

**Testimony of J. Mark Robinson  
Director, Office of Energy Projects,  
Federal Energy Regulatory Commission  
Before the Committee on Energy and Natural Resources  
United States Senate**

**May 8, 2006**

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you to discuss the provisions of the Energy Policy Act of 2005 (EPA 2005) relating to the Federal Energy Regulatory Commission's hydropower licensing program. My name is J. Mark Robinson, and I am the Director of the Commission's Office of Energy Projects. Our Office is responsible for the regulation of non-federal hydropower projects; the certification of between 500 and 2,000 miles of interstate natural gas pipelines annually; the certification of natural gas storage facilities; and the authorization, safety and security of liquefied natural gas (LNG) terminals. I appear today as a Commission staff witness speaking with the approval of the Chairman of the Commission. The views I express are my own and not necessarily those of the Commission or of any individual Commissioner.

The Commission currently regulates over 1,600 hydroelectric projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 57 gigawatts of hydroelectric capacity, more than half of all hydropower in the U.S. and over five percent of all electric generating capacity in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

The Commission is in the midst of processing the 218 relicense applications being filed this decade. These projects include many large capacity and complex projects and have a combined capacity of about 22 gigawatts, or 20 percent of the Nation's installed hydroelectric capacity. The Commission is faced with the challenge of licensing these projects in a reasonable time frame, while complying with statutory requirements under the jurisdiction of a host of federal and state agencies.

Dependable and affordable hydroelectric energy requires a licensing process that is efficient and fair. As the Commission begins 2006, its hydropower staff is focused on pursuing various initiatives to meet current challenges, including implementation of the Commission's Integrated Licensing Process (ILP) to increase the efficiency and timeliness of licensing hydroelectric projects under its jurisdiction, while balancing stakeholder interests and improving the quality of decision-making.

The Commission's hydropower activities generally fall into three categories. First, the Commission licenses and relicenses hydroelectric projects. Relicensing involves projects that originally were licensed 30 to 50 years ago. The Commission's second role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety and security of licensed hydropower dams.

My testimony today will address implementation of the hydropower provisions of section 241 of Subtitle C of Title II and section 1301 of Subtitle A of Title XIII of EPAct 2005 and provide examples of how these sections have already begun to positively affect the hydropower program.

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing developmental and environmental interests, as required by the public interest standards of sections 4(e) and 10(a) of the FPA, various statutory requirements give other agencies a significant role in licensing cases. Several entities have mandatory authorities that limit the Commission's control of licensing requirements and of the cost and timing of licensing. For example, section 4(e) of the FPA authorizes federal land-administering agencies to provide mandatory conditions for projects located on federal reservations under their jurisdiction. Further, section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to "prescribe" fishways.

Prior to the passage of EPAct 2005, the other federal agencies were not required to consider or strike a balance among the many competing developmental and environmental interests, nor were they required to consider alternatives proposed to their mandatory conditions, even if those alternative conditions were less costly and achieved the same level of environmental protection.

Section 241 of EAct 2005 amends sections 4(e) and 18 of the FPA to provide that any party to a license proceeding 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 any agency's mandatory conditions or prescriptions. Section 241 further mandates that, within 90 days of the date of enactment of EAct 2005, the Departments of the Interior, Agriculture, and Commerce establish jointly, by rule and in consultation with FERC, procedures for the expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses.

Section 241 of EAct 2005 also adds a new section 33 to the FPA that allows the license applicant or any other party to the license proceeding to propose an alternative condition or prescription. The Secretary of the agency involved must accept the proposed alternative if the Secretary determines, based on substantial evidence provided by a party to the license proceeding or otherwise available to the Secretary, (a) that the alternative condition provides for the adequate protection and utilization of the reservation, or that the alternative prescription will be no less protective than the condition or fishway initially proposed by the Secretary, and (b) that the alternative will either cost significantly less to implement or result in improved operation of the project works for electricity production.

New FPA section 33 further provides that, following the consideration of alternatives, the Secretary must file with FERC a statement explaining the reasons for accepting or rejecting any alternatives and the basis for any modified conditions or prescriptions to be included in the license. If FERC finds that the modified conditions or prescriptions would be inconsistent with the purposes of the FPA or other applicable law, it may refer the matter to its Dispute Resolution Service (DRS). The DRS is to consult with the Secretary and FERC and issue a non-binding advisory within 90 days, following which the Secretary is to make a final written determination on the conditions or prescriptions.

Since enactment of EPAct 2005, Commission staff has worked with the U.S. Departments of Agriculture, Interior, and Commerce (Departments) to integrate the provisions of section 241 into the Commission's licensing process. We have reviewed the Departments' draft and interim final rules; met with the Departments several times to ensure that the timeframes for the trial-type hearings and alternate conditions and prescriptions fit within the licensing process and to consider how the rules affect pending (transition) and future projects; and commented on schedules for individual transition projects. We continue to coordinate on procedures for notices, for conducting the environmental review process, and priorities for holding hearings and/or considering alternative conditions.

We wish to compliment the Departments for issuing a joint Interim Final Rule in a short timeframe. We are satisfied that the opportunity for a trial-type hearing and the filing of alternate conditions and prescriptions are appropriately integrated into the Commission's licensing time frames. The attached flow chart shows the integration of section 241 of EAct into our licensing process. Provided that the timelines established in the Interim Final Rule are met, section 241 will not extend the Commission's licensing schedule.

The Hells Canyon Project No. 1971 is the first case to follow these timelines. Almost 500 terms and conditions and recommendations were received on the relicense application, including land management conditions under section 4(e) of the FPA and fishway prescriptions for federally listed bull trout under section 18 of the FPA. The National Marine Fisheries Service did not require fishways for anadromous fish at this time because of poor upstream water quality, but rather reserved authority to prescribe fishways at a later date. In February 2006, Idaho Power filed a request for trial-type hearings with the Departments of Agriculture and Interior and provided alternative license conditions under the Energy Policy Act of 2005 in response to the land management conditions and fishway prescriptions. The administrative law judges' decisions on the trial-type hearings are due in July 2006. Our draft environmental impact statement (EIS) is scheduled to be issued in July 2006. Decisions on alternative license conditions are due 60 days after issuance of the draft EIS.

Currently, there are 15 “transition” projects with hearing requests and/or alternative conditions (these are projects for which license applications had been filed when EAct 2005 was enacted, but with respect to which the Commission had not yet issued a license). The Departments have issued schedules for each of these projects. The attached table shows these transition projects and the Departments’ schedules for initiating hearings and filing modified terms and conditions.

Due to a scarcity of Departmental administrative law judges available to hear these cases, the Departments of Interior and Agriculture have stated that they are able to schedule only one hearing per month. We are concerned about the impact these schedules may have upon the Commission’s ability to take final action on these transition cases. For example, for the Priest Rapids Project No. 2114 in Oregon, Interior does not expect to file modified terms and conditions until June 11, 2007. The Commission staff issued its Draft EIS Statement in February 2006 and has scheduled the Final EIS for August 2006. The application is expected to be ready for final Commission action by October 2006. As a result of Interior’s hearing schedules and delayed filing of modified terms and conditions, final action on the application could be delayed by eight months or longer. Similarly, for eight of the remaining 14 transition projects, potential delays for taking final Commission action range from six to 14 months. We would hope that the Departments are able to obtain additional staff

resources to expedite hearings and the filing of modified terms and conditions for these cases.

Notwithstanding the potential for delays on the transition projects, there have been a number of positive outcomes that we surmise may have resulted from section 241 of EAct 2005:

For the Priest Rapids Project No. 2114 in Washington State, the licensee challenged the Bureau of Reclamation's (BOR) section 4(e) conditions under EAct. Subsequently, BOR withdrew its mandatory conditions and refiled them as recommendations pursuant to section 10(a) of the FPA.

For the Upper North Fork Feather River Project No. 2105 and the Poe Project No. 2107, both located in California, the National Oceanic and Atmospheric Administration of the Department of Commerce (NOAA Fisheries) substituted a reservation of authority to prescribe fishways in the future for its previously filed specific section 18 prescriptions.

For the Rocky Reach Project No. 2145 in Washington, the licensee submitted alternatives to Interior's section 18 fishway prescriptions. Subsequently, the licensee and Interior's Fish and Wildlife Service (and others) entered into a comprehensive settlement agreement addressing, among other things, the licensee's fish passage concerns.

As discussed previously, the FPA requires that the Commission authorize projects that are best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation, giving equal consideration to developmental and non-developmental values. Based upon the above examples, it appears that section 241 of EAct 2005, which more closely aligns the criteria that the agencies must use in formulating mandatory conditions with the Commission's "equal consideration" criteria for licensing projects under the FPA, is already reducing conflict between mandatory conditions and the conditions the Commission finds reflect the public interest.

In addition, the above examples seem to indicate that EAct 2005 has provided an increased incentive for agencies to provide cost-effective and factually supported mandatory conditions and has encouraged greater interaction between the resource agencies and the licensees in the development of environmental measures. EAct 2005 has added a degree of accountability that previously did not exist, and the federal resource agencies are making a laudable effort to comply with Congress' mandate. I believe this will result in mandatory license conditions that are fairer and more balanced.

A second important aspect of EAct 2005 is section 1301 of Title XIII Subtitle A, which provides for renewable energy tax credits for incremental energy gains from

efficiency improvements or capacity additions to existing hydroelectric facilities placed into service after August 8, 2005 and before January 1, 2008.

Under that section, the Commission certifies the “historic average annual hydropower production” and the “percentage of average annual hydropower production at the facility attributable to the efficiency improvements or additions of capacity” placed in service after August 8, 2005 and before January 1, 2008.

We have issued a guidance document to help our licensees seeking tax credit certification. The document, which is posted on our web site, explains what information our licensees need to provide for our review and evaluation to certify incremental energy gain. We have also disseminated information about the tax credit at national conferences throughout the country, to encourage efficiency upgrades.

These efforts have resulted in licensees initiating evaluation of possible upgrades at their projects. At this early stage, the Commission has already received 4 applications for a total capacity increase of about 17 megawatts that may qualify for the credit.

Thank you. I will be pleased to answer any questions you may have.

Attachments:

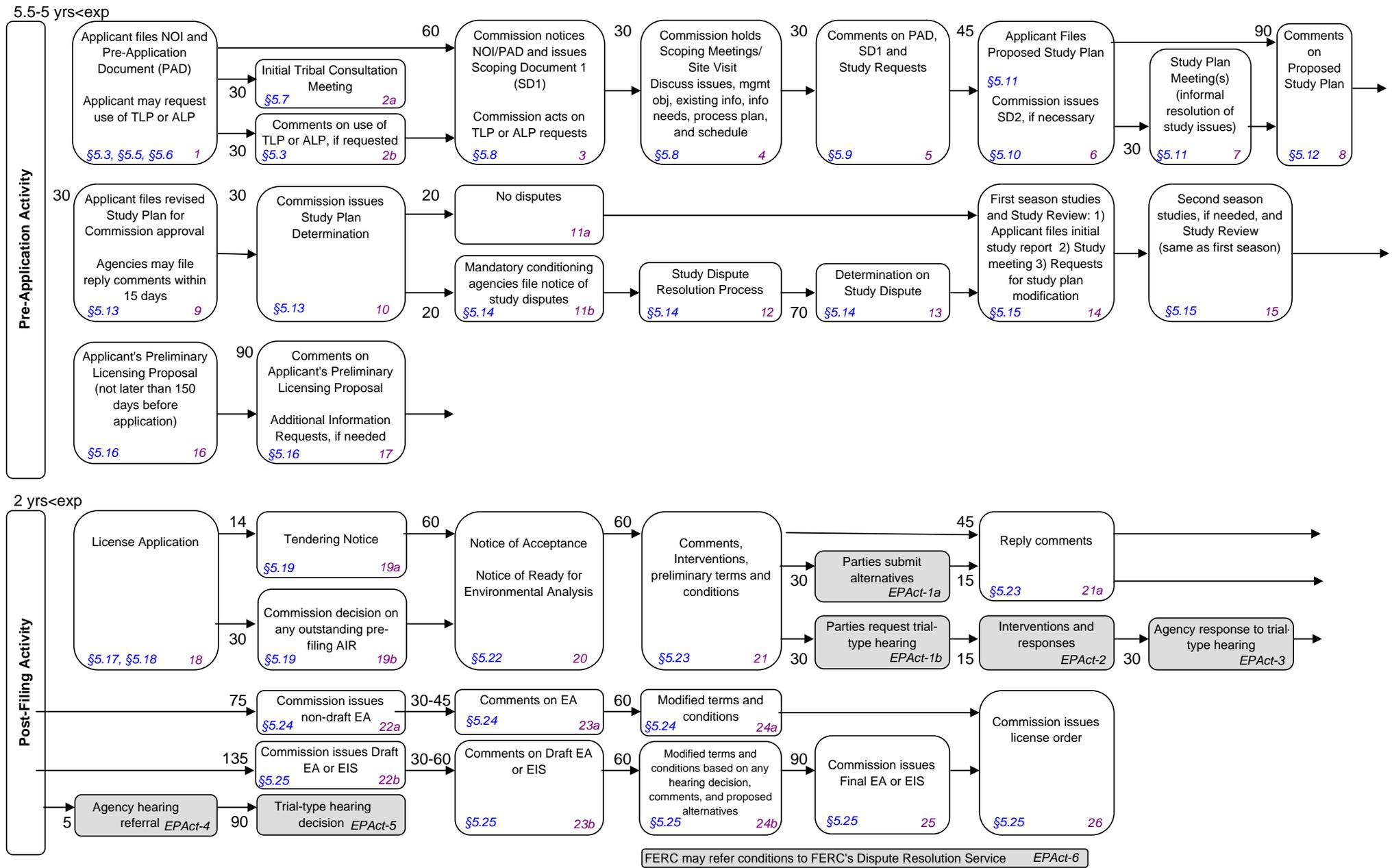
A. [Table of Transition Project Schedules](#)

B. [Flow Chart of section 241 and the Commission’s licensing process](#)

EPAct Transition Projects

Docket	Project Name	Licensee	Alternative Conditions Requested (EPAct 1a)	Trial-Type Hearings Requested (EPAct 1b)	Agency Response Due/Issued (EPAct 3)	ALJ Hearing Decision Due/Issued (EPAct 5)	Draft NEPA Due/Issued	Final NEPA Due/Issued	Modified T&Cs Due/Filed	Ready for Commission Decision
P-11858-002	Lake Elsinore	Elsinore Valley Municipal Water District	USFS - 4(e); Applicant - 12/15/05	None	None	None	2/17/06	Jul-06	6/26/06	Oct-06
P-2114-116	Priest Rapids	PUD No. 2 of Grant County, Washington	DOI - 18 presc. & 4(e); Applicant - 12/19/05	DOI - 18 presc. & 4(e); Applicant - 12/19/05	1/5/07 for FWS & BOR (separate answers)	4/12/07	Feb-06	Aug-06	6/11/07	Oct-06
P-2219-020	Boulder Creek	Garkane Energy Cooperative	USFS - 4(e); Applicant - 12/19/05	USFS - 4(e); Applicant - 12/19/05 (WITHDRAWN)	None	None	6/9/06	12/8/06	4/3/07	Mar-07
P-2107-016	Poe	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/2005	USFS - 4(e); Applicant - 12/19/05	7/31/06	11/3/06	Feb-06	May-06	3/5/07	Jul-06
P-2174-012	Portal	Southern California Edison	USFS - 4(e); Applicant - 12/19/05	USFS - 4(e); Applicant - 12/19/05	6/30/06	10/3/06	8/4/05	Feb-06	12/4/06	Sep-06
P-1893-042	Merrimack River	Public Service Company of New Hampshire	DOI - 18 presc. ; Applicant - 12/19/2005	DOI - 18 presc. ; Applicant - 12/19/2005	7/14/06 (FWS)	10/19/06	1/24/06	none-single EA	12/18/07	May-06
P-178-017	Kern Canyon	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/05	USFS - 4(e); Applicant - 12/19/05	9/30/06	1/3/07	3/22/05	9/27/05	3/5/07	May-06
P-382-026	Borel	Southern California Edison	USFS - 4(e); Applicant - 12/19/05	None	None	None	3/22/05	9/27/05	12/4/06	Mar-06
P-2105-089	North Fork Feather	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/05	USFS - 4(e); Applicant - 12/19/2005	8/31/06	12/4/06	9/13/04	11/10/05	3/5/07	Oct-06
P-2118-007	Donnells-Standard	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/05	None	None	None	9/30/04	3/1/05	3/5/07	3/3/06
P-2130-033	Spring Gap/Stanislaus	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/05	USFS - 4(e); Applicant - 12/19/2005	8/31/06	12/4/06	9/30/04	3/1/05	3/5/07	Dec-06
P-2342-005	Condit	PacifiCorp	NMFS 18 presc.; Applicant 12/19/05 DOI - 18 presc.; Applicant - 12/19/05	NMFS 18 presc.; Applicant 12/19/05 DOI - 18 presc.; Applicant - 12/19/05	DOI and Commerce will issue a schedule within 45 days of any FERC order reinitiating the licensing proceeding.	No date yet.	12/8/95	11/22/96	No date yet.	Deferred
P-2086-035	Vermilion Valley	Southern California Edison	USFS - 4(e); Applicant - 12/19/05	None	None	None	5/3/04	none-single EA	12/4/06	Dec-06
P-233-081	Pit 3,4, & 5	Pacific Gas & Electric	USFS - 4(e); Applicant - 12/19/2005	USFS - 4(e); Applicant - 12/19/2005	8/31/06	12/4/06	3/21/03	6/8/04	3/5/07	Oct-06
P-2194-020	Bar Mills	FPL Energy Maine Hydro LLC	NMFS 18 presc.; Applicant - 1/11/06 DOI - 18 presc.; Applicant - 1/11/06	NMFS 18 presc.; Applicant - 1/11/06 DOI - 18 presc.; Applicant - 1/11/06	1/19/2007 for NMFS and FWS (separate answers)	4/24/07	9/12/05	none-single EA	6/24/07	Jul-06

# Integrated Licensing Process and Section 241 of the Energy Policy Act of 2005



\*Section 241 of the Energy Policy Act of 2005 in gray.