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Report to the Chairman, Committee on Energy and Natural Resources, United States Senate

August 2010

HYDROPOWER RELICENSING

Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed

GAO-10-770

August 2010

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Highlights

Highlights of GAO-10-770, a report to the Chairman, Committee on Energy and Natural Resources, United States Senate

HYDROPOWER RELICENSING

Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed

Why GAO Did This Study

Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) issues licenses for up to 50 years to construct and operate nonfederal hydropower projects. These projects must be relicensed when their licenses expire to continue operating. Relevant federal resource agencies issue license conditions to protect federal lands and prescriptions to assist fish passage on these projects. Under section 241 of the Energy Policy Act of 2005, parties to the licensing process may (1) request a "trial-type hearing" on any disputed issue of material fact related to a condition or prescription and (2) propose alternative conditions or prescriptions. In this context, GAO was asked to (1) determine the extent to which stakeholders have used section 241 provisions in relicensing and their outcomes and (2) describe stakeholders' views on section 241's impact on relicensing and conditions and prescriptions. GAO analyzed relicensing documents filed with FERC and conducted a total of 61 interviews with representatives from relevant federal resource agencies, FERC, licensees, tribal groups, industry groups, and environmental groups.

What GAO Recommends

GAO recommends that cognizant officials who do not adopt a proposed alternative include reasons why in their statement to FERC. The resource agencies generally agreed, but commented that no explanation is required when an alternative is withdrawn as a result of negotiations.

View GAO-10-770 or key components.
For more information, contact Frank Rusco at (202) 512-3841 or RuscoF@gao.gov.

What GAO Found

Since the passage of the Energy Policy Act in 2005, nonfederal stakeholders—licensees, states, environmental groups, and an Indian tribe—used section 241 provisions for 25 of the 103 eligible hydropower projects being relicensed, most of which occurred within the first year. Of these 25 projects, stakeholders proposed a total of 211 alternative conditions and prescriptions. In response, the federal resource agencies (U.S. Department of Agriculture's Forest Service, Department of Commerce's National Marine Fisheries Service, and several bureaus in the Department of the Interior) accepted no alternatives as originally proposed but instead modified a total of 140 and removed a total of 9 of the agencies' preliminary conditions and prescriptions and rejected 42 of the 211 alternatives; the remaining alternatives are pending as of May 17, 2010. Under section 241, resource agencies must submit a statement to FERC explaining the basis for accepting or rejecting a proposed alternative. While agencies generally provided explanations for rejecting alternative conditions and prescriptions, with few exceptions, they did not explain the reasons for not accepting alternatives when they modified conditions and prescriptions. As a result, it is difficult to determine the extent, type, or basis of changes that were made and difficult to determine if and how the proposed alternatives affected the final conditions and prescriptions issued by the agencies. As of May 17, 2010, nonfederal stakeholders requested trial-type hearings for 18 of the 25 projects in which section 241 provisions were used, and three trial-type hearings were completed. Of the remaining 15 projects, requests for hearings were withdrawn for 14 of them when licensees and agencies negotiated a settlement agreement before the administrative law judge made a ruling, and one is pending because the licensee is in negotiations to decommission the project. In the three hearings held to date, the administrative law judge ruled in favor of the agencies on most issues.

According to the federal and nonfederal relicensing stakeholders GAO spoke with, the section 241 provisions have had a variety of effects on the relicensing process and on the license conditions and prescriptions. While most licensees and a few agency officials said that section 241 encourages settlement agreements between the licensee and resource agency, some agency officials said that section 241 made agreements more difficult because efforts to negotiate have moved to preparing for potential hearings. Regarding conditions and prescriptions, some stakeholders commented that under section 241, agencies put more effort into reviewing and providing support for their conditions and prescriptions, but environmental groups and some agency officials said that in their opinion, agencies issued fewer or less environmentally protective conditions and prescriptions. Many agency officials also raised concerns about increases in workload and costs as a result of section 241. For example, their estimated costs for the three hearings to date totaled approximately $3.1 million. Furthermore, many of the stakeholders offered suggestions for improving the use of section 241, including adjusting the time frame for a trial-type hearing.

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Abbreviations

ALJ	administrative law judge
Commerce	U.S. Department of Commerce
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FWS	Fish and Wildlife Service
Interior	U.S. Department of the Interior
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
USDA	U.S. Department of Agriculture

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Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

August 4, 2010

The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
United States Senate

Dear Mr. Chairman:

U.S. hydroelectric power (hydropower) projects generated over 272 gigawatt hours of power in 2009, or about 7 percent of all electricity generated in the United States. Hydropower projects—which include dams, reservoirs, stream diversion structures, powerhouses containing turbines driven by falling water, and transmission lines—have several advantages over other energy sources. Hydropower generation from existing facilities produces little, if any, air pollution and greenhouse gas emissions and can be adjusted quickly to match real-time changes in the demand for electricity. In addition, hydropower projects can provide other benefits, including flood control, irrigation, and recreation. However, hydropower also has some disadvantages. For example, hydropower projects may prevent fish from moving upstream or downstream, disrupting the spawning cycle, and the projects' turbines can kill or injure fish passing through them. Hydropower projects can also alter stream flows in ways that impair wildlife habitats and water quality.

Under the Federal Power Act (FPA),[1] as amended, the Federal Energy Regulatory Commission (FERC)[2] issues licenses to construct and operate nonfederal hydropower projects, such as those owned by public utilities or private industry, including those located on federal lands. As of May 17, 2010, FERC has issued licenses for 1,016 hydropower projects. FERC can issue licenses for up to 50 years, and when these licenses expire, projects must be relicensed in order to continue operating.[3]

[1]16 U.S.C. §§ 791a-825r (2010).

[2]FERC is composed of up to five commissioners who are appointed by the President and confirmed by the Senate.

[3]If a license expires while a project is undergoing relicensing, FERC issues an annual license, allowing a project to continue to operate under the conditions found in the original license until the relicensing process is complete.

While resource agencies and licensees may begin the relicensing process up to 10 years before its expiration, the current FERC relicensing process—the Integrated Licensing Process—begins 5 to 5-1/2 years before a license is due to expire according to FERC's timeline. After initial meetings with FERC and other stakeholders, the licensee proposes a study plan to review project operations and potential impacts of the hydropower project, including environmental, recreational, and cultural impacts. FERC reviews this plan and comments from other stakeholders, such as federal resource agencies; makes revisions; and finalizes this plan. The licensee conducts the studies identified in the plan and submits a license application with proposed mitigations for impacts. After FERC receives the application, federal resource agencies may submit preliminary conditions, prescriptions, and recommendations. Section 4(e) of FPA makes licenses for projects on federal lands reserved by Congress for other purposes—such as national forests—or that use surplus water from federal dams subject to mandatory conditions imposed by the head of the federal agency responsible for managing the lands or facilities.[4] These conditions may be used to protect federal lands and their environmental, recreational, and cultural resources; for this report, these are referred to as conditions. Similarly, section 18 of FPA requires FERC to include license prescriptions for fish passage issued by federal fish and wildlife agencies;[5] for this report, these are referred to as prescriptions. In addition, the Electric Consumers Protection Act of 1986 added section 10(j) to FPA. This section authorizes federal and state fish and wildlife agencies to recommend license conditions to benefit fish and wildlife that FERC must include in the license unless it (1) finds them to be inconsistent with law and (2) has already established license conditions that adequately protect fish and wildlife.

For many years the hydropower industry had expressed concerns that agency conditions and prescriptions added unnecessary costs to their hydropower operations. Licensees contend that prior to the implementation of section 241 of the Energy Policy Act of 2005, if they

[4]These agencies currently include the U.S. Department of Agriculture's Forest Service and several bureaus in the U.S. Department of the Interior. In its comments on a draft of this report, the Department of Commerce's National Oceanic and Atmospheric Administration noted that the agency considers National Marine Sanctuaries to be federal reservations under section 4(e), and that the agency disagrees with FERC's contrary view. See Finavera Renewables Ocean Energy, Ltd., 124 FERC ¶ 61063 (2008).

[5]These agencies currently include the U.S. Department of the Interior's Fish and Wildlife Service and the U.S. Department of Commerce's National Marine Fisheries Service.

disagreed with the preliminary conditions and prescriptions their only option was to ask the resource agencies to hold further discussions and to review the license terms.[6] The agencies could decide on further review or issue final conditions and prescriptions. Section 241 of the Energy Policy Act of 2005 authorizes parties to the licensing process to (1) request a "trial-type hearing" of not more than 90 days on any disputed issue of material fact related to a condition or prescription and (2) propose alternative conditions or prescriptions.[7] Section 241 also requires the U.S. Department of Agriculture (USDA), U.S. Department of the Interior (Interior), and U.S. Department of Commerce (Commerce)—in consultation with FERC—to jointly establish by rule, procedures governing the processes for trial-type hearings and alternative conditions and prescriptions. The agencies issued three substantively identical interim rules on November 17, 2005, addressing trial-type hearings and procedures for the consideration of alternative conditions and prescriptions submitted by any party to a license proceeding. These interim rules allow licensees and other nonfederal stakeholders to request a hearing or submit alternatives within 30 days after the deadline for the agencies' filing of preliminary conditions and prescriptions with FERC. When the interim rules were issued, some projects had already passed the phase of the relicensing process where the section 241 provisions could be used under the normal procedures defined by the interim rules, but were allowed to use the provisions because they had not had new licenses issued as of November 17, 2005. These projects are referred to as "transition projects" in this report. In 2005, the resource agencies stated they would consider revising the interim rules based on the comments received and the initial results of implementation, and issue revised final rules within 18 months of the effective date of the interim rules. However, the 2005 interim rules remain in effect because the agencies have not yet issued final rules.

In this context, you asked us to (1) determine the extent to which licensees and other nonfederal stakeholders have used the section 241 provisions in relicensing projects and the outcomes associated with their use and (2) describe federal and nonfederal stakeholders' views on section

[6]Licensees also had and continue to have the option to seek rehearings of FERC licensing decisions as well as to challenge these decisions in court.

[7]Material fact is defined as a fact that, if proved, may affect a federal resource agency's decision whether to affirm, modify, or withdraw any preliminary condition or prescription.

241's impact on the relicensing process and on the conditions and prescriptions in relicensing.

To determine the extent to which licensees and other nonfederal stakeholders have used section 241's provisions for trial-type hearings and alternative conditions and prescriptions, we analyzed FERC summary documents. To determine the outcomes of the use of section 241 provisions, we analyzed the relicensing documents filed with FERC for all 25 projects in which nonfederal stakeholders used section 241 between November 17, 2005, and May 17, 2010. Our review included an analysis of whether each alternative condition or prescription was accepted or rejected and whether the preliminary condition or prescription associated with this alternative was modified or removed. We have included criteria for our categorization in tables 3 and 4 in this report. We also met with FERC officials for further information about the use and results of the section 241 provisions. To determine stakeholders' views on section 241's impact on the relicensing process and the license conditions and prescriptions, we conducted 32 interviews with officials from FERC; Interior's Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, National Park Service, Office of the Solicitor, Office of Environmental Policy and Compliance, Office of Hearings and Appeals, Fish and Wildlife Service (FWS), and U.S. Geological Survey; USDA's Forest Service; Commerce's National Marine Fisheries Service (NMFS); and the U.S. Department of Energy's Bonneville Power Authority. We also conducted 29 interviews with nonfederal stakeholders involved in the relicensing process about their views of section 241. These stakeholders included all of the licensees who used the section 241 provisions for the 25 relicensing projects, as well as a nonprobability sample of three other licensees that have been engaged or recently engaged in the relicensing process during the period of our review; environmental organizations involved in hydropower issues; hydropower industry groups; and tribal groups that have been affected by hydropower. We visited stakeholders and hydropower projects in California, Oregon, North Carolina, and Washington State. We selected these projects because their licensees were either undergoing relicensing or had recently been relicensed and these projects offered a variety of different characteristics including public and private ownerships and eastern and western U.S. locations. While we collected a variety of views on the effects of section 241, each hydropower project is unique, and the effects of section 241 on one project may not apply or may apply differently to another project. Thus, the results of our interviews cannot be projected to the entire universe of all hydropower projects in relicensing.

We conducted this performance audit from May 2009 to August 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

FPA includes several provisions designed to protect fish, wildlife, and the environment from the potentially damaging effects of a hydropower project's operations. Specifically:

- Section 4(e) states that licenses for projects on federal lands reserved by Congress for other purposes—such as national forests—are subject to the mandatory conditions set by federal resource agencies, including the Forest Service and the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and FWS.[8]

- Section 10(a) requires FERC to solicit recommendations from federal and state resource agencies and Indian tribes affected by a hydropower project's operation on the terms and conditions to be proposed for inclusion in a license.

- Section 10(j) authorizes federal and state fish and wildlife agencies to recommend license conditions to benefit fish and wildlife. FERC must include section 10(j) recommendations in the hydropower licenses unless it (1) finds them to be inconsistent with law and (2) has already established license conditions that adequately protect fish and wildlife.

- Section 18 requires FERC to include license prescriptions for fish passage prescribed by resource agencies, such as FWS and NMFS.

Under section 241 and the interim rules, licensees and other nonfederal stakeholders may request a trial-type hearing with duration of up to 90 days on any disputed issue of material fact with respect to a preliminary condition or prescription. An administrative law judge (ALJ), referred by

[8]The Electric Consumers Protection Act of 1986 amended section 4(e) of FPA to require FERC to give "equal consideration" to water power development and other resource needs, including protecting and enhancing fish and wildlife, in deciding whether to issue an original or a renewed license.

the relevant resource agency, must resolve all disputed issues of material fact related to an agency's preliminary conditions or prescriptions in a single hearing. The interim rules contain procedures for consolidating multiple hearing requests involving the same project.

Under section 241 and the interim rules, licensees and other nonfederal stakeholders may also propose alternatives to the preliminary conditions or prescriptions proposed by the resource agencies. Under section 241, resource agencies are required to adopt the alternatives if the agency determines that they adequately protect the federal land and either cost significantly less to implement or result in improved electricity production.[9] If the alternatives do not meet these criteria, the agencies may reject them. In either case, under section 241, resource agencies must formally submit a statement to FERC explaining the basis for any condition or prescription the agency adopts and reason for not accepting any alternative under this section. The statement must demonstrate that the Secretary of the department gave equal consideration to the effects of the alternatives 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). In addition, the resource agencies often negotiate with the stakeholders who submitted the alternatives and settle on modifications of the agencies' preliminary conditions and prescriptions.

FPA requires licensees to pay reasonable annual charges in amounts fixed by FERC to reimburse the United States for, among other things, the costs of FERC's and other federal agencies' administration of the act's hydropower provisions. To identify these costs—virtually all of which are related to the relicensing process—FERC annually requests federal agencies to report their costs related to the hydropower program for the prior fiscal year. FERC then bills individual licensees for their share of FERC's and the other federal agencies' administrative costs, basing these shares largely on the generating capacity and amount of electricity generated by the licensees' projects. FERC deposits the licensees' reimbursements—together with other annual charges and filing fees that it collects—into the U.S. Treasury as a direct offset to its annual appropriation. Receipts that exceed FERC's annual appropriation are deposited in the General Fund of the U.S. Treasury.

[9]For fishway prescriptions, the alternative must be "no less protective" than the agency's original prescription.

Section 241 Provisions Were Used in 24 Percent of Eligible Relicensing Projects, Resulting in Modified Conditions or Prescriptions for Most Projects and Three Hearings

Nonfederal stakeholders—licensees, states, environmental groups, and an Indian tribe—used the section 241 provisions for 25 of the 103 (24 percent) eligible hydropower projects being relicensed, although the use of these provisions has decreased since its first year. In response to the use of these provisions, resource agencies modified most of the conditions and prescriptions that they had originally proposed. In addition, trial-type hearings were completed for three projects, with the resource agencies prevailing in most of the issues in these hearings.

Nonfederal Stakeholders for 25 Projects Have Used Section 241 Provisions, but Use Has Decreased Since Fiscal Year 2006

From November 17, 2005, through May 17, 2010, 103 hydropower projects being relicensed, including 49 transition projects, were eligible for nonfederal stakeholders to use the section 241 provisions to submit alternative conditions or prescriptions or request a trial-type hearing. Nonfederal stakeholders have used the provisions for 25 of these 103 projects, including 15 of the 49 transition projects. Table 1 shows the 25 projects, the nonfederal stakeholder proposing alternatives, the affected federal resource agency, and whether the stakeholder requested a trial-type hearing. In each of these projects, the licensee submitted one or more alternatives. In addition, in the DeSabla-Centerville, Klamath, and McCloud-Pit projects, stakeholders other than the licensee also submitted alternatives.

Table 1: The 25 Projects That Used Section 241 Provisions, Nonfederal Stakeholder Proposing Alternatives, Affected Federal Resource Agency, and Requests for Trial-Type Hearing, November 17, 2005, to May 17, 2010

Project name (State)	Nonfederal stakeholder proposing alternatives[a]	Affected federal resource agency	Trial-type hearing requests
Ames (Colorado)	Public Service Company of Colorado	Forest Service	No
Bar Mills (Maine)	FPL Energy Maine Hydro LLC	FWS, NMFS	Yes
Borel (California)	Southern California Edison Company	Forest Service	No
Boulder Creek (Utah)	Garkane Energy Cooperative, Inc.	Forest Service	Yes
Condit (Washington)	PacifiCorp	FWS, NMFS	Yes

Project name (State)	Nonfederal stakeholder proposing alternatives[a]	Affected federal resource agency	Trial-type hearing requests
DeSabla-Centerville (California)	Pacific Gas and Electric Company; California Sportfishing Protection Alliance, Friends of Butte Creek, American Whitewater, and Friends of the River	Bureau of Land Management, Forest Service	Yes
Donnells-Curtis (California)	Pacific Gas and Electric Company	Forest Service	No
Hells Canyon (Idaho and Oregon)	Idaho Power Company	Bureau of Land Management, FWS, Forest Service	Yes
Kern Canyon (California)	Pacific Gas and Electric Company	Forest Service	Yes
Klamath (California and Oregon)	PacifiCorp, Oregon Department of Fish and Wildlife, California Department of Fish and Game, Hoopa Valley Tribe[b]	Bureau of Land Management, Bureau of Reclamation, FWS, NMFS	Yes
McCloud-Pit (California)	Pacific Gas and Electric Company; American Whitewater and Friends of the River; McCloud RiverKeepers; California Trout, Trout Unlimited and McCloud River Club	Forest Service	No
Merrimack River (New Hampshire)	Public Service Company of New Hampshire	FWS	Yes
Pit 3, 4, and 5 (California)	Pacific Gas and Electric Company	Forest Service	Yes
Poe (California)	Pacific Gas and Electric Company	Forest Service	Yes
Portal (California)	Southern California Edison Company	Forest Service	Yes
Priest Rapids (Washington)	Public Utility District No. 2 of Grant County, Washington	FWS, Bureau of Reclamation	Yes
Rocky Reach (Washington)	Public Utility District No. 1 of Chelan County, Washington	FWS	No
Santee Cooper (South Carolina)	South Carolina Public Service Authority	FWS, NMFS	Yes
South Feather (California)	South Feather Water and Power Agency	Forest Service	No
Spokane River (Idaho and Washington)	Avista Corporation	Bureau of Indian Affairs	Yes
Spring Gap-Stanislaus (California)	Pacific Gas and Electric Company	Forest Service	Yes
Tacoma (Colorado)	Public Service Company of Colorado	Forest Service	Yes
Upper North Fork Feather River (California)	Pacific Gas and Electric Company	Forest Service	Yes
Vermilion Valley (California)	Southern California Edison Company	Forest Service	No
Yadkin-Pee Dee (North Carolina)	Progress Energy Inc.	FWS, NMFS	Yes

Source: GAO analysis of FERC data.

[a]The "Nonfederal stakeholders proposing alternatives" column does not include stakeholders whose submission of an alternative was rejected by the resource agency because the alternative did not meet the requirements of the regulations for section 241.

[b]The Hoopa Valley Tribe submitted an alternative on April 27, 2006, but withdrew it on January 8, 2007, according to NMFS records.

The use of section 241 provisions has decreased since the first year. In fiscal year 2006, nonfederal stakeholders used section 241 provisions for 19 projects undergoing relicensing. By comparison, after fiscal year 2006, nonfederal stakeholders used the provisions for only 6 projects. Fifteen of the 19 projects in which stakeholders used the provisions in fiscal year 2006 were transition projects. These transition projects included 11

projects that had expired original licenses and were operating on annual licenses at the time that the interim rules were implemented, which helped create the initial surge of projects eligible to use section 241.

As table 2 shows, the number of eligible nontransition projects—projects that had received preliminary conditions and prescriptions from federal resource agencies after section 241 was enacted—for which nonfederal stakeholders have sought to use section 241 provisions has declined since the first year. However, the number of nontransition projects becoming subject to these provisions has not widely varied.

Table 2: Number of Nontransition Projects Eligible for Section 241 Provisions and Number of Projects for Which Nonfederal Stakeholders Used These Provisions, Fiscal Years 2006 through 2010

Fiscal year	Number of eligible nontransition projects	Number of projects for which nonfederal stakeholders used section 241
2006[a]	13	4
2007	9	1
2008	12	2
2009	12	2
2010[b]	8	1
Total	**54**	**10**

Source: GAO analysis of FERC data.

[a]Data for fiscal year 2006 are from November 17, 2005, through September 30, 2006.

[b]Data for fiscal year 2010 are from October 1, 2009, through May 17, 2010.

Proposed Alternatives Often Resulted in Modified Conditions and Prescriptions

Licensees and other nonfederal stakeholders had proposed a total of 211 alternatives—194 alternative conditions and 17 alternative prescriptions—for the 25 projects where section 241 provisions were used. However, these numbers do not necessarily reflect the number of issues considered because section 4(e) conditions and section 18 fishway prescriptions are counted differently. For example, a resource agency may issue a section 4(e) condition for each part of a particular topic. However, NMFS or FWS will typically issue single section 18 fishway prescriptions with multiple sections. Of the 25 projects, stakeholders proposed alternative conditions for 19 and alternative prescriptions for 9.[10] Table 3 provides the number of alternative conditions

[10]Stakeholders for three projects—Hells Canyon, Klamath, and Priest Rapids—proposed both alternative conditions and prescriptions.

proposed, accepted, rejected, and pending, and the number of preliminary conditions modified or removed for 19 of the 25 projects.

Table 3: Number of Alternative Conditions Proposed, Accepted, Rejected, and Pending and Preliminary Conditions Modified or Removed for 19 Projects, November 17, 2005, through May 17, 2010

	Alternative conditions				Preliminary conditions	
Project name	**Proposed[a]**	**Accepted[b]**	**Rejected[c]**	**Pending**	**Modified in settlement[d]**	**Removed**
Ames	2	0	0		2	0
Borel	4	0	0		4	0
Boulder Creek	6	0	0		4	2
DeSabla-Centerville	7	0	5		2	0
Donnells-Curtis	11	0	0		11	0
Hells Canyon	38	0	13		25	0
Kern Canyon	11	0	0		11	0
Klamath	18	0	16		2	0
McCloud-Pit	19			19		
Pit 3, 4, and 5	8	0	0		8	0
Poe	14	0	0		14	0
Portal	6	0	0		6	0
Priest Rapids	3	0	0		0	3
South Feather	2	0	0		2	0
Spokane River	12	0	4		7	1
Spring Gap-Stanislaus	14	0	0		14	0
Tacoma	2	0	2		0	0
Upper North Fork Feather River	12	0	0		12	0
Vermilion Valley	5	0	0		4	1
Total	**194**	**0**	**40**	**19**	**128**	**7**

Source: GAO analysis of FERC data.

[a]Proposed alternatives do not include an alternative in which the resource agency rejected its submission because the alternative did not meet the requirements of the regulations for section 241.

[b]An alternative is counted as accepted if the resource agency states it is accepting the alternative on the basis that the alternative meets both of the section 241 criteria of adequate protection and less costly to implement.

[c]An alternative is counted as rejected if the resource agency states it is not accepting the alternative on the basis that the alternative does not meet one or both of the section 241 criteria of adequate protection and less costly to implement.

[d]A condition is counted as modified in settlement if the resource agency does not explicitly accept or reject the proposed alternative. If an alternative is withdrawn in settlement and the resource agency does not explicitly accept or reject the proposed alternative, this outcome is included in this column.

Table 4 provides the number of alternative prescriptions proposed, accepted, rejected, and pending and the number of preliminary prescriptions modified or removed in settlement for 9 of the 25 projects.[11]

Table 4: Number of Alternative Prescriptions Proposed, Accepted, Rejected, and Pending, and Preliminary Prescriptions Modified and Removed, for 9 Projects, November 17, 2005, through May 17, 2010

	Alternative prescriptions				Preliminary prescriptions	
Project name	**Proposed[a]**	**Accepted[b]**	**Rejected[c]**	**Pending**	**Modified in settlement[d]**	**Removed**
Bar Mills	2	0	0		2	0
Condit	1			1		
Hells Canyon	1	0	1		0	0
Klamath	1	0	1		0	0
Merrimack River	1	0	0		1	0
Priest Rapids	6	0	0		4	2
Rocky Reach	1	0	0		1	0
Santee Cooper	2	0	0		2	0
Yadkin-Pee Dee	2	0	0		2	0
Total	**17**	**0**	**2**	**1**	**12**	**2**

Source: GAO analysis of FERC data.

[a]Proposed alternatives do not include an alternative in which the resource agency rejected its submission because the alternative did not meet the requirements of the regulations for section 241.

[b]An alternative is counted as accepted if the resource agency explicitly states it is accepting the alternative on the basis that the alternative meets both of the section 241 criteria of no less protective and less costly to implement.

[c]An alternative is counted as rejected if the resource agency explicitly states it is not accepting the alternative on the basis that the alternative does not meet one or both of the section 241 criteria of no less protective and less costly to implement.

[d]A prescription is counted as modified in settlement if the resource agency does not explicitly accept or reject the proposed alternative. If an alternative was withdrawn in settlement, and the resource agency does not explicitly accept or reject the proposed alternative, this outcome is included in this column.

As the tables show, instead of accepting or rejecting alternative conditions and prescriptions, resource agencies most frequently modified the original conditions and prescriptions in settlement negotiations with the

[11]In commenting on a draft of this report, Commerce's National Oceanic and Atmospheric Administration noted that resource agencies use the term "modified prescription" as a "term of art" to refer to the agencies' final prescription, regardless of whether the final prescription actually differs from the preliminary one. In this report, we count a preliminary prescription as modified if the resource agency does not explicitly accept or reject the proposed alternative.

nonfederal stakeholders. In all, resource agencies did not formally accept any alternatives as originally proposed and instead

- modified a total of 140 preliminary conditions and prescriptions for 22 of the 25 projects,
- rejected a total of 42 alternative conditions and prescriptions in 5 projects, and
- removed a total of 9 preliminary conditions and prescriptions in 4 projects.

Licensees submitted 204 of the 211 alternative conditions and prescriptions. State agencies or nongovernmental organizations submitted the remaining 7 alternative conditions, 4 of which were rejected by the resource agencies, and 3 were being considered as of May 17, 2010.

Section 241 directs the Secretary of the relevant resource agency to explain the basis for any condition or prescription the agency adopts, provide a reason for not accepting any alternative condition under this section, and demonstrate that it gave equal consideration to the effects of the alternatives 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). Similarly, the agencies' interim rules provide, "The written statement must explain the basis for the modified conditions or prescriptions and, if the Department did not accept an alternative condition or prescription, its reasons for not doing so."[12] While the agencies provided an explanation for rejecting all 42 alternative conditions and prescriptions, they did not explain the reasons for not accepting a proposed alternative for 127 of the 140 modified conditions and prescriptions. Without an explanation, it is difficult to determine the extent, type, or basis of changes that were made and difficult to determine if and how the proposed alternatives affected the final conditions and prescriptions issued by the agencies.

[12]*Federal Register*, vol. 70, no. 221, November 17, 2005, 69805.

Three Trial-Type Hearings Were Completed, and Resource Agencies Have Prevailed on Most of the Issues Decided in These Hearings

As of May 17, 2010, nonfederal stakeholders requested trial-type hearings for 18 of the 25 projects in which the section 241 provisions were used, and 3 trial-type hearings were completed. Most of these requests were made by licensees. The requests for hearings in 14 of the 18 projects were withdrawn when nonfederal stakeholders and resource agencies reached a settlement agreement before the ALJ made a ruling, and 1 request is pending as of May 17, 2010, because the licensee is in negotiations to decommission the project.

Prior to a trial-type hearing, an ALJ holds a prehearing conference to identify, narrow, and clarify the disputed issues of material fact. 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 prehearing conference, which can include dismissing issues the ALJ determines are not disputed issues of material fact. For the three projects that have completed trial-type hearings, the number of issues in these projects was reduced from 96 to 37 after prehearing conferences. In addition, in a fourth project in which the federal resource agencies and the licensee eventually reached a settlement before going to a hearing, the number of issues was reduced from 13 to 1 after the prehearing conference.

As table 5 shows, the three trial-type hearings were held for the Klamath project, in California and Oregon; the Spokane River project, in Idaho and Washington; and the Tacoma project, in Colorado, all of which are nontransition projects. In addition to the licensees requesting hearings, one nongovernmental organization and one tribe requested a hearing for the Klamath project. The Spokane River and Tacoma hearings were completed in 90 days, the time allotted by the interim rule, while Klamath required 97 days. As table 5 shows, of the 37 issues presented, the ALJ ruled in favor of the federal resource agency on 25 issues, ruled in favor of the licensee on 6 issues, and offered a split decision on 6 issues.

Table 5: Projects with Trial-Type Hearings, the Affected Federal Agency, and Their Outcomes

		Outcomes			
Project name	**Affected federal resource agency**	**Rule for licensee**	**Rule for federal resource agency**	**Split ruling**	**Total issues presented**
Klamath	Bureau of Land Management, FWS, NMFS	1	10	3	14
Spokane River	Bureau of Indian Affairs	4	9	3	16
Tacoma	Forest Service	1	6	0	7
Total		**6**	**25**	**6**	**37**

Source: GAO analysis of FERC data.

Stakeholders Cited a Variety of Effects from Section 241 Provisions on the Relicensing Process and on the License Conditions and Prescriptions and Suggested Improvements

According to the relicensing stakeholders we spoke with, section 241 provisions have had a variety of effects on relicensing in three areas: (1) settlement agreements between licensees and resource agencies, (2) conditions and prescriptions that the resource agencies set, and (3) agencies' workload and cost. Most licensees and a few resource agency officials that we spoke with said that section 241 encourages settlement agreements between the licensee and resource agency. In contrast, other agency officials we spoke with said that section 241 made the relicensing process more difficult to reach a settlement agreement with the licensee. Regarding conditions and prescriptions, some stakeholders commented that under section 241, resource agencies generally researched their conditions and prescriptions more thoroughly, while all seven of the environmental groups' representatives and some resource agency officials we spoke with said that resource agencies issued fewer or less environmentally protective conditions and prescriptions. Resource agency officials also raised concerns about increases in workload and costs as a result of section 241. Finally, many of the stakeholders offered suggestions for improving the use of section 241.

Most Licensees Reported That Section 241 Made Settlements Easier, but Some Resource Agency Officials Said It Made Settlements More Difficult

Most of the licensees and a few resource agency officials we spoke with said that section 241 encourages settlement agreements between the licensee and resource agency. Several licensees commented that before section 241 was enacted, they had little influence on the mandatory conditions and prescriptions and that the resource agencies had made decisions on which conditions and prescriptions to issue without the potential oversight of a third-party review. One licensee commented that resource agencies had little incentive to work collaboratively with the licensee during relicensing prior to section 241. Several licensees and a few resource agency officials said that under section 241, some resource agencies have been more willing to negotiate their conditions and prescriptions to avoid receiving alternatives and requests for trial-type hearings.

Some resource agency officials, however, said that in some cases, reaching a settlement with the licensee has been more difficult under section 241 than in previous negotiations. Specifically, they noted the following:

- If licensees request a trial-type hearing, resource agencies and licensees have to devote time and resources to preparing for the potential upcoming trial-type hearing instead of negotiating a settlement.

- Section 241 made the relicensing process less cooperative and more antagonistic when, for example, a licensee did not conduct the agencies' requested studies, the agencies had less information to support their conditions and prescriptions. As a case in point, one NMFS regional supervisor told us that a licensee declined to conduct a study about the effects of its dams' turbines on fish mortality. However, the licensee subsequently requested a trial-type hearing because, it argued, the agency had no factual evidence to support the agency's assertion that the turbines injured or killed fish.

- Some licensees used their ability to request a trial-type hearing as a threat against the agencies' issuance of certain conditions, prescriptions, or recommendations. For example, two NMFS biologists and their division chief told us that a licensee had threatened to issue a trial-type hearing request on fish passage prescriptions if NMFS made flow rate recommendations that it did not agree with.

  The Hydropower Reform Coalition, a coalition of conservation and recreational organizations, commented that from its experience, participation in settlement negotiations under section 241 is "almost exclusively limited to licensees." It also commented that agreements reached by the license applicant and resource agency are not comprehensive settlement agreements in which licensees, state and federal resource agencies, tribes, nongovernmental organizations, and other interested parties are involved in the agreement.

Stakeholders Differed on the Effects of Section 241 on the Resource Agencies' Conditions and Prescriptions

Some licensees said agencies now put more effort into reviewing and providing support for their conditions and prescriptions because licensees or other nonfederal stakeholders could challenge the terms in a trial-type hearing. Several agency officials commented that they generally conduct more thorough research and provide a more extensive explanation about mandatory conditions and prescriptions than they had for projects prior to section 241. A few agency officials also commented they are requesting licensees to conduct more extensive studies about the effects of their hydropower projects to ensure that the agencies have sufficient information for writing conditions and prescriptions.

Views differed on whether conditions and prescriptions were as protective or less protective since section 241 was enacted. All seven environmental group representatives that we spoke with expressed concerns that resource agencies were excluding and writing less protective conditions, prescriptions, and recommendations to avoid trial-type hearings. For

example, one group commented that in one hydropower project, under section 241, agency officials settled for stream flow rates that were lower than necessary for protecting and restoring the spawning habitat for fish that swam in the project area. Some agency officials said the conditions and prescriptions they have issued are as protective as those issued prior to the enactment of section 241. Others said that they now issue fewer or less environmentally protective conditions or prescriptions to avoid a costly trial-type hearing. In addition, some other officials commented that instead of issuing conditions and prescriptions that could result in a trial-type hearing, agencies have either issued recommendations or reserved authority to issue conditions and prescriptions at a later time. While a reservation of authority allows the resource agency to issue conditions and prescriptions after the issuance of the license, one regional agency official told us that in his experience, this rarely occurs. At one regional office, two staff biologists and their division chief told us that while they still issue prescriptions that meet the requirements of resource protection, these prescriptions are less protective than they would have been without the possibility of a trial-type hearing.

Many Agency Officials Said That Section 241 Has Increased Their Workload, Added Costs, and Adversely Affected Their Ability to Complete Other Work

Many agency officials said that the added efforts they put into each license application since the passage of section 241 has greatly increased their workloads for relicensing. Several agency officials also told us that even greater efforts are needed when a trial-type hearing is requested. To complete the work needed for a trial-type hearing, agencies often need to pull staff from other projects. According to these officials, at the local level, pulling staff from other projects can result in the agency's neglect of its other responsibilities. Officials commented that whether they win or lose a trial-type hearing, agencies must provide the funding for an ALJ, expert witnesses, and their attorneys at a trial-type hearing. Although they did not track all costs, the Bureau of Indian Affairs, Bureau of Land Management, Interior's Office of the Solicitor, FWS, Forest Service, and NMFS provided individual estimates that totaled to approximately $3.1 million in trial-type hearings for the following three projects:[13]

- Approximately $300,000 for the Tacoma project.
- Approximately $800,000 for the Spokane River project.

[13]These three figures are based on the agencies' best estimates, and we did not test for data reliability.

- Approximately $2 million for the Klamath project.[14]

Among all the resource agencies, only NMFS has dedicated funding for section 241 activities. However, this funding only covers administrative costs related to a trial-type hearing and does not fund NMFS's program staff or General Counsel staff for a hearing.

Stakeholders Have Suggestions to Improve Section 241

Many of the agency officials, licensees, and other stakeholders we spoke with had suggestions on how to improve section 241 and the relicensing process. For example, several licensees and agency officials raised concerns that the 90-day period for a trial-type hearing, including a decision, was too short and resulted in the need to complete an enormous amount of work in a compressed time frame. Some said that an ALJ who did not have a background in hydropower issues needed more time to review the information presented following the hearing. Some stakeholders suggested allowing the ALJ to make his or her decision outside of the 90-day period. Other stakeholders, however, commented that an extension of the 90-day period could result in greater costs for all parties. One regional hydrologist suggested using a scientific peer review panel rather than an ALJ to hear arguments. Some stakeholders also suggested providing an opportunity to delay the start date of a trial-type hearing if all parties were close to reaching a settlement.

The stakeholders we spoke with also had several suggestions that were specific to their interests, which included the following:

- A couple of licensees noted that while the provisions of section 241 may be used after preliminary conditions and prescriptions are issued, they would like to be able to use these provisions after the issuance of final conditions and prescriptions because of concerns that the final conditions and prescriptions could differ from the agreed-upon terms that were arrived at through negotiations. These licensees assert that if they do not have this option, their only recourse is to sue in an appeals court, after the license has been issued. These licensees were not aware of any instance in which the terms had drastically changed between negotiations and the issuance of the final license.

[14]The relicensing of the Klamath project is on hold pending a decommissioning agreement.

- Several environmental group representatives commented that while section 241 allows stakeholders to propose alternative conditions and prescriptions, they would like to be allowed to propose additional conditions and prescriptions to address issues that the resource agencies have not addressed in their preliminary conditions and prescriptions. Three of these representatives also commented that the section 241 criteria for the acceptance of an alternative—adequately or no less protective and costs less to implement—favored licensees, not conservation groups. Instead, one representative suggested that the criterion for an alternative should be that it is more appropriately protective and not that it costs less to implement. In addition, another representative suggested that all interested parties should be allowed to participate in negotiations to modify the preliminary conditions and prescriptions after the submission of an alternative. In his experience, these negotiations have been limited to the stakeholder who uses the provisions of section 241 and the resource agency.

- A few resource agency officials suggested that licensees who lose the trial-type hearing should pay court costs, such as the costs of the ALJ. They also suggested that licensee reimbursements for the relicensing costs go directly to the resource agencies rather than the General Fund of the U.S. Treasury.

- Almost 5 years have passed since the interim rules were issued, and several stakeholders that we spoke with expressed interest in having an opportunity to comment on a draft of the revised rules when they become available and before these rules become final. In addition, on June 2, 2009, the National Hydropower Association—an industry trade group—and the Hydropower Reform Coalition submitted a joint letter addressed to Interior, NMFS, and USDA expressing interest in an opportunity to comment on the revised rules before they become final.[15]

[15]In *American Rivers v. U.S. Department of the Interior*, Civ. No. C05-2086P, 2006 WL 2841929 (W.D.Wash.), a federal district court held that the interim rules were procedural rules exempt from the requirement that the agency provide the public notice and an opportunity to comment prior to issuing regulations. Nevertheless, the agencies are not prohibited from providing an opportunity for notice and comment before they finalize the existing rules, and indeed did take comments on the interim rules, although after it went into effect. See 70 Fed. Reg. 69804 (2005).

Conclusions

Section 241 of the Energy Policy Act of 2005 changed the hydropower relicensing process, including permitting licensees and other nonfederal stakeholders to propose alternative conditions and prescriptions. All parties involved in relicensing a hydropower project have an interest in understanding how the conditions and prescriptions for a license were modified, if at all, in response to proposed alternatives. Indeed, the interim rules require agencies to provide, for any condition or prescription, a written statement explaining the basis for the adopted condition and the reasons for not accepting any alternative condition or prescription. While we found that the agencies have provided a written explanation for all 42 rejected conditions and prescriptions, they provided a written explanation of the reasons for not accepting a proposed alternative for only 13 of the 140 modified conditions and prescriptions. The absence of an explanation makes it difficult to determine the extent or type of changes that were made.

Furthermore, when the interim rules that implemented section 241 were issued on November 17, 2005, the federal resource agencies stated that they would consider issuing final rules 18 months later. Instead, nearly 5 years later, final rules have not yet been issued. Given this delay and the amount of experience with section 241's interim rules, many stakeholders we spoke with had ideas on how to improve section 241 and several expressed interest in providing comments when a draft of the final rules becomes available.

Recommendations for Executive Action

To encourage transparency in the process for relicensing hydropower projects, we are recommending that the Secretaries of Agriculture, Commerce, and the Interior take the following two actions:

- Direct 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; and

- Issue 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.

Agency Comments, Third-Party Views, and Our Evaluation

We provided the departments of Agriculture, Commerce, and the Interior; FERC; the Hydropower Reform Coalition; and the National Hydropower Association with a draft of this report for their review and comment. FERC had no comments on the report. Commerce's National Oceanic and Atmospheric Administration (NOAA), Interior, USDA's Forest Service, the Hydropower Reform Coalition, and the National Hydropower Association provided comments on the report and generally agreed with the report's recommendations.

While Forest Service, Interior, and NOAA generally agreed with our recommendation that they file a written statement with FERC on their reasons for not accepting a proposed alternative, they all cited a circumstance in which they believed that they were not required to do so. Specifically, the three agencies commented that under the interim rules, they do believe that they are required to explain their reasons for not accepting a proposed alternative when the alternatives were withdrawn as a result of negotiations. Two of the agencies, Interior and NOAA, agreed to indicate when a proposed alternative was voluntarily withdrawn, and NOAA acknowledged that providing an explanation on what occurred after the withdrawal of an alternative may be appropriate in some circumstances. We continue to believe that providing an explanation for not accepting a proposed alternative is warranted, even when the proposed alternative is voluntarily withdrawn as a result of negotiations, and we have modified our recommendation to address this situation. The agencies could add transparency to the settlement process by laying out the basis for the modifications made to the preliminary conditions and prescriptions; the reasons the agencies had for not accepting the proposed alternative, including those alternatives withdrawn as a result of negotiations; and an explanation of what occurred subsequent to the withdrawal. Further, no provision of the interim rules discusses withdrawal of proposed alternatives or provides an exemption from the requirement to explain why a proposed alternative was not accepted. [16] The agencies have an opportunity to clarify their approach to withdrawn

[16]The preamble to the interim rules notes that a license party might choose to withdraw a proposed alternative in the wake of an ALJ's adverse finding on an issue of material fact, and that in such circumstances the agencies would not need to address the withdrawn alternative. 70 Fed. Reg. 69814. As we observed above, however, the regulatory language itself contains no discussion of withdrawals, even in the trial-type hearing context. Moreover, an ALJ finding along the lines discussed in the preamble (and the related agency briefs in the hearing record) would provide some transparency with regard to the potential shortcomings of the proposed alternative. In the much more common case of a settlement between the agencies and the licensee, such transparency is often lacking.

conditions and prescriptions as they consider revisions to the interim rules.

Interior and NOAA commented that they agreed with our recommendation regarding the issuance of final rules and are considering providing an additional public comment opportunity. According to Interior and NOAA, the resource agencies are currently working on possible revisions to the interim rules.

NOAA also commented that resource agencies use the term "modified prescription" as a "term of art" to refer to the agencies' final prescription, regardless of whether the final prescription actually differs from the preliminary one. As we noted in table 4 of this report, we counted a preliminary prescription as modified if the resource agency does not explicitly accept or reject the proposed alternative. In response to this comment, we added an additional clarifying footnote in the report.

Interior suggested that we clarify in our report that agencies have no reason to write less protective recommendations because recommendations cannot be the basis for trial-type hearing requests. We did not change the language in our report because we believe that Interior's assertion that agencies have no reason to write less protective recommendations may not always be the case. For example, as stated in our report, NMFS officials told us that a licensee had threatened to issue a trial-type hearing request on fish passage prescriptions if NMFS made flow rate recommendations that it did not agree with.

The Hydropower Reform Coalition suggested that we collect additional information and conduct further analysis on the use of the section 241 provisions. We did not gather the suggested additional information or conduct additional analysis because in our view, they fell outside of the scope and methodology of our report.

Appendixes I, II, III, IV, and V present the agencies', the Hydropower Reform Coalition's, and the National Hydropower Association's comments respectively. Interior, NOAA, and the Hydropower Reform Coalition also provided technical comments, which we incorporated into the report as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees; the Secretaries of Agriculture, Commerce, and the Interior; the Chairman of the Federal Energy Regulatory Commission; and other interested parties. In addition, this report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or ruscof@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed are listed in appendix VI.

Sincerely yours,

Frank Rusco
Director, Natural Resources and Environment

Appendix I: Comments from the U.S. Department of Agriculture

USDA United States Department of Agriculture | Forest Service | Washington Office | 1400 Independence Avenue, SW Washington, DC 20250

File Code: 1430-1
Date: JUL 20 2010

Frank Rusco
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G. Street, N.W.
Washington, DC 20548

Dear Mr. Rusco:

We appreciate the opportunity to review and comment on the draft Government Accountability Office (GAO) Report Number GAO-10-770, "HYDROPOWER RELICENSING: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed." The Forest Service generally concurs with the report's finding and recommendations, and appreciates the time and effort of the GAO to understand a highly complex, interagency process, and to assist in improving our procedures. The agency's comments on the two recommendations are as follows:

- Recommendation Number 1: The Secretary of Agriculture...[shall] direct cognizant officials, where the agency has not adopted a proposed alternative condition or prescription, to include in a written statement filed with FERC its reasons for not doing so, in accordance with the interim rules.

  Agency Response: The Agency currently does provide analyses of and reasons for accepting or rejecting every proposed alternative pending at the time written statements are filed with FERC. The Agency does not include proposed alternatives that have been withdrawn by proponents prior to the Agency providing written statements to FERC. We often negotiate a mutually acceptable revised condition and the proponent subsequently withdraws its alternative from consideration. We believe this is an appropriate protocol and compliant with the interim rules.

- Recommendation Number 2: The GAO recommended on page 21, "Issue final rules ... after providing an additional period for notice and comment opportunity and after considering their own lessons learned from their experiences with the interim rules." On page 3, GAO states, "In 2005, the resource agencies stated that they would revise the interim rules based on comments received and the initial results of implementation and issue revised rules within 18 months of the effective date of the interim rules." GAO makes essentially the same statement on page 20. In fact, the interim final rule reads, "Based on the comments received and the initial results of implementation, we will consider promulgation of [a] revised final rule within 18 months of the effective date of this rule." Reference 70 Fed. Reg. 69804 (2005).

If you have any questions or concerns please contact Donna M. Carmical, Chief Financial Officer, at 202-205-1321 or dcarmical@fs.fed.us.

Sincerely,

THOMAS L. TIDWELL
Chief

cc: Mona M Koerner, Robert Cunningham, Sandy T Coleman, Jennifer McGuire

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Appendix II: Comments from the U.S. Department of Commerce

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

July 16, 2010

Mr. Frank Rusco
Director
Natural Resource and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Rusco:

Thank you for the opportunity to review and comment on the Government Accountability Office's draft report entitled, "Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed" (GAO-10-770). On behalf of the Department of Commerce, I have enclosed the National Oceanic and Atmospheric Administration's programmatic comments to the draft report.

Sincerely,

Gary Locke

Enclosure

Department of Commerce
National Oceanic and Atmospheric Administration
Comments to the Draft GAO Report Entitled
"Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed"
(GAO-10-770, August 2010)

The Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) appreciates the opportunity to review the Government Accountability Office's (GAO) draft report. NOAA acknowledges GAO's efforts and provides the following general comment, followed by NOAA's responses to the two GAO report recommendations.

General Comments

The term "modified" in relation to prescriptions needs clarification in the report. A final prescription does not necessarily contain any modifications as suggested by the resource agencies during the relicensing process. Any final prescription is a "modified" prescription. GAO's draft report appears to assume that resource agencies' final "modified" prescriptions always contain modifications (i.e., changes) to the original relicensing proposal. While the final modified prescription may in fact be modified in the common sense of the word, this is not always the case. In some cases, the modified prescription is not modified at all (or is not modified in any significant, substantive manner) and actually mirrors the preliminary prescription in all pertinent respects. In the exercise of their Federal Power Act (FPA) section 18 authority, resource agencies file "preliminary" prescriptions with the Federal Energy Regulatory Commission (FERC) followed, 60-days after the close of the National Environmental Policy Act comment period, by "modified" prescriptions (i.e., final prescriptions). In this context, the term "modified" is used as a term of art to refer to the agencies' final prescription.

NOAA Response to GAO Recommendations

The draft GAO report states, "To encourage transparency in the process for relicensing hydropower projects, we are recommending that the Secretaries of Agriculture, Commerce, and the Interior take the following two actions:"

Recommendation 1: "Direct cognizant officials, where the agency has not adopted a proposed alternative condition or prescription, to include in the written statement filed with FERC its reasons for not doing so, in accordance with the interim rules;"

NOAA Response: NOAA agrees that Section 241 of the Energy Policy Act of 2005 and the November 2005 interim rules require NOAA to include a written statement filed with FERC setting forth the reasons for not adopting a proposed alternative condition or prescription.

However, in many cases a proposed alternative may be voluntarily withdrawn by the proponent as a result of settlement or other negotiations with the agency. In those cases, there is no longer any alternative to adopt and, therefore, NOAA does not view the statutory requirement to provide a reason for not adopting an alternative to apply. We do, of course, agree that we are required to explain the basis for our final modified condition or prescription in all cases. In addition, in those cases where a proposed alternative is voluntarily withdrawn, we believe that additional explanation in the administrative record (as set forth in our written statement) of what occurred subsequent to withdrawal of the proposed alternative may in some circumstances be appropriate. We further agree that our written statement should include an explanatory notation indicating that the proposed alternative was voluntarily withdrawn.

Recommendation 2: "Issue 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."

NOAA Response: Approximately 18 months after the effective date of the interim rule, the resource agencies (including the Department of Commerce as represented by NOAA) reconvened to consider promulgation of a revised final rule. The agencies tentatively agreed that issuance of a revised final rule was appropriate, making some adjustments to the interim rule and responding to the public comments received. Unfortunately, progress on a revised final rule was interrupted by the transition to the new Administration, but the agencies have recently resumed their work.

The agencies are continuing to work on possible revisions to the interim rules in light of the public comments they received and their own experience, and they are considering providing an additional public comment opportunity.

Recommended Changes for Factual/Technical Information

Page 1, first paragraph, after sentence 6: Add sentence to further clarify potential impacts of hydropower projects: "Hydropower projects can delay or block the necessary migrations of ecologically and economically important fish, including species of Pacific salmon that support commercial and recreational fisheries or are threatened or endangered."

Page 2, first paragraph, footnote 4: Add sentence to further clarify that NOAA, through its National Marine Sanctuaries Program has asserted, and will continue to assert, its FPA section 4(e) conditioning authority. In NOAA's view, a National Marine Sanctuary is a "reservation" for FPA section 4(e) purposes. Although FERC has once rejected NOAA's assertion of authority, no federal court of appeals has yet weighed in on this matter.

Page 3, lines 1-2: Add clarification that requests for rehearing and court of appeals challenges were/are options available to licensees.

Page 3, first paragraph, lines 21-23: Note that the resource agencies stated: "Based on the comments received and the initial results of implementation, we will consider promulgation of

[a] revised final rule within 18 months of the effective date of this rule." 70 Fed. Reg. 69,804 (Nov. 17, 2005).

Page 5, bullet 1: Add sentence to further clarify that NOAA's National Marine Sanctuaries Program asserts that projects within National Marine Sanctuaries are also subject to mandatory 4(e) conditions. In NOAA's view, a National Marine Sanctuary is a "reservation" for FPA section 4(e) purposes. Although FERC has once rejected NOAA's assertion of authority, no federal court of appeals has yet weighed in on this matter.

Page 6, second paragraph, line 2: Correction - add 'preliminary' before conditions or prescriptions.

Page 7, footnote 8: Provide a more comprehensive explanation of alternatives to fishway prescriptions.

Page 12, table 4: For the Santee Cooper Project, NMFS rejected the alternatives per the requirements of Section 33 of the FPA. *See* Section 3 of NMFS' Modified Prescriptions for Fishways (July 20, 2007).

Page 13, lines 9-12: This statement is not clear - ("While the agencies provided an explanation for rejecting all 43 alternative conditions and prescriptions, they did not explain the reasons for not accepting a proposed alternative for 127 of the 139 modified conditions and prescriptions.")

Page 20, first full paragraph, lines 8-12: This statement is not clear (see comment above for page 13).

Page 20, second full paragraph: Note that the resource agencies stated: "Based on the comments received and the initial results of implementation, we will consider promulgation of [a] revised final rule within 18 months of the effective date of this rule." 70 Fed. Reg. 69,804 (Nov. 17, 2005).

Appendix III: Comments from the U.S. Department of the Interior

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL

Mr. Frank Rusco
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Rusco:

Thank you for providing the Department of the Interior the opportunity to review and comment on the draft Government Accountability Office Report entitled, *Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed* (GAO-10-770). The Department shares GAO's interest in encouraging transparency in the process for relicensing hydropower projects and generally concurs with the recommendations made in the draft Report. The Department's comments and suggestions are enclosed for your consideration.

If you have any questions or need additional information, please contact Kathy Garrity, Acting Chief Division of Policy and Directives Management, U.S. Fish and Wildlife Service at (703) 358-2551.

Sincerely,

Rhea S. Suh
Assistant Secretary
Policy, Management and Budget

Enclosure

Enclosure

Government Accountability Office (GAO) Draft Report
Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed
GAO-10-770

Technical Comments:

- **Pages 6**, last line of the second full paragraph, add an apostrophe at the end of "agencies".
- **Page 13**, middle of top paragraph: The reference to 43 alternative conditions and prescriptions should be corrected to 42, as noted in all other areas of report.
- **Page 17**, first three lines: The concern described here should be clarified. Recommendations cannot be the basis for trial-type hearing requests, so the agencies have no reason to write "less protective . . . recommendations to avoid trial-type hearings." Presumably the concern is that the agencies may be excluding conditions and prescriptions, writing less protective conditions and prescriptions, or writing recommendations in lieu of conditions and prescriptions, all to avoid trial-type hearings.

Comments on GAO's First Recommendation:

The first recommendation in the draft report states that the Secretary of the Interior should "[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 its reasons for not doing so, in accordance with the interim rules." Draft Report at 21. GAO based this recommendation on its observation that "[w]hile we found that the agencies have provided a written explanation for all 42 rejected conditions and prescriptions, they provided a written explanation of the reasons for not accepting a proposed alternative, in accordance with the interim rules, for only 12 of the 139 modified conditions and prescriptions." Draft Report at 20.

The Department agrees that Section 241 of the Energy Policy Act of 2005 and the Department's interim rules require the Department to prepare a written statement explaining the reasons for not accepting a proposed alternative condition or prescription. However, the Department views this requirement to apply in cases where an alternative condition or prescription is before the Department for consideration. Many of the Department's modified conditions and prescriptions are developed pursuant to settlement agreements or other negotiated agreements that result in the voluntary withdrawal of alternatives by their proponents. In such cases, the alternative is no longer before the Department for consideration and thus, the Department does not view Section 241 or the interim rules as requiring the Department to provide reasons for not accepting the withdrawn alternative. Because the Department is required to include in its administrative record and written statement an explanation of the basis for any final modified condition or prescription, the Department intends to identify in such explanations when an alternative is withdrawn.

Comments on GAO's Second Recommendation:

The second recommendation in the draft report is that the agencies "[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." Draft Report at 21. This recommendation follows from a statement earlier in the draft report that, "[i]n 2005, the resource agencies stated that they would revise the interim rules based on comments received and the initial results of implementation and issue revised rules within 18 months of the effective date of the interim rules." Draft Report at 3 (a similar statement appears on page 20).

In fact, what the agencies said in the interim final rule was, "Based on the comments received and the initial results of implementation, we will consider promulgation of [a] revised final rule within 18 months of the effective date of this rule." 70 Fed. Reg. 69804 (Nov. 17, 2005). The agencies did confer 18 months after the effective date of the interim rule to consider promulgation of a revised final rule. They tentatively agreed that issuance of a revised final rule was appropriate, making some adjustments to the interim rule and responding to the public comments received. Progress on a revised final rule was interrupted by the transition to the new Administration, but the agencies have recently resumed their work.

The Department agrees with the recommendation that the agencies revise the interim rules in light of the public comments received and the agencies' own experience, and it is consulting with the Departments of Agriculture and Commerce on providing an additional public comment opportunity.

Appendix IV: Comments from the Hydropower Reform Coalition

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coordinator@hydroreform.org

HYDROPOWER
REFORM
COALITION
Putting water, wildlife, and people back in rivers.

July 12, 2010

Mr. Frank Rusco
Director, Natural Resources and Environment
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Rusco:

On behalf of the Steering Committee and members of the Hydropower Reform Coalition (HRC), thank you for the opportunity to submit comments on the GAO's draft report on the effects of section 241 of the Energy Policy Act of 2005 (EPAct §241). The Hydropower Reform Coalition (HRC) consists of more than 150 member organizations that seek to improve the water quality, fisheries, recreation, and general environmental health of rivers that have been degraded by hydropower dam operations. Our member organizations have a strong interest in the Federal Energy Regulatory Commission's (FERC) hydropower licensing process and have appeared before FERC in numerous licensing proceedings and rulemakings. HRC members have also participated in all of the proceedings before FERC where the EPAct § 241 provisions were used. Additionally, the HRC actively participated in the rulemaking proceeding implementing EPAct §241.

On balance, we think that GAO did an excellent job. We agree with most of the report's substantive findings, and strongly support both of GAO's recommendations. We also feel that the draft report would benefit both from minor clarifications and from additional information and analysis. Our comments address those areas and clarify HRC's position on EPAct §241.

GAO's draft report has three sections: the first quantifies the outcomes of EPAct §241, the second reports on stakeholders' experiences with the provisions, and the third makes two recommendations for how the process could be improved. Our comments will address each section in turn. For each of the three sections, we offer our interpretation and views on the report's findings based on our experience with EPAct §241. For the first section, we recommend several minor changes and clarifications that we believe would improve the report. For the second section, we clarify HRC's views on EPAct §241 and offer our interpretation of some of the report's findings based on our own experience. For the third section, we address GAO's recommendations and offer some of our own recommendations for how the EPAct §241 process could be improved.

SECTION 1: QUANTIFYING OUTCOMES OF EPACT §241

In general, we agree with GAO's findings on the use of EPAct §241. Our comments on this section of the draft report can be summarized as follows:

- HRC agrees with the figures in GAO's draft report.
- The report could benefit from additional figures and analysis on the use of the EPAct §241 provisions.
- The report should clarify what is meant by "conditions" and "prescriptions."
- The report would benefit from additional analysis of the economics of these provisions.
- The report should qualify the use of the term "settlement."

HRC agrees with the figures in GAO's draft report

The draft report provides an accurate high-level description of how the EPAct §241 provisions are being used:

- The provisions have been used in about one fourth of all eligible licensings (a total of 25) since passage of EPAct in 2005.
- Of the 25 projects where the provisions were used, 18 projects involved requests for trial-type hearings.
- Of those 18 projects, only three went to hearing. The issues surrounding 14 of the remaining 15 projects were resolved mainly through bilateral negotiations between the license applicant and the conditioning or prescribing agency. One project is still pending.
- 3 projects did go to a trial-type hearing in order to resolve 96 disputed issues of material fact.
- Of those 96 disputed issues, 59 issues were discarded after pre-trial conferences held before an ALJ.
- Of the remaining 37 issues that went to trial, only 6 were resolved in favor of the license applicant.
- The three hearings that were completed were estimated to cost more than $3 million.
- Out of 211 alternative conditions and prescriptions studied, no alternatives were formally accepted. 42 alternatives were formally rejected. Agencies modified 139 conditions and prescriptions and withdrew 10, usually after bilateral negotiations between the license applicant and the conditioning or prescribing agency.

These figures tell a compelling story about the use of the EPAct §241 provisions. Most proposals for alternative conditions were accompanied by a request for a trial-type hearing. Nearly all of those requests were made by license applicants. License applicants have not fared particularly well in trial-type hearings. In the few cases where an agency did decide to see a hearing through to completion, most (61%) disputed issues were thrown out after a prehearing conference where the ALJ can dismiss issues that are not material or factual. Only 16% of the issues that remained after prehearing conference (or 6% of all issues that went to a trial-type hearing) were resolved in favor of the license applicant. The cost, however, is high, with agencies estimating that the 3 hearings cost them more than $3 million. If the goal of the EPAct §241 provisions was to provide increased oversight over agencies' mandatory conditioning and prescription authorities, then it has been a

mixed success: very little such oversight has actually taken place (only 3 out of 25 hearing requests ended up having issues argued before an ALJ), and the oversight that has taken place has been extraordinarily costly. However, the results of the hearings suggest that agencies' are doing a good job justifying their conditions and prescriptions, and that they can stand up to intense scrutiny.

The draft GAO report describes several licensees as commenting that "before section 241 was enacted, they had little influence on the mandatory conditions and prescriptions" imposed by agencies. If the goal of §241 was simply to increase licensees' influence over the conditions and prescriptions that agencies can require to protect resources impacted by their hydropower projects, then licensees have achieved their desired result. In most cases (83%), when faced with the threat of a trial-type hearing requested by the license applicant, agencies chose to withdraw or modify their conditions or prescriptions after bilateral negotiations with the license applicant. Once agencies had agreed to modify or withdraw their conditions or prescriptions, applicants withdrew their requests for a hearing. The EPAct §241 provisions – particularly the threat of a costly trial-type hearing – appears to give license applicants enormous leverage over the agencies.

The report could benefit from additional figures and analysis on the use of the EPAct §241 provisions

While we agree with the figures in the draft report, we do feel that it could have provided a clearer picture of *how* the process is being used by focusing on the details of individual cases. For instance, the report could include included a summary or table describing the various conditions and prescriptions before and after they were modified by agencies in order that the reader might be able to assess how EPAct §241 has resulted in different requirements for environmental and/or resource protection. The report could also compare the substance of preliminary and final conditions with alternatives proposed by licensees and other non-federal stakeholders so that readers could better understand the role that the alternatives process is playing in the modification of conditions and prescriptions. Finally, the report would benefit from an analysis of the issues raised in trial-type hearing requests – including those requests for hearings that did not go to trial – to determine the extent to which issues being raised are limited to material and factual issues as required by EPAct §241.

We understand from discussing this draft report with GAO staff that some of the above recommendations may be beyond the scope of the originating request for this report. There are, however, several other figures that could be obtained fairly easily (where possible, we identify potential sources of this information below) and would provide similar additional insights into the effects of the EPAct §241 provisions. These figures would provide better context for the various stakeholder views presented in the second section of the report. To the extent that these figures are within the scope of the originating request for the report, we recommend that GAO amend the draft report to include:

1. The total number of "eligible" preliminary conditions and prescriptions issued by agencies for which the §241 provisions could have been applied. These figures should be freely available from FERC's eLibrary, and GAO has likely already obtained many of the relevant documents in the course of this study. Alternately, GAO could ask agencies for

copies of all preliminary and final conditions and prescriptions submitted since the passage of the 2005 EPAct.

2. The percentage of "eligible" preliminary conditions or prescriptions for which alternatives were actually proposed (e.g. "Agencies received a total of X proposed alternatives for Y out of Z eligible preliminary conditions and prescriptions. Out of the Y preliminary conditions and prescriptions where alternatives were proposed, M preliminary conditions and prescriptions involved more than one proposed alternative"). In other words, how many conditions and prescriptions went unchallenged? This figure could be obtained by applying the figures in GAO's draft report to the figures in #1 above.
3. The number of discrete conditions and prescriptions that were modified when a request for a trial-type hearing was withdrawn. This figure could also be obtained by applying the figures in GAO's draft report to the figures in #1 above.
4. The number of discrete conditions and prescriptions that were modified via the alternatives process in the *absence* of a formal request for a trial-type hearing. This figure could be obtained by applying the figures in GAO's draft report to the figures in #1 above.
5. A more detailed description of which "nonfederal stakeholders" are exercising their rights to use these provisions, using the materials that GAO relied on to prepare its report. For instance:
    a. The number of alternatives proposed and/or trial-type hearings requested by license applicants.
    b. The number of alternatives proposed and/or trial-type hearings requested by NGOs.
    c. The number of alternatives proposed and/or trial-type hearings requested by Tribes.
6. The number of issues that were dismissed in a prehearing conference because they were neither "material" nor "factual." This information should be readily available in transcripts or summaries of prehearing conferences.
7. For each of the projects where a trial-type hearing was requested, a list of the non-federal stakeholders that formally intervened in the hearing. These figures can be easily obtained by the agencies case referrals for hearing requests, which they are obliged to file within 5 days of responding to any hearing request. Each hearing request referral must contain a list of all intervenors. Additionally, agencies should have in their records a copy of each notice of intervention that was filed for each proceeding.
8. For each of the projects where a trial-type hearing was requested and later withdrawn as the result of a negotiated agreement, a list of the non-federal stakeholders that participated or were invited to participate in such negotiations. These figures could be obtained relatively easily by asking each of the parties identified in #7 above if they participated or were invited to participate in such negotiations.

The report should clarify what is meant by "conditions" and "prescriptions"

On page 5 of the draft report, GAO briefly describes the various authorities available to federal and state agencies for recommending or prescribing hydropower license conditions, describing sections 4(e), 10(j), 10(a), and 18 of the Federal Power Act. While GAO's description is accurate, we recommend that GAO clarify that the EPAct §241 provisions are only applicable to mandatory conditions under section 4(e) and fishway prescriptions under section 18 of the Federal Power Act (FPA). We also recommend that GAO clarify the key difference between mandatory conditions or prescriptions and advisory recommendations: While FERC does not have the authority to reject

mandatory conditions or prescriptions issued pursuant to sections 4(e) or 18 of the FPA, it has the discretion to reject agency recommendations made pursuant to sections 10(a) or 10(j). GAO's description of the various authorities is not incorrect, but it could be clearer. We also recommend that GAO clarify the headings of table 3 and 4 slightly to reflect the relevant sections of the Federal Power Act to which they refer: Section 4(e) for alternative conditions (table 3) and section 18 for alternative prescriptions (table 4).

The report would benefit from additional analysis of the economics of these provisions

On page 7 of the draft report, GAO refers to FERC's cost recovery mechanism for agency participation. Section 10(e) of the Federal Power Act allows FERC to charge licensees for "reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities [for hydroelectric licensing]." While FERC does collect costs from licensees based on Federal Agencies' reporting, we feel that GAO's draft report would benefit from a more detailed explanation of how this cost recovery process works in practice.

First, FERC is required to consider whether agencies' costs are "reasonable and necessary" before charging licensees. It often does so by revising agencies' cost estimates downward, leaving taxpayers to fill any gap. Second, the annual fees collected by FERC are deposited into the General Fund of the U.S. Treasury rather than being paid directly to the agencies that have actually incurred the costs of administering the EPAct §241 provisions.[1] Because of the relatively unpredictable timing of the FERC licensing process – and because agencies cannot anticipate the number, scope, or content of a licensee applicant's disputed issues – these provisions are in effect an unfunded mandate. Agencies cannot accurately predict whether or when they will incur the costs of complying with EPAct §241; by the time the costs have been incurred, it is for too late for the administration to request the necessary funds from Congress through the annual appropriations process.[2] For agencies, there is a significant economic incentive to avoid a hearing altogether.

For individual license applicants, however, there is almost no financial disincentive to requesting a hearing: win or lose, most of the costs will be borne by taxpayers in the short term and if these costs to the public are recovered later through FERC's annual fees, the costs of one licensee's hearing will be distributed among *all* FERC licensees. If a license applicant is a regulated utility, it can also recover its own costs associated with a hearing from its ratepayers.

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[1] GAO's draft report does indirectly reference this situation, but only in the context of agency officials who "suggested that licensee reimbursements for the relicensing costs go directly to the resource agencies rather than the General Fund of the U.S. Treasury."

[2] The GAO's draft report correctly notes that the National Marine Fisheries Service (NMFS) has managed to secure additional funding to cover the administrative costs of complying with these provisions, but that these funds do not cover the costs associated with retasking program staff or attorneys to analyze alternatives or participate in trial-type hearings.

Agencies do not report their costs to FERC on a per-project basis, and FERC does not collect funds from individual license applicants on a per-project basis. Costs are reported to FERC in the aggregate, with the only reporting distinction being between costs associated with municipal and non-municipal license applicants. FERC apportions these costs among individual licensees based on their annual generation and/or installed capacity. Individual license applicants are not charged for the actual costs associated with relicensing their project. Licensees therefore have no incentive to help agencies control these costs, and since a hearing (or, as the draft GAO report demonstrates, the mere threat of a hearing) can lead to costly license conditions being withdrawn or modified, they have a powerful incentive to use these provisions in every proceeding, even if they are raising issues which could not withstand the scrutiny of a hearing.

The report should qualify the use of the term "settlement"

Throughout the GAO's draft report conditions and prescriptions are described as having been modified through "settlements" or "settlement negotiations." See:

> p. 12: "instead of accepting or rejecting alternative conditions and prescriptions, resource agencies most frequently modified the original conditions and prescriptions in ***settlement negotiations with the nonfederal stakeholders***."
>
> p. 13 "The requests for hearings in 14 of the 18 projects were withdrawn ***when nonfederal stakeholders and resource agencies reached a settlement agreement*** before the ALJ made a ruling."
>
> ***(Emphasis added)***

While these statements are technically correct, they are somewhat misleading. The term "non-federal stakeholders" implies that all non-federal parties to a proceeding have an opportunity to participate in settlement negotiations. In fact, that opportunity is almost exclusively limited to licensees. While the rules implementing EPAct §241 give stakeholders the opportunity to formally intervene in trial-type hearings, those rules do not prohibit *ex parte* communications among the various parties or guarantee intervenors a seat at the negotiating table.

Several of HRC's members have formally intervened in trial-type hearings that were ultimately "settled," but they were not invited to participate – and in some cases, were actively barred from participating – in "settlement" negotiations. In our experience, this has been the case in nearly every proceeding, and several of our members described this situation in interviews with GAO prior to the development of the draft report. We recommend that GAO clarify this point by referring to "licensees" instead of "nonfederal stakeholders" in the context of "settlement negotiations." We also recommend that GAO modify its draft report to reflect the makeup of such settlement negotiations and to clarify that non-licensee nonfederal stakeholders were almost always excluded from such negotiations. We recommend that GAO use the phrase "bilateral negotiations between the licensee[s] and resource agencies" to describe such negotiations.

In addition, the draft GAO report describes some confusion amongst licensees and resource agencies as to whether EPAct §241 encourages "settlements" or not:

> p. 14: "Most licensees and a few resource agency officials that we spoke with said that section 241 encourages settlement agreements between the licensee and resource agency. In contrast, other agency officials we spoke with said that section 241 made the relicensing process more difficult to reach a settlement agreement."

On its face, this disconnect might seem confusing, especially given that more than three-fourths of all hearing requests analyzed in GAO's draft report were withdrawn after bilateral negotiations or "settlement" talks between licensees and resource agencies. However, it is much clearer when one realizes that the terms "settlement" and "settlement agreement" have a very specific meaning and connotation in the context of hydropower licensing. All of the agency officials quoted in the paragraph above are technically correct. Their differing views on how EPAct §241 has affected "settlements" reflect the fact that the different groups of officials are almost certainly referring to two different types of "settlement" agreements.

Over the past 20 years, an increasing number of contentious hydropower licensings have been resolved by "comprehensive settlement agreements," in which licensees, state and federal resource agencies, Tribes, NGOs, and other interested parties came together to negotiate a collaborative, mutually-agreeable outcome for the continued operation of a hydropower project. Such settlement agreements are typically submitted to FERC as a formal "offer of settlement," and FERC often uses these agreements as the basis for its license conditions. Under such a settlement, a wide range of federal and non-federal stakeholders agree to support the licensing of the project if it is operated according to the terms of the agreement. These comprehensive settlement agreements make licensing more efficient: parties can amicably resolve the entire spectrum of issues in a relicensing and agree to mutually support the project rather than challenge it in court.[3]

While the agreements described in GAO's draft report are technically "settlement agreements," they do not resemble "settlement agreements" in the sense that the term is typically used in the context of a FERC hydropower licensing. While comprehensive settlement agreements generally involve the major parties to a given licensing proceeding, the "settlement agreements" described in GAO's draft report are typically limited to the license applicant and the resource agency that issued the preliminary condition or prescription. Other parties are not invited to participate. Instead of addressing a comprehensive suite of issues, the agreements described in GAO's draft report resolve a much more limited set of issues: agencies agree to withdraw or modify their conditions or prescriptions, and licensees agree to withdraw their request for a trial-type hearing. So while EPAct §241 has arguably increased the number of "settlements," these settlements are far less comprehensive, less transparent, and less open to the public. They are also much less likely to lead to unchallenged licenses. These limited "settlements" have also made it much more difficult for parties to engage in truly collaborative discussions and achieve settlements (i.e. comprehensive settlement agreements) as they are typically defined in the context of hydropower

[3] We find it odd that a licensee would, as reported in GAO's draft, comment that agencies " had little incentive to work collaboratively with the licensee during relicensing prior to section 241." Agencies had been collaborating – with great success – with licensees and other non-federal stakeholders for years before the EPAct §241 provisions were passed.

licensing, since the hearing process necessarily forces parties into an adversarial relationship where they must spend time preparing their cases rather than finding a truly collaborative solution.

This is a critical distinction. While the term "settlement agreement" in hydropower licensing generally refers to a settlement that features agreement among a wide variety of stakeholders on a comprehensive set of issues ranging from flows to shoreline management to license implementation, the term "settlement" is used in this draft report to refer to negotiations wherein a licensee agrees to withdraw a request for a costly trial-type hearing in exchange for a resource agency withdrawing or modifying its preliminary terms and conditions. We recommend that GAO's report clarify that the term "settlement" has a specific meaning in the context of FERC relicensing, and that agreements reached under EPAct §241 are distinct from the comprehensive settlements agreements that are submitted to FERC as multi-party, collaborative agreements among federal and non-federal stakeholders that address and resolve multiple issues in a licensing to the mutual satisfaction of all parties.

SECTION 2: STAKEHOLDER VIEWS ON THE EFFICACY OF EPACT §241

The comments received from stakeholders in this section are largely consistent with our experience, and GAO has accurately reported our views in its draft report. While we would have preferred that GAO's draft report contain additional analysis to determine the extent to which stakeholders' views are supported by the record, we understand from conversations with GAO staff that such additional analysis is beyond the scope of the originating study request. We therefore make a general recommendation here that such additional future study is necessary to fully evaluate the impact of EPAct §241. The remainder of our comments on this section of the draft report is intended to further clarify our views of the effects of EPAct §241, using other stakeholder comments from the draft report to illustrate our concerns. Our comments on this section of the draft report can be summarized as follows:

- EPAct §241 gives licensees unprecedented leverage over federal agencies' decision-making.
- Agencies are responding to this leverage by issuing fewer, less protective conditions and prescriptions.
- EPAct §241 has made agencies' need for information and studies even more critical, but they are not getting the information they need.

EPAct §241 gives licensees unprecedented leverage over federal agencies' decision-making

HRC has long expressed concern over the effects EPAct §241 on hydropower licensing. While we are not opposed in principle to a process that would allow increased oversight or scrutiny over the scientific underpinnings of agencies' conditions or prescriptions, EPAct §241 is far from the most efficient way to accomplish this goal, and it is not used this way in practice. Rather, the rules are used by licensees to pressure agencies to modify or withdraw their conditions or prescriptions. In HRC's 2006 comments on the Interim Final Rules published by the Departments of Agriculture, Commerce, and the Interior implementing the EPAct §241 provisions, we wrote:

> "[The] rules will tend to benefit parties - license applicants in particular - with plentiful resources, impose undue burdens on all other stakeholders, and impose such a severe financial burden on the Departments that they will have an incentive to avoid requiring controversial conditions or prescriptions altogether. [...] The EPAct rule contains features that impose significant, unnecessary burdens on non-licensee stakeholders. For example, we have been informed by regional staff in your Departments that a hearing request may often result in a withdrawal of a challenged condition and the mere reservation of authority to impose the condition in the future, since costs for the trial-type hearings and other related costs may not be covered by the budget of the affected Department office."

GAO's report – and our experience – confirms that our prediction was accurate. The EPAct §241 provisions have given hydropower licensees a powerful tool to assert unprecedented influence and leverage over the conditions of FERC-issued hydropower licenses, particularly those license conditions and prescriptions which address environmental quality, fisheries, recreation, and public lands. This leverage takes many forms. First, there is extreme financial pressure: the administrative costs of a single hearing have the potential to drain a regional office's entire budget. Second, there is workload pressure: agencies must reassign staff time from other projects for months at a time in order to adequately staff a trial-type hearing.

Finally, there is intense psychological pressure placed on individual agency staff. A full trial-type hearing takes place in an extremely tight timeframe of roughly 10 weeks from the receipt of a hearing request. In order to defend their position on disputed issues of material fact, agencies must be able to draw on extremely detailed technical knowledge and expertise about those issues. Because these issues are highly place-specific, the burden often falls on the individual project leads that developed the conditions and prescriptions. This burden is enormous. A review of documents obtained via a Freedom of Information Act Request to the National Marine Fisheries Service showed one individual staff member working 961 hours (equivalent to 24 working weeks) on the Klamath trial-type hearing during a 19-week period. This represents an enormous personal commitment on the part of the staffer, well above and beyond the call of duty. Our own experience with these hearings suggests that this experience is not unique. A decision to defend a disputed condition or prescription – or even to issue such a condition or prescription at all – must weigh very heavily on agency staff, knowing the impact that such a decision is likely to have on their personal life.

Here, as elsewhere, EPAct §241 benefits those parties with abundant resources. For a licensee, the decision to engage outside consultants and legal counsel to challenge an agency decision is strictly a business decision: if the cost of challenging an agency condition or prescription is likely to be less than the cost of implementing the resource protection, it is logical to challenge it. The costs associated with EPAct §241 provisions may not even affect a licensee's bottom line, since they can be recovered from ratepayers as a cost associated with obtaining a license for their project. For agencies and other non-federal stakeholders who do not generate revenue from the project, however, the costs are significant and unsustainable.

Licensees clearly understand the role that this pressure plays on agencies' decision to issue conditions or prescriptions, and they are using this pressure to gain greater influence over the

process. In the draft report, one licensee claims: "before section 241 was enacted, they had little influence on the mandatory conditions and prescriptions." This statement, however, strikes us as odd. Our Coalition's members have been participating in hydropower licensing proceedings for more than two decades. In that time, we have never known agencies to be unwilling to discuss their conditions with licensees or to modify their conditions. Indeed, such negotiations often formed the basis for the comprehensive settlement agreements described above. Agencies have always been sensitive to the need to balance competing uses, and licensees have always been able to influence agency decisions or challenge them in court. The real change since the passage of EPAct is in the *degree* of influence that licensees are able to assert over agencies.

Agencies are responding to this leverage by issuing fewer, less protective conditions and prescriptions

The draft report indicates that agencies are responding to the various pressures being applied by license applicants through the use of EPAct §241:

> "[Agencies admit that they] now issue fewer or less environmentally protective conditions or prescriptions to avoid a costly trial-type hearing. In addition, some other officials commented that instead of issuing conditions and prescriptions that could result in a trial-type hearing, agencies have either issued recommendations or reserved authority to issue conditions and prescriptions at a later time. While a reservation of authority allows the resource agency to issue conditions and prescriptions after the issuance of the license, one regional agency official told us that in his experience, this rarely occurs. At one regional office, two staff biologists and their division chief told us that while they still issue prescriptions that meet the requirements of resource protection, these prescriptions are less protective than they would have been without the possibility of a trial-type hearing."

Our experience supports these observations. Of particular importance is agencies' increased use of "reserved authority" to issue conditions or prescriptions at a later time. The regional agency official's statement above that agencies rarely exercise this reserved authority is consistent with our experience. However, with agencies are refraining from issuing conditions in order to avoid hearings, it is even more unlikely that agencies will choose to exercise such authority in the future, since they would still be subject to a request for a costly trial-type hearing at that time. The rules implementing EPAct §241 give parties the right to request a trial-type hearing should an agency reserve this authority. See, for example, 7 C.F.R. §1.601(c):

> c) *Reservation of authority.* Where the Forest Service notifies FERC that it is reserving its authority to develop one or more conditions during the term of the license, the hearing and alternatives processes under this subpart for such conditions will be available if and when the Forest Service exercises its reserved authority. The Forest Service will consult with FERC and notify the license parties regarding how to initiate the hearing process and alternatives process at that time."

The reverse, however, does not apply: the rules do not allow other non-federal stakeholders to challenge the absence of a condition or prescription or an agency's decision to reserve authority. The Section-by-Section analysis published together with the rules implementing EPAct §241 by

the Departments of Commerce, Agriculture, and the Interior states: "license parties cannot request a hearing regarding the reservation of authority itself, or submit alternatives to such reservation."

In other words, EPAct §241's leverage only runs in one direction: towards less environmental protection. While the EPAct §241 rules are nominally open to all non-federal stakeholders, they are clearly useful only to those stakeholders with an interest in advocating for *less* environmental protection: the licensees. Agencies can only adopt alternatives that are *less* costly and either equally (in the case of prescriptions) or adequately (in the case of conditions) protective. Alternatives that may offer additional protection – even if they cost more – cannot be accepted. A licensee can request a trial-type hearing when an agency exercises its conditioning or prescriptive authority, but other non-federal stakeholders cannot request a similar hearing to seek review of the facts that led an agency to determine that such conditions are not necessary. EPAct §241 places non-licensee stakeholders – and their interests in the protection of public resources affected by hydropower projects – at a significant disadvantage.

Again, EPAct §241 gives licensees tremendous leverage over agencies, and agencies are clearly responding to the threat posed by licensee's trial-type hearing requests:

> p. 15: "[S]everal licensees and a few resource agency officials said that under section 241, some resource agencies have been more willing to negotiate their conditions and prescriptions to avoid receiving alternatives and requests for trial-type hearings."

Our experience supports this observation. The Catawba-Wateree project in the Santee River basin in North and South Carolina provides one such example.[4] In June 2008, the U.S. Fish and Wildlife Service recommended a set of flows for the project that were intended to protect resident species and to provide adequate spawning flows for restoration of diadromous fish in the Santee basin. These recommendations were not mandatory conditions or prescriptions – they were recommendations made to FERC pursuant to other authorities contained in the Federal Power Act. FERC must consider such recommendations, but it is not obliged to include them in any license for the project. These recommendations are not subject to the requirements of EPAct §241.

The U.S. Fish and Wildlife Service also filed fishway prescriptions for the Catawba-Wateree project pursuant to §18 of the Federal Power Act. The license filed a request for a trial type hearing to challenge those fishway prescriptions. The Fish and Wildlife Service and the licensee subsequently entered into closed-door negotiations. Other non-federal stakeholders who had legitimately intervened in the trial-type hearing were not invited or permitted to participate.

At the conclusion of these closed bilateral negotiations, the licensee withdrew its request for a trial-type hearing. Incredibly, the negotiated agreement did not address the question of fish passage at all: the licensee agreed to accept the fish passage prescriptions if the Fish and Wildlife

[4] The draft GAO report does not directly refer to this project, but describes a similar set of circumstances in one example.

Service changed its minimum flow recommendations. The compromise made by the Fish and Wildlife Service is evident in the text of the agreement:[5]

> "The Utilities will not pursue Trial Type Hearings ("TTH") before an Administrative Law Judge pursuant to FPA §§4(e) or 18 to contest the USFWS's FPA §§4(e) or 18 diadromous fish requirements so long as the USFWS's ESA §7 requirements, FPA §§4(e) conditions, 10(a) and 10(j) recommendations, and 18 prescriptions do not materially vary reservoir elevation limitations, required flow releases, low inflow protocols or the high inflow protocols as set for the in: (A) the CRA; (B) Existing project Licenses at the Ninety-Nine Islands and Gaston Shoals projects; (C) a settlement agreement among the SCDNR, the USFWS, and SCE&G for the Saluda Hydroelectric Project; and (D) this Accord."

Subsequent to signing and filing with FERC the Santee Accord, the U.S. Fish and Wildlife Service altered its previous river flow recommendations for diadromous fish to match flows proposed by the licensee.[6]

Here, the licensee clearly used EPAct §241 as leverage against the Fish and Wildlife Service. The use of the provisions here do not appear to have been intended to seek third party oversight over agency conditions and prescriptions, but rather to simply coerce the agency into changing its recommendations issued under a separate authority. The licensee apparently did not even seek changes to the fish passage prescriptions that triggered the EPAct §241 review. Instead, it used the threat of a trial-type hearing to pressure the agencies to change separate recommendations made pursuant to other authorities to which EPAct §241 does not even apply: Sections 10(a) and 10(j) of the Federal Power Act, and Section 7 of the Endangered Species Act. When licensees interviewed for the draft report talk about providing agencies with an "incentive" or having "influence" over agency conditions, this is the result they are describing.

The clearest indication that licensees are using EPAct §241 as leverage over agency decision-making rather than as an opportunity for oversight over agencies' science is the interest expressed by some licensees in gaining the ability to request trial-type hearings or propose alternatives to agencies' *final* conditions and prescriptions *if they differ from the terms that were agreed upon during negotiations*. Once a licensee has agreed to withdraw a request for a trial-type hearing (because agencies have agreed to submit final conditions or prescriptions that are more to the licensee's liking), it loses its leverage over agencies, and its "only recourse is to sue in an appeals court, after the license has been issued."[7] If licensees were allowed to challenge final conditions

[5] Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement, FERC Accession Number 20080619-5006, p. 3

[6] ERRATA to COMMENTS and RECOMMENDATIONS, Notice of Application Ready for Environmental Analysis, Catawba-Wateree Hydroelectric Project FERC No. 2232-522; North Carolina and South Carolina, FERC Accession Number 20080718-0219, p. 3.

[7] The option to seek judicial review was also available to licensees before the passage of EPAct §241.

and prescriptions, agencies could be subject to an endless loop wherein licensees submitted new requests for trial-type hearings to challenge new facts or proposed new alternatives until agencies agreed to withdraw or modify their conditions to licensees' liking.

EPAct §241 has made agencies' need for information and studies even more critical, but they are not getting the information they need

Finally, some agency staff interviewed for the draft GAO report indicated that EPAct §241 has led them to request "licensees to conduct more extensive studies about the effects of their hydropower projects to ensure that the agencies have sufficient information for writing conditions and prescriptions." Unfortunately, agencies lack the authority to require licensees to conduct such studies, and licensees often refuse studies requested by agencies and other non-federal stakeholders. For instance, one agency staffer quoted in the draft report described a case where a licensee declined to conduct such a study and then challenged an agency condition on the grounds that the agencies lacked the supporting factual evidence ***that the requested study would have provided***.

While agencies with conditioning and prescriptive authority under the Federal Power Act lack the authority to require licensees to perform studies, FERC does have this authority. Unfortunately, FERC's record of cooperation with its sister agencies is uneven at best, and FERC frequently rejects agencies' requests for studies. EPAct §241 has given agencies a clear sense of what information they require in order to prepare Section 4(e) conditions and Section 18 prescriptions that are based on a solid factual underpinning. Given that these agencies are now being held to a standard that requires much more detailed information, it is unclear why FERC would repeatedly choose to deny them access to the information that they have identified as necessary.

As a result, we have observed a marked increase in formal agency disputes over FERC's study plan determinations. While FERC's licensing regulations allow agencies to request a technical panel to resolve disputes with FERC over which studies should or should not be performed, FERC is not required to accept the panel's recommendations. Indeed, on a number of occasions, the Director of FERC's Office of Energy Projects has overridden an independent technical panel's recommendation that studies requested by an agency be performed. This lack of interagency cooperation makes it more likely that licensees will request trial-type hearings when information gaps lead to disputes over issues of material fact. FERC's refusal to require critical studies also leaves agencies without the tools they need to defend their conditions and prescriptions should a licensee request a trial-type hearing.

SECTION 3: GAO'S RECOMMENDATIONS

HRC strongly agrees with both of the recommendations made by the GAO in its draft report. We are already on record asking the agencies to finalize their 2005 draft rules implementing EPAct §241, and we recently wrote a joint letter with the National Hydropower Association asking the agencies to hold an additional public comment period before issuing their final rules.

We also agree with GAO's recommendation that agencies include statements explaining their reasons for not adopting proposed alternative conditions or prescriptions when they submit their final conditions and prescriptions to FERC, in accordance with the interim rules. We would

further recommend that agencies provide a more detailed explanation of the material facts underpinning any decision to modify conditions and prescriptions, especially when those modifications were the result of a negotiated agreement that also resulted in the withdrawal of a request for a trial-type hearing.

In conclusion, HRC also has four other recommendations for how the trial-type hearing and alternatives process could be improved. While we recognize that some of these recommendations go beyond the scope of GAO's draft report, we include them here to clarify our views on the efficacy of §241 of the Energy Policy Act of 2005.

- Agencies need tools to agencies need tools to recover the costs associated with their compliance with the EPAct §241 provisions, especially trial-type hearings
- Agencies should have the express authority to reject trial-type hearings in which the issues in dispute are not factual, which dispute conditions and prescriptions rather than the facts underlying them, and which can be resolved otherwise through the licensing process
- Agencies need to be able to gather relevant information necessary to develop – and defend – their conditions and prescriptions.
- The rules implementing EPAct §241 should prohibit all *ex parte* communications among parties to a trial-type hearing

First, **agencies need tools to recover the costs associated with their compliance with the EPAct §241 provisions, especially trial-type hearings.** While it is appropriate that EPAct §241 should be used to improve oversight over agencies' decision-making, licensees are instead using these provisions to influence agencies' decisions to issue conditions or prescriptions. For a licensee, there is a clear economic incentive for requesting a trial-type hearing. For an agency, there is a clear economic and workload incentive to modify or withdraw its conditions (or avoid issuing them in the first place) in order to avoid the high cost of a hearing. We recommend that Congress examine the post-EPAct §241 Federal Power Act and consider changes that would result in a more equitable balance of these cost incentives and a funding mechanism that would allow agencies to provide non-federal stakeholders with the trial-type hearings that Congress intended without drawing on funds that Congress has appropriated for the agencies' other critical work.

Second, **agencies should have the express authority to reject trial-type hearings in which the issues in dispute are not factual, which dispute conditions and prescriptions rather than the facts underlying them, and which can be resolved otherwise through the licensing process.** In the three trial-type hearings discussed in GAO's report, more than 61% of the issues were dismissed after an ALJ's pre-trial hearing, suggesting that quite a few of those issues were neither material nor factual. While the draft report does not include a similar analysis of disputed issues that never went to hearing because the hearing request was withdrawn, our own experience with the rules suggests that many issues being raised address points of policy rather than points of fact (e.g. "the preliminary fish passage prescription is too expensive and/or unnecessary"), and would be unlikely to survive a pre-trial hearing before an ALJ. Agencies should amend the rules implementing EPAct §241 to give staff the authority to reject disputes over issues that are not material or factual before the case is referred to an ALJ.

Third, **agencies need to be able to gather relevant information necessary to develop – and defend – their conditions and prescriptions.** Given the extraordinarily high standards for supporting evidence created by EPAct §241, FERC should substantially improve its cooperation with agencies with mandatory conditioning authority under Section 4(e) and prescriptive authority under Section 18 of the Federal Power Act. By refusing to require licensees to perform studies requested by agencies, FERC effectively prevents those agencies from exercising their authorities under the Federal Power Act. FERC should use its existing authorities under the Federal Power Act to require licensees to perform all studies that agencies have indicated are necessary to develop such conditions and prescriptions. Alternately, Congress should amend the Federal Power Act to either a) allow agencies with mandatory conditioning or prescriptive authority to require licensees to perform relevant studies, or b) to give agencies the ability to perform such studies on their own and bill licensees for the costs.

Finally, **the rules implementing EPAct §241 should prohibit all *ex parte* communications among parties to a trial-type hearing.** Determinations regarding alternative conditions and all trial-type hearings should be subject to ex parte rules to prevent parties who have intervened in a proceeding from being denied equal access to agency decision-makers. The alternatives process is essentially a paper hearing conducted by the agency on the record. The prohibition on ex parte communication is necessary to ensure that the agency's decision regarding a condition or prescription made on a public record is not influenced by private, off-the-record communications from any party interested in the outcome. Such a prohibition is standard in other regulations for hearings promulgated by these agencies.

Again, we appreciate this opportunity to comment on the GAO's draft report. If you have any questions about our comments, please feel free to contact me at 202-347-7550 or jseebach@americanrivers.org.

Sincerely,

John Seebach
Chair
Hydropower Reform Coalition

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Appendix V: Comments from the National Hydropower Association

National Hydropower Association
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July 9, 2010

Mr. Frank Rusco
Director, Natural Resources and Environment
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Comments on the GAO EPAct 2005 Section 241 Report

Dear Mr. Rusco,

The National Hydropower Association (NHA) appreciates this opportunity to provide comments to the Government Accountability Office (GAO) on the draft report of the Section 241 trial type hearing and alternative condition and prescription provisions of the Energy Policy Act of 2005 (EPAct 2005).

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new hydrokinetic technologies. NHA's membership consists of more than 170 organizations including public utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, consultants and others involved in the industry.

NHA members have a keen interest in the Section 241 provisions having participated in the development of the interim final rules and developing substantial experience with the provisions as utilized in their re-licensing proceedings.

The following comments are also endorsed by the American Public Power Association[1] and the Edison Electric Institute[2].

[1] APPA is a national service organization that represents the interests of more than 2,000 publicly owned, not-for-profit electric utilities located in all states except Hawaii. Over 70 percent of APPA's members serve communities with less than 10,000 residents, and approximately 45 million Americans receive their electricity from public power systems operated by municipalities, counties, authorities, states, or public utility districts.

[2] EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates. Our members represent approximately 70% of the U.S. electric power industry. They generate electricity from a diverse portfolio of fuel resources, including hydropower.

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History

NHA and the hydropower industry sought the provisions of Section 241 to inject additional accountability and transparency into the process for developing mandatory conditions and prescriptions. Prior to EPAct 2005, the hydropower licensing process provided no administrative mechanism to review preliminary conditions and prescriptions proposed by the agencies. A licensee's only option was to challenge conditions in the court of appeals – a process which only served to delay implementation of appropriate mitigation and other measures at a significant cost to both the licensees and the agencies.

The ability to hold a trial-type hearing provides licensees with a tool to ensure proposed conditions and prescriptions are based on accurate information and address impacts directly related to the project.

In addition, the pre-EPAct 2005 process did not afford consideration of alternatives to agency proposed conditions and prescriptions. Requiring agency analysis and acceptance of alternatives that meet the same standard for natural resource protection (though at lower cost or with increased power savings) allows licensees the ability to fully realize the clean energy potential of their projects in the most cost efficient manner.

In the end, the ultimate goal of the industry in supporting the Section 241 provisions was better, maximized outcomes in the licensing process – both for environmental protection and for needed renewable energy generation from hydropower.

General Comments and Response to Report Recommendations

NHA commends the GAO and its staff for the extensive work it undertook in interviewing licensees, agencies and other stakeholders in meeting the report's objectives to illustrate the use of the Section 241 provisions, their outcomes, and the views on those outcomes and the process itself.

Hydropower licensing is one of the most heavily intensive processes for a generation source in the United States and includes the high level of input from a wide variety of stakeholders. Based on the experience of NHA and its members, and a review of the results of the interviews GAO conducted, the Association believes that the provisions of EPAct 2005 Section 241 are providing more transparency and accountability, for all stakeholders, in the process as Congress intended and leading to better licensing outcomes.

Though some administrative modifications to the agencies' interim final rules are both needed and useful, NHA believes these can be accomplished without any statutory changes to the structure of the program. Additional information on proposed changes is included.

Finally, NHA also fully supports the GAO's recommendations in the report that: (1) agencies provide in their written statement filed with the Federal Energy Regulatory Commission (FERC)

the reasons for not adopting proposed alternative conditions or prescriptions, as is currently required by the interim rule; and (2) the agencies issue a final rule governing the use of Section 241 provisions with additional notice and opportunity for public comment.

NHA endorses the above recommendations and looks forward to working with the agencies and other stakeholders as a final rule is developed.

Specific Comments on the Report

Based on the extensive research conducted by the GAO in the preparation of this report, NHA can draw several conclusions. But, in general, it is clear from the comments and data that Section 241 has indeed met the goals of transparency and accountability that was intended.

A. Need for agency statement on modified conditions

Of the 139 conditions that were modified, only 13 came with explanations of why the conditions were modified, as opposed to accepted or rejected. It is important for resource agencies to provide the reasoning behind the actions they take in accepting, rejecting, modifying and removing proposed conditions and prescriptions. Without such reasoning, it is hard for stakeholders to determine, as the GAO pointed out, the basis of the changes, their extent, and if the proposed alternatives had any affect on the final licensing conditions. Providing such reasoning offers a fuller picture of the licensing process to stakeholders, FERC, and Congress.

B. Settlements not adversely affected by Section 241 provisions

In the process, we continue to see settlement between involved parties and less employment of the trial-type hearing. In the few cases where a trial-type hearing has been utilized, the administrative law judge (ALJ) has ruled for both the licensee and the agencies.

We believe the Section 241 provisions have fostered a greater environment of collaboration amongst stakeholders. Of all the proposed alternative conditions and prescriptions, 72 percent resulted in modification of conditions, indicating that common ground was found and agreement reached on mutually beneficial licensing conditions. And while there is some concern that the trial-type hearings have been time and resource consuming, only three went to completion, with the majority of proceedings initiated being settled in negotiations before an ALJ decision was issued.

C. Section 241 has resulted in the generation of better Information

NHA also believes that the process has generated better information. Both licensees and resource agency officials expressed that the resource agencies put more effort into researching, supporting and explaining their conditions and prescriptions, as well as

requesting more extensive studies from the licensee. This ensures a complete scientific and fact-based support of licensing conditions set by the resource agencies.

D. The process is demanding on all parties involved

Among the comments from stakeholders and resource agencies, cost to the resource agencies was often cited as a negative result of Section 241. In addition to the agencies, the process involves extensive effort and resources on the part of the licensee as well. The goal is transparency and accountability, and the hydropower industry believes there should be an appropriate level of investment towards these goals and feels that it too has made a significant contribution.

Proposed Recommendations for Final Rule Issuance

On November 17, 2005, the Departments of Agriculture, Interior and Commerce issued interim final rules for implementing the trial-type hearing and alternatives provisions of EPAct 2005. In the interim rule it was indicated that revised final rules would be promulgated within 18 months, based on comments received and the initial results of the procedures set forth.

NHA filed comments on that rule in January 2006. Over four and a half years later, the Departments and stakeholders have had extensive experience with Section 241 provisions and NHA believes the agencies should proceed with issuing a final rule, after a period of public comment. As per our June 2009 joint letter with the Hydropower Reform Coalition, NHA believes that there are opportunities to enhance the cost effectiveness of the procedures before issuance of a final rule.

For example, with regard to the trial type hearing process, Section 241 provides that the license applicants shall be entitled to trial-type hearing of no more than 90 days on fact disputes related to the licensing conditions. As it is now, the ALJ issues his or her decision within that 90 day time frame. NHA believes those 90 days should be dedicated to proceedings in order to give parties sufficient time to develop an adequate record on the facts at issue and to provide appropriate due process. Therefore, we recommend that in the final rule making the process be modified to (1) start the 90 day hearing clock when direct testimony is filed and (2) authorize the ALJ to write his or her decision following completion of the hearing.

NHA looks forward to providing additional recommendations and expanding on the recommendations posed here by providing supplementary input as the agencies work to finalize their interim rule.

Conclusion

NHA would again like to thank the GAO for this opportunity to provide comments on the draft report. The Section 241 provisions of EPAct 2005 are important to providing the most cost

effective and fact-based licensing conditions and prescriptions to ensure that hydropower generation has an opportunity to fully realize its important role in America's renewable, clean energy portfolio.

Sincerely,

Linda Church Ciocci

Linda Church Ciocci
Executive Director

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Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Frank Rusco, (202) 512-3841 or RuscoF@gao.gov

Staff Acknowledgments

In addition to the contact named above, Ned Woodward, Assistant Director; Allen Chan; Jeremy Conley; Richard Johnson; Carol Herrnstadt Shulman; Jay Smale; and Kiki Theodoropoulos made key contributions to this report.

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