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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 45

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 221

[Docket No. 080220223-6961-03]

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

**Resource Agency Hearings and Alternatives Development Procedures in
Hydropower Licenses**

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

ACTION: Final rules; response to comments.

SUMMARY: The Departments of Agriculture, the Interior, and Commerce are jointly issuing final rules for procedures for expedited trial-type hearings and the consideration of alternative conditions and fishway prescriptions required by the Energy Policy Act of 2005. The hearings are conducted to expeditiously resolve disputed issues of material fact with respect to conditions or prescriptions developed for inclusion in a hydropower license issued by the Federal Energy Regulatory Commission under the Federal Power

Act. The final rules make no changes to existing regulations that have been in place since the revised interim rules were published on March 31, 2015, and took effect on April 30, 2015. At the time of publication of the revised interim rules, the Departments also requested public comments on additional ways the rules could be improved. The Departments now respond to the public comments received on the revised interim rules by providing analysis and clarifications in the preamble. The Departments have determined that no revisions to existing regulations are warranted at this time.

DATES: Effective [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Mona Koerner, Lands and Realty Management, Forest Service, U.S. Department of Agriculture, 202-205-0880; John Rudolph, Solicitor's Office, Department of the Interior, 202-208-3553; or Melanie Harris, Office of Habitat Conservation, National Marine Fisheries Service, 301-427-8636.

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SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Departments of Agriculture, the Interior, and Commerce (the Departments) are issuing final rules to implement section 241 of the Energy Policy Act of 2005.

ENERGY POLICY ACT OF 2005, 109 Pub. L. 58, 119 Stat. 594, 674, 109 Pub. L. 58, 2005. Section 241 created additional procedures applicable to conditions or prescriptions that a Department develops for inclusion in a hydropower license issued by Federal Energy Regulatory Commission (FERC). Specifically, section 241 amended sections 4 and 18 of the Federal Power Act (FPA) to provide for trial-type hearings on disputed

issues of material fact with respect to a Department's conditions or prescriptions; and it added a new section 33 to the FPA, allowing parties to propose alternative conditions and prescriptions.

In 2015, the Departments promulgated three substantially similar revised rules—one for each agency—with a common preamble. The revised interim rules became effective on April 30, 2015, so that interested parties and the agencies more immediately could avail themselves of the improvements made to the procedures. At the same time, the Departments requested public comment on additional ways the rules could be improved.

The Departments have reviewed the public comments received on the revised interim rules, and are providing responses to the public comments and further analysis and clarification. The Departments have determined that no changes to existing regulations are warranted in the Final Rules.

II. Background

A. Interim Final Rules

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

823d, allowing any party to the license proceeding to propose an alternative condition or prescription, and specifying the consideration that the Departments must give to such alternatives.

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

B. Request for Additional Comment Period

In July 2009, the Hydropower Reform Coalition (HRC) and the National Hydropower Association (NHA) sent a joint letter to the three Departments, asking that an additional 60-day comment period be provided before publication of final rules. The organizations noted that they and their members had gained extensive experience with the interim final rules since their initial comments were submitted in January 2006, and they now have additional comments to offer on ways to improve the trial-type hearing and alternatives processes. The Departments granted NHA and HRC's request. Instead of publishing final rules, the Departments published revised interim rules, effective on April 30, 2015, with a 60-day comment period.

C. Revised Interim Rules

On March 31, 2015, the Departments jointly published revised interim rules implementing EAct section 241. 80 FR 17156. The rules and preamble addressed a few issues that remained open in the 2005 rulemaking, such as who has the burden of proof in a trial-type hearing and whether a trial-type hearing is an administrative remedy that a party must exhaust before challenging conditions or prescriptions in court.

Additionally, the revised interim rules clarified the availability of the trial-type hearing and alternatives processes in the situation where a Department exercises previously reserved authority to include conditions or prescriptions in a hydropower license.

The revised interim rules went into effect on April 30, 2015, but a 60-day comment period was provided for the public to suggest changes to the revised interim regulations.

D. Comments Received

The Departments received comments on the revised interim rules from Exelon Generation Company, LLC (“Exelon”) and comments submitted jointly by the National Hydropower Association, American Public Power Association, Edison Electric Institute, and Public Utility District no. 1 of Snohomish County, Washington (“Industry Commenters”). Responses to these comments are provided below. The Departments also received a comment that is not relevant to this rulemaking and therefore does not necessitate a response. The reader may wish to consult the section-by-section analysis in the revised interim rules for additional explanation of all the regulations.

Burden of Proof

The Industry Commenters strongly disagree with the Departments' decision in the revised interim final rule to assign the burden of proof to the party requesting a hearing. See 7 CFR 1.657(a), 43 CFR 45.57(a), and 50 CFR 221.57(a). They assert that the burden of persuasion should be assigned, in accordance with § 7(d) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), to the party that is “the proponent of [the] rule or order,” and that the burden should be assigned to the Departments because they are the proponents of their mandatory conditions or prescriptions which they seek to attach to a

licensing order as well as the alleged facts supporting those conditions or prescriptions. The Departments received these comments on the interim final rule and explained the Departments' rationale for disagreeing with the comment in the revised interim rules. 80 FR 17170-17171. For the reasons explained in the revised interim rules, the Departments do not agree with the comment and no changes to the regulations are required.

The Industry Commenters cite *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), in support of the assertion that the Departments are the proponents. In that case the Supreme Court noted that a condition or prescription must be supported by evidence provided by the conditioning agency (or other interested parties). *Id.* at 777 nn.17, 20. The Industry Commenters assert that this is consistent with the APA requirement that the proponent of an order "has the burden of proof."

However, the *Escondido* case dealt with an appeal from a U.S. court of appeals' decision that § 4(e) of the FPA required FERC to accept without modification any license conditions recommended by the Secretary of the Interior. As noted by the Supreme Court, FERC's orders, including licenses, are reviewable by a U.S. court of appeals under 18 U.S.C. 8251(b), and the court of appeals, and not FERC, has exclusive authority to determine the validity of a condition or prescription in a license. 466 U.S. at 777 and 777 nn. 19, 21. Because conditions and prescriptions, and whether they are supported by substantial evidence, are only reviewable under § 8251(b), the conditions or prescriptions themselves are not the subject "orders" of the trial-type hearing. Rather, the subject of the hearing is the hearing requester's claim that the correct facts are different than the Department's factual basis for the conditions or prescriptions.

In a trial-type hearing, the requester seeks a decision from the ALJ upholding its claim and thus is the proponent of the order and bears the burden of persuasion. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The correctness of this position is strongly buttressed by the fact that the same conclusion was reached by all six independent ALJs who ruled on this issue prior to specifically assigning the burden of proof in the revised interim rules. No changes to the regulations are necessary.

Applicability of Rules on Reopener

The Industry Commenters state that the revised interim rules should, but do not appear to, provide for a trial-type hearing or the submission of alternative conditions or fishway prescriptions (alternatives) when an agency imposes conditions and prescriptions during the licensing proceeding, reserves its right to impose additional or modify existing conditions or prescriptions during the license term, and then exercises that reserved right. The Departments disagree with the commenter's premise that the rules do not provide for a trial type-hearing or the submission of alternatives in such a situation.

The revised interim rules provide that where a Department "has notified or notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions at a later time, the hearing and alternatives processes under this part for such conditions or prescription will be available if and when DOI exercises its authority." 7 CFR 1.601(c); 15 CFR 221.1(c); 43 CFR 45.1(c). Accordingly, if a Department exercises reserved authority during the license term to impose additional or modified conditions or prescriptions, the hearing and alternatives processes under this part for such conditions or prescriptions will be available.

The Industry Commenters contend that where a Department imposes new or substantially modified conditions or prescriptions under reserved authority during the license term, the Department has an obligation under the license to justify these changes based on a change in facts. This comment pertains to the justification for a Department's exercise of its reserved authority, which is beyond the scope of this rulemaking, and therefore merits no further response.

Improvements to the Hearing Timeline

The revised interim rules extended a few of the deadlines in the 2005 rules, while not adopting some commenters' recommendations that the Departments significantly expand the hearing schedule. The Industry Commenters assert that these extensions do not go far enough because the compressed timeline set out in the rules imposes extreme hardship on the parties and forces parties to limit the scope of their challenges to agency conditions and prescriptions. They contend that EPCRA does not require such a condensed schedule.

Specifically, they reiterate two recommendations rejected in the revised interim rules: (1) extending the deadline for filing trial-type hearing requests and proposed alternative conditions or prescriptions from 30 to 45 days after a Department issues its preliminary conditions or prescriptions; see 7 CFR 1.621(a)(2)(i), 43 CFR 45.21(a)(2)(i), and 50 CFR 221(a)(2)(i), and (2) allowing for consecutive rather than concurrent 90-day hearings when there are two unconsolidated hearing requests pending for the same conditions or prescriptions, thus delaying by 90 days the issuance of a decision by the ALJ for one of the hearings. The Departments continue to reject these recommendations for the reasons stated in the revised interim rules, 80 FR 17164-65, including that adding

more time to the hearing process raises a significant potential for delay in license issuance, a result Congress expressly sought to avoid in section 241 of EPA Act.

The commenters also recommend a rule amendment to allow for supplementation of the exhibit and witness lists which must be filed with the hearing request. The Departments decline to make such an amendment because supplementation is already allowed. See 7 CFR 1.642(b), 43 CFR 45.42(b), and 50 CFR 221.42(b).

Another commenter recommendation is that the rules should mandate rather than merely allow consolidation of hearing requests with common issues of fact. In fact, the rules do require consolidation for all hearing requests with respect to any conditions from the same Department or any prescriptions from the same Department. See 7 CFR 1.623(c)(1) and (2), 43 CFR 45.23(c)(1) and (2), and 50 CFR 221.23(c)(1) and (2).

Regarding all other situations, certainly consolidation may be appropriate to avoid inconsistent decisions, promote economy of administration, and serve the convenience of the parties. However, especially where the commonality is minimal, allowing the requests to be processed separately may be the most economical and streamlined approach, avoiding complicating one process with the numerous, intricate issues of the other process. Consequently, the Departments decline to accept the recommendation, opting to retain the flexibility to determine the best approach based on the unique circumstances of each situation. See 7 CFR 1.623(c)(3), 43 CFR 45.23(c)(3), and 50 CFR 221.23(c)(3).

Definition of Disputed Issue of Material Fact

In the preamble to the revised interim rules, the Departments offered guidance on the types of issues which constitute disputed issues of material fact and are thus

appropriate for resolution in a trial-type hearing, stating that legal or policy issues are not issues of material fact. The Industry Commenters contend that the Departments should revisit their guidance, asserting that the Departments' notion of what is a legal or policy issue is overbroad.

However, the focus of their comments is not on the relevant regulation or guidance, but on the positions taken by the Departments during previous trial-type hearings. They reference several instances in which ALJs disagreed with the Departments' litigation positions regarding what constitutes a disputed issue of material fact. The positions the Departments have taken in trial-type hearings are based on the specific facts and circumstances of the issues before the ALJ. The Departments' litigation positions are not the subject of this rulemaking; therefore, these comments do not necessitate a change to the regulations.

The commenters refer the Departments to the Departments' preamble statement in the revised interim rules that "historical facts' such as whether fish were historically present above a dam 'may be resolved based on available evidence and do not involve attempts to predict what may happen in the future.'" 80 FR 17178. The commenters assert that the "Departments' attempt to distinguish between an 'historical fact' and matters of 'prediction' is a false dichotomy." The commenters reason:

Whether a condition or prescription will, in practice, have the desired effect or achieve an agency's goals is a factual question, not a policy question. All conditions and prescriptions are attempts to achieve a future result, and thus have predictive elements. Parties often disagree with an agency whether its condition or prescription will achieve that result. An essential and fundamental element of the scientific method is prediction. . . . Scientific prediction is a tool for crafting environmental policies. Any disputed issues of material fact with regard to the science behind proposed conditions or prescriptions are appropriate for determination by the ALJ.

The Departments do not agree that the distinction between historical facts and matters of prediction is a false dichotomy. As explained in the revised interim rules, only disputed issues of material fact are appropriate for resolution in a trial-type hearing. 80 FR 17177-17178. While the Departments agree that some predictive elements of a condition or prescription may represent disputed issues of material fact in a particular case, such as whether a prescription will result in the passage of fish, other predictive elements of a condition or prescription may represent legal, policy or non-material issues that are not appropriate for resolution in a trial-type hearing. The Departments continue to believe that only disputed issues of material fact are appropriate for determination by the ALJ.

The Industry Commenters also contend that disputed issues with respect to alternatives considered and rejected by a Department are material facts that should be resolved by the ALJ. They assert that if a Department, in issuing a preliminary condition or prescription, considered and rejected other potential conditions or prescriptions, the scientific justification for why those options were rejected is material.

This contention is responsive to the Departments' position in the revised interim rules that immaterial issues not appropriate for ALJ consideration include those that blur the distinction between the EPAAct trial-type hearing process and the separate alternatives process created under new FPA section 33. The Departments' position and reasoning remain unchanged in this regard:

Trial-type hearings are limited to resolving disputed issues of material fact relating to a Department's own preliminary condition or prescription. Where the hearing requester's purpose is to establish facts that may support an alternative proposed under the distinct section 33 process, but that do not otherwise affect the Department's ultimate decision whether to

affirm, modify, or withdraw its preliminary prescription or condition, then the issue raised is not “material” to that condition or prescription.

Such matters must be resolved by the relevant Department through the section 33 process, and the ALJ should not make findings that would preempt the Department’s review.

80 FR 17178.

Prohibition against Forum-shopping: (1) venue selection, (2) ALJ selection

The Industry Commenters propose changes to the regulations based on the assumption that the Departments exert undue influence over the selection of a venue for the trial-type hearing and the presiding ALJ. The Departments disagree with this assumption and therefore the proposed changes are unnecessary.

Regarding venue selection, they offer purported examples of undue influence in support of a suggested rule change requiring the ALJ to balance the convenience of the parties. The commenters point to the assignment of an ALJ in the Pacific Northwest for FERC Project No. 2206, which involved a licensee based in Raleigh, North Carolina, with counsel in Birmingham, Alabama. However, that hearing was scheduled to take place in Charlotte, North Carolina, and was settled before a hearing was held.

The commenters also refer to the assignment of an ALJ in Sacramento, California, for FERC Project No. 2082, which involved a licensee based in Portland, Oregon, with counsel in Washington, D.C. However, the licensee withdrew a motion to hold the hearing in Portland after the overwhelming majority of the parties expressed to the ALJ a preference for a hearing in Sacramento during the prehearing conference. These examples do not demonstrate any undue influence.

Further, the apparent inference that the venue is determined by the location of the ALJ’s office is not correct. Nor is it determined solely by balancing the convenience of

the parties, as implied by the commenters suggested amendment. As pointed out in the preamble to the revised interim rules:

the ALJ has discretion to manage hearing locations. As the ALJs have done in prior cases, the Departments expect that an ALJ will take into consideration factors such as convenience to the parties and to the ALJ, the location of witnesses, and the availability of adequate hearing facilities when determining the location of a hearing.

80 FR 17170.

The Departments conclude that no change in the rules is needed regarding hearing venue selection.

Regarding the selection of an ALJ, the Industry Commenters assert that a Department “should not be allowed to hand pick a Department ALJ or an ALJ with a track record favorable to the Department.” They identify two potential remedial amendments: (1) use a lottery system to select an ALJ, or (2) preferably, use FERC ALJs instead of Department ALJs under the assumption that FERC ALJs would be more neutral and have more subject matter expertise.

The Departments disagree with the unsupported assumptions that they are exercising undue influence over the selection of ALJs or that a Department would consider “hand picking” an ALJ to obtain an advantage. In accordance with the mandate of 5 U.S.C. 3105, administrative law judges are assigned to cases in rotation so far as practicable, with due consideration given to the demands of existing caseloads and the case to be assigned.

The Departments also dispute the assertion that FERC ALJs are “more neutral” or have more germane expertise. In fact, the independence of all ALJs is protected and impartiality fostered by laws which, among other things, exempt them from performance

ratings, evaluation, and bonuses (see 5 U.S.C. 4301(2)(D), 5 CFR 930.206); vest the Office of Personnel Management rather than the employing agency with authority over the ALJs' compensation and tenure (see 5 U.S.C. 5372, 5 CFR 930.201-930.211); and provide that most disciplinary actions against ALJs may be taken only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for a hearing (see 5 U.S.C. 7521). As for expertise, the Departments' ALJs have considerable experience and expertise evaluating natural resource issues similar to those which typically underlie imposition of a condition or prescription.

Furthermore, the use of FERC ALJs would require the agreement of FERC and possibly a statutory amendment. In sum, the Departments disagree with the premises of the comment regarding the selection of ALJs and conclude that no related change in the rules is necessary or desirable.

Stay of Case for Settlement

The Industry Commenters also assert that the revised interim rules should permit settlement negotiations not only for 120 days before a case is referred to an Administrative Law Judge (ALJ)—as provided in the revised interim rules—but also during the period after the ALJ has issued the decision, yet before issuance of the Department's modified conditions. The Industry Commenters add that settlement discussions should not be prohibited under *ex parte* principles, considering that settlements ought to be encouraged at all points in a hearing process.

Notwithstanding the Industry Commenters' assertion, the Industry Commenters also offered support for the new 120-day stay period for purposes of facilitating settlement. We agree that both the length of this period and its placement at the pre-

referral stage could lead to more settlements and avoid the more formal stages of the hearing process. We also agree with the Industry Commenters that settlements should be permitted whenever reached by parties. Yet here we note that the availability of a stay period is not the only mechanism or incentive by which settlements can be facilitated, and that parties are at liberty to conduct robust and meaningful settlement discussions concurrently with the ongoing hearing process, at any stage in such process. Further, given that Congress established in EPAct a short 90-day time limit for completion of the trial-type hearing to avoid the potential for substantial delay in license issuance, it would be unworkable to provide for any additional amount of time beyond the revised interim rules' 120 day-period for a stay in proceedings in which to pursue a settlement.

Other Minor Modifications

1. Discovery

In the preamble to the revised interim rules, the Departments declined to amend the discovery provisions for the trial-type hearing in response to comments that the rules needlessly limit discovery by requiring authorization from the ALJ or agreement of the parties. The commenters recommended that the Departments adopt the approach of the FERC regulations at 18 CFR 385.402(a) and 385.403(a), which authorize discovery to begin without the need for ALJ involvement unless there are discovery disputes. Industry Commenters have reiterated these comments, further arguing that section 241 of EPAct guarantees the availability of discovery, not that such discovery must be first agreed to by the parties or authorized by the ALJ.

The Departments continue to disagree that the regulations should be changed for the reasons detailed in the preamble to the revised interim rules. See 80 FR 17168-69. In

summary, the Departments' rules do allow for rapid initiation of discovery and the criteria for allowing discovery are fairly similar to those utilized by FERC and federal courts. More importantly, discovery limits are necessary in this specialized trial-type hearing context to fit within the expedited time frame mandated by section 241 of EPA Act, and wide-ranging discovery should not be necessary, given the typical documentation generated during the license proceeding, including the record supporting the conditions or prescriptions.

Also, the fact that section 241 provides for "the opportunity to undertake discovery" does not guarantee unlimited discovery.

It is fundamental that the scope of discovery is not limitless and is restricted by the concepts of relevancy. *United States Lines (S.A.) Inc. -- Petition for Declaratory Order Re: The Brazil Agreements*, 24 S.R.R. 1387, 1388 (ALJ 1988). See also 4 James W. Moore et al., *Moore's Federal Practice*, P 26.56[1], at 26-96 (2d ed. 1993).

American President Lines, LTD v Cyprus Mines Corp., 1994 FMC LEXIS 33, *31-32 (Jan. 31, 1994); see also Fed. R. Civ. P. 26(d)(1). Further, as noted by the Supreme Court, even the liberal discovery rules of the Federal Rules of Civil Procedures,

are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." To this end, the requirements of Rule 26(d)(1) that the material sought in discovery be "relevant" should firmly be applied, and the . . . courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Herbert v. Lands, 441 U.S. 153, 177 (1979) (emphasis in original).

The revised interim rules reasonably incorporate similar standards for discovery, see 7 CFR 1.641(b), 43 CFR 45.41(b), and 50 CFR 221.41(b), to be applied by the administrative law judges to secure the just, speedy, and inexpensive determination of each case. The Industry Commenters have not addressed how application of those standards would unduly limit discovery. Because the Departments conclude that the standards are fair and reasonable, no change in the discovery provisions is warranted.

2. Page Limitations

In preamble to the revised interim rules, the Departments declined to extend the page limits for hearing requests in response to comments requesting that the limit for describing each issue of material fact be increased from two pages to five pages and that the limit for each witness identification be increased from one to three pages. The Departments did conclude that the required list of specific citations to supporting information and the list of exhibits need not be included in the page restrictions and amended the rules accordingly. See 7 CFR 1.621(d), 43 CFR 45.21(d), and 50 CFR 221.21(d).

The Industry Commenters renew the same requests without offering any new reasons why the requests should be granted. The Departments continue to believe that the page limits are generally appropriate and provide sufficient space for parties to identify disputed issues, particularly in light of the expedited nature of the proceeding. The Departments further note that they are bound by the same page limits in submitting an answer. See 7 CFR 1.622, 43 CFR 45.22, and 50 CFR 221.22. Therefore, for the reasons stated in the preamble to the revised interim rules, the Departments decline to amend the page limitations.

3. *Electronic Filing*

In the preamble to the revised interim rules, the Departments rejected commenter suggestions to revise the regulations to allow parties to file documents electronically, using e-mail or FERC's eFiling system. The Departments did agree that, in many circumstances, the electronic transmission of documents is a preferable means of providing documents to another party and revised the rules to allow for electronic *service* of documents on a party who consents to such service. However, the Departments noted that ALJ offices do not currently have the capacity or resources to accept electronically and print off the large volume of documents typically filed in connection with a trial-type hearing.

The Industry Commenters again suggest that electronic filing should be allowed at the ALJ's discretion, citing the example of a Coast Guard ALJ allowing filing by email pursuant to the agreement of the parties at a prehearing conference addressing a trial-type hearing request. For the reasons discussed in the revised interim rules, the Departments decline to adopt regulations that permit filing by email with the ALJ offices. 80 FR 17161-17612. Email is not a substitute for a dedicated electronic filing system in which administrative, information technology, and policy issues such as document management, storage, security, and access can be systematically addressed. Because none of the ALJ Offices have a dedicated system, the Departments will not authorize filing by electronic means.

Equal Consideration Statements

The Industry Commenters request that the Departments revisit their interpretation of section 33 of the Federal Power Act (FPA section 33) as described in the revised

interim rules. 80 FR 17176-17177. In the revised interim rules, the Departments interpreted FPA section 33 to require a Department to prepare an equal consideration statement only when a party has submitted an alternative condition or prescription.

The commenters state that the Departments' interpretation is contrary to the plain language of section 33(a)(4) and (b)(4), which they suggest should be read to require that a Department prepare an equal consideration statement whenever a Department submits any condition or prescription, regardless of whether a party submits an alternative. The commenters assert that the Departments' contextual analysis of FPA section 33, as described in the revised interim rules, is flawed because FPA section 33 unambiguously supports the commenters' interpretation. The Departments disagree with this comment.

As the Departments explained in the revised interim rules, the requirement that the Departments prepare an equal consideration statement must be read in the context of the overall statutory scheme. 80 FR 17177. Section 33 of the FPA is titled "Alternative Conditions and Prescriptions," and it sets forth a series of sequential steps for considering an alternative and reaching a final determination. Section 33(a)(1) permits any party to a hydropower license proceeding to propose an alternative condition. Under section 33(a)(2), the Secretary must accept an alternative if it "(A) provides for the adequate protection and utilization of the reservation; and (B) will either, as compared to the condition initially [deemed necessary] by the Secretary[,] (i) cost significantly less to implement; or (ii) result in improved operation of the project works for electricity production." 16 U.S.C. 823d(a)(2). When evaluating an alternative, section 33(a)(3) directs the Secretary to consider evidence otherwise available concerning "the implementation costs or operational impacts for electricity production of a proposed

alternative.’’ The Departments continue to believe that a contextual analysis of FPA section 33 demonstrates that section 33 requires the preparation of an equal consideration statement only when a party submits an alternative condition or prescription. No changes to the regulations are needed in response to the comment.

The commenters also disagree with the Departments’ perspective, as explained in the revised interim rules, that in the absence of an alternative the Departments will generally lack sufficient information to provide a meaningful equal consideration analysis of the factors required by FPA section 33(a)(4) and (b)(4). The commenters state that ample information is available to the Departments in the licensing application at the time the Departments adopt a condition or prescription, regardless of whether any alternatives were proposed under FPA section 33. The commenters observe that “[w]ithout this information, the Departments presumably would not have sufficient information to draft meaningful preliminary conditions and prescriptions.’’

The Departments note FPA sections 4(e) and 18, which authorize the Departments to issue conditions and prescriptions, do not require the Departments to consider certain types of information otherwise required by FPA section 33 when evaluating alternatives, such as “the implementation costs or operational impacts for electricity production of a proposed alternative.’’ 16 U.S.C. 823d(a)(3). Accordingly, the Departments generally lack related information until such time that the Departments evaluate an alternative and prepare an equal consideration statement, which occurs after the Departments prepare preliminary conditions and prescriptions.

When preparing an equal consideration statement, the Departments must evaluate “such information as may be available to the Secretary, including information voluntarily

provided in a timely manner by the applicant and other parties.” 16 U.S.C. 823d(a)(4) and (b)(4). The revised interim rules require a proponent of an alternative to submit information necessary to evaluate the alternative and prepare an equal consideration statement pursuant to FPA section 33. While such information may or may not be available in licensing applications prepared for FERC, the Departments will generally lack sufficient information to provide a meaningful equal consideration pursuant to FPA section 33 until such time as the proponent of an alternative submits the information with an explanation of how the alternative meets the criteria set forth in FPA section 33. No changes to the regulations are needed in response to the comment.

Hearings on Modified Conditions and Prescriptions

Commenters request that the Departments address perceived loopholes in the revised interim rules that would allow the Departments to avoid trial-type hearings in three scenarios. The commenters state that the interim final rules were silent as to whether a right to a trial-type hearing exists in situations where (1) the Department issues no preliminary conditions or prescriptions, but reserves the right to submit mandatory conditions or prescriptions later in the licensing process; (2) the Department adds conditions or prescriptions that were not included with its preliminary conditions or prescriptions; or (3) the Department’s modified conditions or prescriptions include factual issues or justifications that were not presented with its preliminary conditions or prescriptions. The commenters write that the revised interim rules addresses the second scenario by handling it on a case-by-case basis, but do not address the first and third scenarios. The Departments believe that the revised interim rules address all three of these scenarios and no changes to the regulations are needed. The Departments again

note that in several instances, the commenters discuss specific licensing proceedings. As stated above, such proceedings are not the subject of the rulemaking and therefore, the comments about them do not necessitate a change to the regulations.

The revised interim rules address the commenters' first scenario, in which a Department issues no preliminary conditions or prescriptions, but reserves a right to submit conditions and prescriptions later in the licensing process. The Departments received comments on the interim final rules that requested the availability of a trial-type hearing when a Department reserves its authority to include conditions or prescriptions in a license. The Department responded to this comment by stating that "under EPCAct, it is only when a Department affirmatively exercises its discretion to mandate a condition or prescription that the hearing and alternatives processes are triggered. Allowing for trial-type hearings and alternatives when the agencies have not exercised this authority would be both inconsistent with the legislation and an inefficient use of the Departments' resources. Consequently, these final rules continue to provide that the hearing and alternatives processes are available only when a Department submits a preliminary condition or prescription to FERC, either during the initial licensing proceeding or subsequently through the exercise of reserved authority." 80 FR 17159. Thus, the revised interim rules addressed the commenters' first scenario by providing a right to a trial-type hearing only when a Department submits a preliminary condition or prescription to FERC during the initial licensing proceeding, or when a Department submits a condition or prescription to FERC through the exercise of reserved authority after FERC has issued a license.

In discussing their first scenario, the commenters' language suggests that they may not be concerned about a Department's reservation of authority to submit conditions or prescriptions, but instead may actually be concerned with the availability of a trial-type hearing when a Department issues no preliminary conditions or prescriptions, but submits conditions and prescriptions outside of the timeframe contemplated in FERC's regulations for filing preliminary conditions or prescriptions, which is "no later than 60 days after the notice of acceptance and ready for environmental analysis." 18 CFR 5.23(a). See also 18 CFR 4.34(b). The Departments note that in this scenario, the Departments would not be exercising reserved authority to submit preliminary conditions or prescriptions because, as long as a licensing proceeding is pending, a Department has authority to submit conditions and prescriptions without the need to "reserve" its authority. A reservation of authority is only necessary for submission of conditions or prescriptions after FERC has issued a license.

The revised interim rules, when addressing whether a trial-type hearing should be held to address disputed issues of fact at the preliminary or modified condition/prescription stage, impliedly addressed the scenario where the Departments submit conditions and prescriptions outside of the timeframe for doing so in FERC's regulations. The Departments explained the circumstances under which a Department may submit a preliminary condition or prescription later in the licensing process and that the availability of the trial-type hearing process would be decided on a case-by-case basis: "[E]xceptional circumstances may arise where facts not in existence and not anticipated at an earlier stage necessitate a new preliminary condition or prescription. This circumstance would be handled on a case-by-case basis, in coordination with FERC

as necessary.” 80 FR 17164. The Departments have continued to apply this rationale and process in the final rules.

With respect to the third scenario, the Departments received similar comments on the interim final rule that requested “the regulations provide for trial type hearings at the modified stage if the modifications are based on new facts that did not exist or were not anticipated at the preliminary stage, or if the agency submits an entirely new condition or prescription at the modified stage.” 80 FR 17163. The Departments responded by stating that the revised interim rules “continue the approach taken in the interim regulations of scheduling the trial-type hearing process immediately following the issuance of preliminary conditions and prescription.” 80 FR 17164. The Departments reasoned that this approach allows trial-type hearings to occur during FERC’s licensing time frame as required by Congress, that it promotes efficiency, and that providing for trial-type hearings at the modified stage is not a reasonable or efficient use of resources. 80 FR 17163-17164. The Departments maintain this rationale in the final rules.

Industry commenters state that any final rules must provide a remedy for licensees who object to new conditions and prescriptions imposed at the modified stage, or when the Department’s modified conditions or prescriptions include factual issues or justifications that were not presented with its preliminary conditions or prescriptions. The commenters also state that the final rules must provide a standard for when a modified condition or prescription would trigger the right to a trial-type hearing. The Departments disagree with these comments. For the reasons discussed above and in the revised interim rules, the Departments will continue their approach of scheduling the trial-type hearing process immediately following the issuance of preliminary conditions

and prescriptions. The Departments again acknowledge “that exceptional circumstances may arise where facts not in existence and not anticipated at an earlier stage necessitate a new preliminary condition or prescription. This circumstance would be handled on a case-by-case basis, in coordination with FERC as necessary.” 80 FR 17164. No changes to the regulations are needed in response to these comments.

Submissions and Acceptance of Alternatives

The Industry Commenters believe the Departments are not complying with the requirements of FPA section 33 to accept a proposed alternative if the alternative: “(A) provides for the adequate protection and utilization of the reservation; and (B) will either, as compared to the condition initially proposed by the Secretary—(i) cost significantly less to implement; or (ii) result in improved operation of the project works for electricity production.” 16 U.S.C. 823(a)(2). The Departments disagree with this comment. Notwithstanding this comment, the Industry Commenters do not provide proposed revisions, and the Departments do not believe any changes to the regulations are necessary.

The Industry Commenters also “commend” the revised interim rules for adding a new change to allow for a revised alternative within 20 days of an ALJ decision, but express the view that this time period is still “unnecessarily short,” given an ALJ opinion’s typical length and underlying complexity. The commenters compare this timeframe to the 60-day timeframe in which the Departments may revise conditions and prescriptions, and suggest that the deadline for a revised alternative be, similarly, 60 days.

In response, the Departments note that the FPA specifically provides that the Departments will evaluate alternatives “based on such information as may be available to the [Departments], including information voluntarily provided in a *timely* manner by the applicant and others.” 16 U.S.C. 823d(a)(4), (b)(4) (emphasis added). To achieve a proper balance between the Congressional mandate to consider evidence otherwise available to DOI, including information *timely* submitted, and Congressional intent to avoid delays in the FERC licensing process, the Departments established a 20-day period for submittal of revised alternatives.

Exelon submitted comments concerning 43 CFR 45.74(c), which generally provides that DOI will consider information regarding alternatives provided by the deadline for filing comments on FERC’s National Environmental Policy Act (NEPA) document. This provision states that “[f]or purposes of paragraphs (a) and (b) of this section, DOI will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC’s NEPA document under 18 CFR 5.25(c).” 43 CFR 45.74(c). Paragraph (a) in 43 CFR 45.74 specifies the evidence and supporting material DOI must consider when deciding whether to accept an alternative. Paragraph (b) in 43 CFR 45.74 identifies the criteria DOI must use to evaluate whether to accept an alternative. Paragraph (c) in 18 CFR 5.25 identifies which FERC hydropower license applications require FERC to issue a draft NEPA document. As discussed below in more detail, the provision’s scope is limited to *license applications* under FERC’s Integrated License Application Process, as opposed to proposed amendments to existing licenses.

Exelon interpreted 43 CFR 45.74(c) as establishing a strict deadline for submittal of information regarding a proposed alternative. The commenter noted that the subsequent finalization of any conditions or prescriptions may occur much later than this deadline, sometimes because of pending applications for water quality certifications (required under section 401 of the Clean Water Act). Exelon expressed concern that a potentially substantial time gap between the NEPA comment deadline and finalization of a prescription or condition could result in the exclusion of the best and most current scientific research to inform DOI's evaluation of alternative prescriptions and conditions.

DOI does not believe that 43 CFR 45.74(c) will result in the exclusion of the best and most current scientific research to inform the Department's evaluation of alternative conditions and fishway prescriptions. DOI believes that considering information regarding alternatives submitted by any license party by the close of the FERC NEPA comment period will provide the Departments with all reasonably available information to evaluate an alternative condition or fishway prescription in accordance with Section 33 of the Federal Power Act.

Furthermore, as noted in the interim final rule, “[g]iven the complexity of the issues and the volume of material to be analyzed in the typical case, the Departments cannot reasonably be expected to continue to accept and incorporate new information right up until the FERC filing deadline for modified conditions and prescriptions.” 80 FR 17156, 17176. Nevertheless, the language of 43 CFR 45.74(c) only sets forth the requirement that DOI must consider pre-deadline submittals, and thus it does not preclude DOI from considering, in exceptional circumstances, evidence and supporting material submitted after the deadline.

It is not unusual for a license applicant to have authorization petitions pending at the time a Department considers an alternative. These types of pending petitions include, but are not limited to, applications for a Clean Water Act section 401 water quality certification.

As a practical matter, the parties and stakeholders share an interest in the timely submittal of evidence and supporting materials in order to ensure a robust alternatives process and avoid delays during FERC's licensing proceedings. The timely submittal of evidence under 43 CFR 45.74(c) also reflects a statutory process that prescribes specific timeframes. The EPAAct avoids delay by requiring the hearing process to be completed in a 90-day timeframe and "within the time frame established by [FERC] for each license proceeding." As noted in the revised interim rules, the hearing process was crafted to work within FERC's licensing timeframes. 80 FR 17156, 17163 (Mar. 31, 2015). The process for submitting, evaluating, and adopting alternatives was similarly drafted with the timeframes in mind.

Under FERC's rules, modified conditions and prescriptions, including any adopted alternatives, must be filed within 60 days after the close of FERC's NEPA comment period. 18 CFR 5.25(d). The timely submission of information under 43 CFR 45.74(c) is necessary so DOI has adequate time to consider the information and file modified conditions and prescriptions 60 days after the close of FERC's NEPA comment period.

Additionally, the FPA specifically provides that the Departments will evaluate alternatives "based on such information as may be available to the [Departments], including information voluntarily provided in a *timely* manner by the applicant and

others.” 16 U.S.C. 823d(a)(4), (b)(4) (emphasis added). DOI believes that 43 CFR 45.74(c) achieves the proper balance between the Congressional mandate to consider evidence otherwise available to DOI, including information *timely* submitted, and Congressional intent to avoid delays in the FERC licensing process.

Exelon also expressed concern that in instances where DOI exercises its reserved authority to include a condition or prescription in a license that FERC has previously issued, the language in 43 CFR 45.74(c), that the DOI “will consider” information submitted prior to the NEPA comment deadline, could potentially preclude the introduction of additional relevant and supporting information that was not submitted during the license-application-related NEPA process. As discussed above, the language of 43 CFR 45.74(c) only sets forth the requirement that DOI must consider pre-deadline submittals. Thus, it does not preclude DOI from considering evidence and supporting material submitted after the deadline in cases where FERC has issued a license and a Department exercises reserved authority. Therefore, notwithstanding Exelon’s concern, paragraph (c) of 43 CFR 45.74 does not preclude the introduction of relevant information that would support a proposed alternative condition or prescription after DOI exercises its reserved authority to include a condition or fishway prescription in a FERC license.

VI. Consultation with FERC

Pursuant to EAct’s requirement that the agencies promulgate rules implementing EAct section 241 “in consultation with the Federal Energy Regulatory Commission,” the agencies have consulted with FERC regarding the content of the revised interim rules. After considering post-promulgation comments, no changes were made to the revised interim final regulations in the final rules.

VII. Conclusion

These final rules have been determined to be not significant for purposes of Executive Order 12866.

OMB has reviewed the information collection in these rules and approved an extension without change of a currently approved collection under OMB control number 1094-0001. This approval expires November 30, 2018.

The Departments have reviewed the comments received in response to the revised interim rules and have determined that no change to the rules is necessary.

Accordingly, the interim rules amending 6 CFR part 1, 43 CFR part 45, and 50 CFR part 221, which were published at 80 FR 17155 on March 31, 2015, are adopted as final without change.

Dated: October 6, 2016.

Robert F. Bonnie,
Undersecretary - Natural Resources and Environment,
U.S. Department of Agriculture.

Dated: September 22, 2016.

Kristen J. Sarri,
Principal Deputy Assistant Secretary - Policy, Management and Budget,
U.S. Department of the Interior.

Dated: October 31, 2016.

Samuel D. Rauch III,
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U.S. Department of Commerce.

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