ office, the regulations in this subpart will continue to apply to the hearing process.

(b) If the Office of Habitat Conservation refers the case to the United States Department of Agriculture's Office of Administrative Law Judges, the regulations at 7 CFR 1.601 *et seq.* will apply from that point on.

(c) If the Office of Habitat Conservation refers the case to the Department of the Interior's Office of Hearings and Appeals, the regulations at 43 CFR 45.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§ 221.30 What will the Department of Commerce's designated ALJ office do with a case referral?

Within 5 days after the effective date stated in the referral notice under § 221.26(c)(4), 43 CFR 45.26(c)(4), or 7 CFR 1.626(c)(4):

(a) The Department of Commerce's designated ALJ office must:

(1) Docket the case;

(2) Assign an ALJ to preside over the hearing process and issue a decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case; and

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 221.40. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 221.31 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process relating to NOAA's or any other Department's condition or prescription that has been referred to the ALJ for hearing, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas under § 221.47;

(c) Shorten or enlarge time periods set forth in these regulations, except that the deadline in § 221.60(a)(2) can be extended only if the ALJ must be replaced under § 221.32 or 221.33;

(d) Rule on motions;

(e) Authorize discovery as provided for in this subpart;

(f) Hold hearings and conferences;

(g) Regulate the course of hearings;

(h) Call and question witnesses;

(i) Exclude any person from a hearing or conference for misconduct or other good cause;

(j) Summarily dispose of any hearing request or issue as to which the ALJ determines there is no disputed issue of material fact;

(k) Issue a decision consistent with § 221.60(b) regarding any disputed issue of material fact; and

(l) Take any other action authorized by law.

§ 221.32 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 221.31, the Department of Commerce's designated ALJ office will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 221.33 Under what circumstances may the ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's decision, any party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a decision.

§ 221.34 What is the law governing ex parte communications?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

§ 221.35 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after the Department of Commerce's designated ALJ office issues a docketing notice under § 221.30.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be reduced to writing.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of this subpart with respect to form, content, filing, and service; and

(iii) Not exceed 15 pages, including all supporting arguments.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this part, any other party may file a response to a written motion within 10 days after service of the motion. The response may not exceed 15 pages, including all supporting arguments. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

Prehearing Conferences and Discovery

§ 221.40 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the notice under § 221.30, on or about the 20th day after the effective date stated in the referral notice under § 221.26(c)(4), 7 CFR 1.626(c)(4), or 43 CFR 45.26(c)(4).

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under § 221.41 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing;

(iv) To set deadlines for submission of written testimony under § 221.52 and exchange of exhibits to be offered as evidence under § 221.54; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation.* (1) Each party's representative must be fully prepared to discuss all issues pertinent to that party that are properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

(i) To meet in person, by telephone, or by other appropriate means; and

(ii) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(e) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(f) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(g) *Order.* Within 2 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

§ 221.41 How may parties obtain discovery of information needed for the case?

(a) *General.* By agreement of the parties or with the permission of the ALJ, a party may obtain discovery of information to assist the party in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories as provided in § 221.43;

(2) Depositions of witnesses as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the ALJ during a prehearing conference or in a written order under § 221.40(g). The ALJ may authorize discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not already in the license proceeding record or otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law;

(3) That the scope of the discovery is not unduly burdensome;

(4) That the method to be used is the least burdensome method available;

(5) That any trade secrets or proprietary information can be adequately safeguarded; and

(6) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable.

(c) *Motions.* A party may initiate discovery:

(1) Pursuant to an agreement of the parties; or

(2) By filing a motion that:

(i) Briefly describes the proposed method(s), purpose, and scope of the discovery;

(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and

(iii) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after the effective date stated in the referral notice under § 221.26(c)(4), 7 CFR 1.626(c)(4), or 43 CFR 45.26(c)(4).

(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (b)(6) of this section.

(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).

(1) If a party wants to discover such materials, it must show:

(i) That it has substantial need of the materials in preparing its own case; and

(ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(2) In ordering discovery of such materials when the required showing has been made, the ALJ must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(g) *Experts.* Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert through the methods set out in paragraph (a) of this section concerning any relevant matters that are not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at the hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:

(i) That it has a compelling need for the information; and

(ii) That it cannot practicably obtain the information by other means.

(h) *Limitations on depositions.* (1) A party may depose an expert or non-expert witness only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her government duties.

(4) Unless otherwise stipulated to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours.

(i) *Completion of discovery.* All discovery must be completed within 25 days after the initial prehearing conference.

§ 221.42 When must a party supplement or amend information it has previously provided?

(a) *Discovery.* A party must promptly supplement or amend any prior response to a discovery request if it learns that the response:

(1) Was incomplete or incorrect when made; or

(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.

(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under §§ 221.21(c), 221.22(c), or 221.25(c).

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under §§ 221.21(c), 221.22(c), or 221.25(c).

(c) *Failure to disclose.* (1) A party will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose under §§ 221.21(c), 221.22(c), or 221.25(c), or paragraphs (a) or (b) of this section.

(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) A party may object to the admission of evidence under paragraph (c)(1) of this section before or during the hearing.

(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 221.43 What are the requirements for written interrogatories?

(a) *Motion; limitation.* Except upon agreement of the parties:

(1) A party wishing to propound interrogatories must file a motion under § 221.41(c); and

(2) A party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause.

(b) *ALJ order.* The ALJ will issue an order under § 221.41(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

(1) Grant the motion and approve the use of some or all of the proposed interrogatories; or

(2) Deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on such records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from

which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

§ 221.44 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 221.41(c). Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *ALJ order.* The ALJ will issue an order under § 221.41(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

(c) *Arrangements.* If the parties agree to or the ALJ approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the ALJ's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the ALJ's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross-examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense.

(2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording.* The testimony at a deposition may be recorded on videotape, subject to any conditions or restrictions that the parties may agree to or the ALJ may impose, at the expense of the party requesting the recording.

(1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(4) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the videotape to any party that requests it, at the requesting party's expense; and

(ii) Attach to the videotape a statement identifying the case and the deponent and certifying the authenticity of the video recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 221.53.

§ 221.45 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion.* Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 221.41(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *ALJ order.* The ALJ will issue an order under § 221.41(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

§ 221.46 What sanctions may the ALJ impose for failure to comply with discovery?

(a) Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under § 221.42(a).

(b) The ALJ may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

§ 221.47 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may request by written motion that the ALJ issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may request a subpoena for a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) The reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at the request of any party without having been subpoenaed is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to Federal employees who are called as witnesses by a Department.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires production of information during discovery that is not discoverable; or

(iii) Requires disclosure of irrelevant, privileged, or otherwise protected information.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

Hearing, Briefing, and Decision

§ 221.50 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 221.40, generally within 25 days after the date set for completion of discovery.

(b) On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 221.51 What are the parties' rights during the hearing?

Each party has the following rights during the hearing, as necessary to assure full and accurate disclosure of the facts:

(a) To present testimony and exhibits, consistent with the requirements in §§ 221.21(c), 221.22(c), 221.25(c), 221.42(b), and 221.52;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 221.52 What are the requirements for presenting testimony?

(a) *Written direct testimony.* Unless otherwise ordered by the ALJ, all direct hearing testimony for each party's initial case must be prepared and submitted in written form. The ALJ will determine whether rebuttal testimony, if allowed, must be submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 10 days after the date set for completion of discovery; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the ALJ, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The ALJ may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the ALJ.

(2) The ALJ will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The ALJ may issue a subpoena under § 221.47 directing a witness to testify by telephonic conference call.

§ 221.53 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under § 221.44 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the ALJ.

(2) The ALJ will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Videotaped deposition.* If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 221.54 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (b) through (d) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 221.55 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of § 221.42(b), the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence must concisely state the grounds. A ruling on every objection must appear in the record.

§ 221.56 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing will be transcribed verbatim.

(1) The Department of Commerce's designated ALJ office will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the Department of Commerce's designated ALJ office on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript Corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as practicable after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 221.57 Who has the burden of persuasion, and what standard of proof applies?

(a) Any party who has filed a request for a hearing has the burden of persuasion with respect to the issues of material fact raised by that party.

(b) The standard of proof is a preponderance of the evidence.

§ 221.58 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 221.56(b).

§ 221.59 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 15 days after the close of the hearing.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 221.60 What are the requirements for the ALJ's decision?

(a) *Timing.* The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under § 221.58; or

(2) 120 days after the effective date stated in the referral notice under § 221.26(c)(4), 7 CFR 1.626(c)(4), or 43 CFR 45.26(c)(4).

(b) *Content.* (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be accepted or rejected.

(c) *Service.* Promptly after issuing his or her decision, the ALJ must:

(1) Serve the decision on each party to the hearing;

(2) Prepare a list of all documents that constitute the complete record for the hearing process (including the decision) and certify that the list is complete; and

(3) Forward to FERC the complete record for the hearing process, along with the certified list prepared under paragraph (c)(2) of this section, for inclusion in the record for the license proceeding. Materials received in electronic form, *e.g.,* as attachments to

electronic mail, should be transmitted to FERC in electronic form. However, for cases in which a settlement was reached prior to a decision, the entire record need not be transmitted to FERC. In such situations, only the initial pleadings (hearing requests with attachments, any notices of intervention and response, answers, and referral notice) and any dismissal order of the ALJ need be transmitted.

(d) *Finality.* The ALJ's decision under this section with respect to the disputed issues of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825*l*(b).

Subpart C—Alternatives Process

§ 221.70 How must documents be filed and served under this subpart?

(a) *Filing.* (1) A document under this subpart must be filed using one of the methods set forth in § 221.12(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service.* (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be delivered or sent to each license party and FERC, using:

(i) One of the methods of service in § 221.13(c); or

(ii) Regular mail.

(2) The provisions of § 221.13(d) regarding a certificate of service apply to service under this subpart.

§ 221.71 How do I propose an alternative?

(a) *General.* To propose an alternative condition or prescription, you must:

(1) Be a license party; and

(2) File a written proposal with the Office of Habitat Conservation, at the address set forth in § 221.2:

(i) For a case under § 221.1(d)(1), within 30 days after NOAA files a preliminary condition or prescription with FERC; or

(ii) For a case under § 221.1(d)(2), within 60 days after NOAA files a proposed condition or prescription with FERC.

(b) *Content.* Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to NOAA's preliminary condition or prescription;

(2) An explanation of how the alternative:

(i) If a condition, will provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, will be no less protective than the fishway prescribed by NMFS;

(3) An explanation of how the alternative, as compared to the preliminary condition or prescription, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (*e.g.,* regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 221.72 May I file a revised proposed alternative?

(a) Within 20 days after issuance of the ALJ's decision under § 221.60, you may file with the Office of Habitat Conservation, at the address set forth in § 221.2, a revised proposed alternative condition or prescription if:

(1) You previously filed a proposed alternative that met the requirements of § 221.71; and

(2) Your revised proposed alternative is designed to respond to one or more findings of fact by the ALJ.

(b) Your revised proposed alternative must:

(1) Satisfy the content requirements for a proposed alternative under § 221.71(b); and

(2) Identify the specific ALJ finding(s) to which the revised proposed alternative is designed to respond and how the revised proposed alternative differs from the original alternative.

(c) Filing a revised proposed alternative will constitute a withdrawal of the previously filed proposed alternative.

§ 221.73 When will NOAA file its modified condition or prescription?

(a) Except as provided in paragraph (b) of this section, if any license party proposes an alternative to a preliminary condition or prescription under § 221.71, NOAA will do the following within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c):

(1) Analyze under § 221.74 any alternative condition or prescription proposed under § 221.71 or 221.72; and

(2) File with FERC:

(i) Any condition or prescription that NOAA adopts as its modified condition or prescription; and

(ii) Its analysis of the modified condition or prescription and any proposed alternative under § 221.74(c).

(b) If NOAA needs additional time to complete the steps set forth in paragraphs (a)(1) and (a)(2) of this section, it will so inform FERC within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c).

§ 221.74 How will NOAA analyze a proposed alternative and formulate its modified condition or prescription?

(a) In deciding whether to accept an alternative proposed under § 221.71 or 221.72, NOAA must consider evidence and supporting material provided by any license party or otherwise reasonably available to NOAA, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on NOAA's preliminary condition or prescription;

(3) Any ALJ decision on disputed issues of material fact issued under § 221.60 with respect to the preliminary condition or prescription;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under § 221.71 or § 221.72.

(b) NOAA must accept a proposed alternative if NOAA determines, based on substantial evidence provided by any license party or otherwise reasonably available to NOAA, that the alternative:

(1) Will, as compared to NOAA's preliminary condition or prescription:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will:

(i) If a condition, provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, be no less protective than NMFS's preliminary prescription.

(c) For purposes of paragraphs (a) and (b) of this section, NOAA will consider

evidence and supporting material provided by any license party by the deadline for filing comments on FERC's NEPA document under 18 CFR 5.25(c).

(d) When NOAA files with FERC the condition or prescription that NOAA adopts as its modified condition or prescription under § 221.73(a)(2), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition or prescription;

(ii) If NOAA is not accepting any pending alternative, its reasons for not doing so; and

(iii) If any alternative submitted under § 221.71 was subsequently withdrawn by the license party, that the alternative was withdrawn; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(e) The written statement under paragraph (d)(1) of this section must demonstrate that NOAA gave equal consideration to the effects of the condition or prescription adopted and any alternative not accepted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 221.75 Has OMB approved the information collection provisions of this subpart?

Yes. This rule contains provisions that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

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