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Office of the Secretary
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PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM 10-4

To: Heads of Bureaus and Offices

From: Michaela E. Noble, Director /s/09/12/2018
Office of Environmental Policy and Compliance

Subject: Trial-Type Hearing Requests on Mandatory Conditions and Prescriptions for Federal Energy Regulatory Commission (FERC) Hydroelectric Power Licensing Proceedings Under Sections 4(e) and 18 of the Federal Power Act

PURPOSE

This memorandum describes the procedures to be followed in the Department of the Interior (Department) when a party to a FERC license proceeding requests a trial-type hearing under 43 CFR Part 45 to resolve disputed issues of material fact with respect to mandatory conditions and/or prescriptions (MCPs) filed by the Department under sections 4(e) and 18 of the Federal Power Act (FPA), as amended.

BACKGROUND

Section 241 of the Energy Policy Act of 2005 (EPAct) amended sections 4(e) and 18 of the Federal Power Act (FPA) to provide any party to a licensing proceeding with an opportunity to request a trial-type hearing to challenge disputed issues of "material fact" that have formed the basis for MCPs. In order for a fact to be considered "material," it must specifically be relevant to a Department's decision whether to affirm, modify, or withdraw the MCP. The EPAct also added a new section 33 to the FPA, allowing any party to the licensing proceeding to propose alternative MCPs that achieve the same effect as the Department's MCPs, either as a result of the determination on the material facts in dispute or when there is no material fact dispute. Other Environmental Review Memorandums (ERMs) address the Department's process for consideration of alternative MCPs. On November 23, 2016, the Departments jointly issued the revised final rules ([81 FR 84389](#)) to implement the EPAct.

In a trial-type hearing proceeding, an Administrative Law Judge (ALJ) will examine and make a determination on the material fact(s) disputed based on a preponderance of the evidence. Under 43 CFR 45.60(d), "[t]he ALJ's decision...with respect to the disputed issue of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis

for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825/[b].” All MCP material facts must be disputed through the trial type hearing process before an objection can be filed in court.

RELATED GUIDANCE

Refer to the ERM Series for additional, required guidance with respect to the Federal Energy Regulatory Commission (FERC) licensing process. The Office of Environmental Policy and Compliance (OEPC) updates the ERM series as needed.

Under other ERMS, the Department assigns actions in connection with trial-type hearings to bureau Regional Directors and Regional Solicitors with only occasional elevations to headquarters as appropriate.

PROCESS

1. Trial-Type Hearing Requests and Referrals

Trial-type hearing requests are due 30 days after the Department files preliminary MCP(s) with FERC. The filing of a hearing request will trigger a series of steps that the bureau(s) must take, both before the OEPC refers the request to an ALJ and afterwards. The deadlines for these steps generally are those identified in regulation at 43 CFR 45.4 (and noted below), unless otherwise provided for by the ALJ. Some of the tasks that the bureau(s) must accomplish before the OEPC refers the case to an ALJ include:

- Identify bureau staff that will participate in the trial-type hearing process, including a coordinator to oversee bureau involvement.
- Compile a list of disputed facts.
- Coordinate with other bureaus and agencies, as necessary.
- Identify subject matter experts to serve as witnesses and provide the Solicitor’s Office with witness résumés.
- Identify exhibits that the bureau intends to present at the hearing and provide the Solicitor’s Office with the exhibits, which shall include the administrative record.
- Work with the Solicitor’s Office to prepare an answer or a notice in lieu of an answer.

After a trial-type hearing request is filed, the bureau(s) will generally have 50 days to file an answer to the trial-type hearing request with the OEPC headquarters office in Washington, D.C. Refer to Attachment A for a description of what must be contained in any answer to a trial-type hearing request. If an answer is not provided, the bureau is deemed to agree that the issues listed by the requester are factual, material, and in dispute.

At any point during this time, the bureau(s) can meet with the requester to reach a settlement on the disputed issues of fact and have the hearing request withdrawn. Generally within 55 days after the deadline for filing requests for a trial-type hearing (85 days from the date the Department’s preliminary conditions and prescriptions were due), the OEPC will refer the case to an ALJ.

After the case is referred to an ALJ, a 90-day trial-type hearing process will start. This time period will be very demanding for both the Regional Solicitor's Office and bureau staffs and will entail discovery (including requests for production of documents, interrogatories, and possible depositions), pre-trial motions, trial preparation, hearing testimony, and post-trial briefing. At a minimum, bureau(s) will have to work with the Solicitor's Office to accomplish the following after the OEPC refers the case to an ALJ:

- prepare motions and discovery requests;
- respond to motions and discovery requests; and
- prepare witnesses for depositions and testimony.

Bureaus are required to provide funding for the costs of the trial-type hearing as well as provide the significant amount of staff time that will be required to defend the MCP(s). Attachment B provides a timeline of events (deadlines generally applicable to each step) in the trial-type hearing process ranging from when the Department submits its initial MCPs to when the ALJ issues a decision.

2. Coordination and Consolidation

Within 10 days of receiving a hearing request, the affected Bureau(s) must consult with other bureaus and Departments of Agriculture (USDA) and Commerce, National Oceanic and Atmospheric Administration (NOAA), to determine (1) whether any other preliminary conditions or prescriptions has been filed, and (2) whether any other hearing request has been received.

If multiple bureaus or Departments receive hearing requests, then a decision must be made on whether and how to consolidate the hearings. The criteria for deciding whether hearings will or may be consolidated are set forth in 43 CFR 45.23(c). In proceedings where Interior is the only agency that receives a hearing request, an Interior ALJ will conduct the hearing(s). Interior may elect to hold one consolidated hearing to address all matters, or hold a separate hearing for factual disputes related to section 18 prescriptions and for those related to section 4(e) conditions.

For hearings that may be consolidated with USDA and/or NOAA pursuant to 43 CFR 45.23(c)(3)(ii)-(iv), each Bureau should consider several factors, such as: (1) the number of conditioning and prescribing agencies involved, (2) the number and nature of issues for each agency, (3) ALJ availability for each agency, and (4) the cost of reimbursing a NOAA or USDA ALJ for an appropriate share of the ALJ's costs. Each affected bureau must address consolidation in its answer, stating whether its hearing request(s) will be consolidated and which agency will conduct the hearing. In consolidated hearings, coordination between the Department, including all affected bureaus, USDA, and NOAA will be crucial throughout the hearing process. Any decision on consolidation should be made in consultation with the Solicitor's Office. This consolidation and hearing agency determination should be conducted within 25 days of the deadline for filing hearing requests to allow adequate time within the mandatory deadlines in the trial-type hearing process.

3. Settlement

Before the OEPC refers a case to an ALJ, the trial-type hearing requester and the Department may, by agreement, stay the hearing process up to 120 days to allow for settlement discussions (43 CFR 45.24). The period of the stay and any subsequent hearing process (if required) must occur within the timeframe established for the license proceeding.

ROLE OF OTHER OFFICES

1. Role of the Solicitor's Office

The Solicitor's Office will provide legal counsel and will represent the bureaus in all aspects of the trial-type hearing process. Specifically, the Solicitor's Office will provide strategic and procedural guidance, assist in preparing and responding to discovery requests, and represent bureau personnel in pre-hearing conferences, depositions, and at the hearing. The Solicitor's Office will also represent the bureaus in any settlement negotiations, and assist the bureaus in deciding whether to propose or accept a settlement offer.

Role of the Office of Hearings and Appeals (OHA) and the ALJ Offices for Agriculture and Commerce

The Department's OHA will provide an ALJ, as necessary, to preside over trial-type hearings. Similarly, Agriculture and Commerce may provide an ALJ to preside over trial-type hearings related to MCPs issued by their respective agencies. If cases from two or more Departments are consolidated for hearing, the ALJ may come from any of the Departments involved.

Like Federal court judges, the ALJs have broad authority to conduct a fair, orderly, expeditious, and impartial hearing. The ALJs will decide issues of material fact, rule on motions, and regulate the course of hearings and conferences. Decisions of the ALJ regarding the disputed issues of material fact will be final for any Department involved in the hearing.

2. Role of the Office of Environmental Policy and Compliance (OEPC)

The OEPC is the office designated to receive hearing requests and alternatives submitted to the Department (43 CFR 45.21(a), 45.71(a)). With hearings, license parties must send all documents to the OEPC until the OEPC refers the case to a hearings division (43 CFR 45.12(a)). The OEPC will refer the case to the Department's Hearings Division or to USDA's or NOAA's hearings division within 5 days of receipt of all affected bureaus' answers (43 CFR 45.12(a)(1)). The OEPC will notify all hearing parties of the date of referral. After that, all documents must be sent to the appropriate hearings division. (43 CFR 45.12(a)(1))

GENERAL

This memorandum is new and issued as ERM 10-4. ERM 10-4 is new and a previous ERM 10-4 that addressed Environmental Review requests has been revised and reissued as ERM 10-1.

This memorandum establishes internal Department guidelines. It does not create any legal rights, substantive or procedural, enforceable at law by any party.

Attachments

**Required Content for
Bureau Answer to a Trial-Type Hearing Request**

1. For each of the numbered factual issues listed by the hearing requester, the answer must explain the bureau's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:
 - i. That the bureau is willing to stipulate to the facts as alleged by the requester;
 - ii. That the bureau believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;
 - iii. That the bureau believes the issue listed by the requester is not material, explaining the basis for such belief; or
 - iv. That the bureau agrees that the issue is factual, material, and in dispute.
2. The answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests, and if so:
 - i. Identify any other hearing request that will be consolidated with this hearing request; and
 - ii. State which Department will conduct the hearing and provide contact information for the appropriate Department hearings component.
3. If the bureau plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, it must provide a copy with its answer.
4. Indicate whether or not the bureau consents to service by electronic means and, if so, by what means.
5. List the witnesses and exhibits that the bureau intends to present at the hearing.
 - i. For each witness listed, the bureau must provide:
 - a. His or her name, address, telephone number, and qualifications; and
 - b. A brief narrative summary of his or her expected testimony.
 - ii. For each exhibit listed, the bureau must specify whether it is in the license proceeding record.

Trial-Type Hearing Process: Applicable Deadlines

| Process step | Process Day | Must generally be completed | See 43 CFR Part 45 Section |
|---|--------------------|--|---|
| (1) DOI files preliminary condition(s) or prescription(s) with FERC | 0 | | 45.20 |
| (2) License party files request for hearing | 30 | Within 30 days after DOI files preliminary condition(s) or prescription(s) with FERC | 45.21(a) |
| (3) Any other license party files notice of intervention and response | 50 | Within 20 days after deadline for filing requests for hearing | 45.22(a) |
| (4) Bureau may file answer | 80 | Within 50 days after deadline for filing requests for hearing | 45.25(a) |
| (5) OEPC refers case to ALJ office for hearing and issues referral notice to parties | 85 | Within 55 days after deadline for filing requests for hearing | 45.26(a) |
| (6) Parties may meet and agree to discovery (optional step) | 86-91 | Before deadline for filing motions seeking discovery | 45.41(a) |
| (7) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference | 90 | Within 5 days after effective date of referral notice | 45.30 |
| (8) Party files motion seeking discovery from another party | 92 | Within 7 days after effective date of referral notice | 45.41(d) |
| (9) Other party files objections to discovery motion or specific portions of discovery requests | 99 | Within 7 days after service of discovery motion | 45.41(e) |
| (10) Parties meet to discuss discovery and hearing schedule | 100-104 | Before date set for initial prehearing conference | 45.40(d) |
| (11) ALJ conducts initial prehearing conference | 105 | On or about 20th day after effective date of referral notice | 45.40(a) |
| (12) ALJ issues order following initial prehearing conference | 107 | Within 2 days after initial prehearing conference | 45.40(g) |
| (13) Party responds to interrogatories from another party as authorized by ALJ | 120-22 | Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference | 45.43(c) |

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| (14) Party responds to requests for documents, etc., from another party as authorized by ALJ | 120-22 | Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference | 45.45(c) |
| (15) Parties complete all discovery, including depositions, as authorized by ALJ | 130 | Within 25 days after initial prehearing conference | 45.41(i) |
| (16) Parties file updated lists of witnesses and exhibits | 140 | Within 10 days after deadline for completion of discovery | 45.42(b) |
| (17) Parties file written direct testimony | 140 | Within 10 days after deadline for completion of discovery | 45.52(a) |
| (18) Parties complete prehearing preparation and ALJ commences hearing | 155 | Within 25 days after deadline for completion of discovery | 45.50(a) |
| (19) ALJ closes hearing record | 160 | When ALJ closes hearing | 45.58 |
| (20) Parties file post-hearing briefs | 175 | Within 15 days after hearing closes | 45.59(a) |
| (21) ALJ issues decision | 190 | Within 30 days after hearing closes | 45.60(a) |

Note: a process day is defined as in 43 CFR 45.3; deadlines are identified in 43 CFR 45.4.