

Senate Energy and Natural Resources Committee Holds Hearing on Hydro Power

DOMENICI:

Good afternoon, ladies and gentlemen.

The Committee on Energy and Natural Resources will convene, and thank you for your interest today in the oversight hearing on the implementation of the energy bill's hydropower licensing procedure.

As most of you know, it is an extremely important issue to me personally. In this time of increased oil and gas prices, hydropower is a clean, renewable and low-cost source of energy. My state of Idaho benefits greatly from the renewable resource, receiving almost 80 percent of its electricity from hydropower.

Over the last several years, I've worked to reform the hydropower relicensing procedure. The federal resource agencies, with their authority to issue mandatory environmental conditions on fishway prescriptions play a major role in FERC's processes; however, such conditions must be supported by facts and that has not always, in my opinion, been the case.

Last year, with the enactment of the Energy Policy Act of 2005, Congress finally brought much needed reform to this area and we did it in a way that I was very proud of: a bipartisan way.

If you had told me a couple of years ago that we would have had myself, Senator Dingell, Senator Domenici, Senator Barton, Senator Cantwell, Senator Bingaman, Senator Feinstein involved in a compromise on this issue, I think there are many in the audience and myself among them who would simply not have believed it.

But that's exactly what we did. It doesn't get more bipartisan than that listing.

The agreement provides full participation for all parties

involved in a licensing procedure. Any party may request a trial-type hearing on disputed issues of material fact to examine whether an agency's conditions is factually supported. Any party may propose alternatives. This is a sound policy which will provide much needed accountability to the process. The resource agencies have established the new implementing procedure, and with a full 20 percent of the nation's non federal dams up for relicensing in the next decade, we will see it in action.

It just so happens as it turns out that the first trial-type hearing will take place this June in my state of Idaho to examine issues relating to the Hells Canyon complex. I hope to attend those hearings personally. I'm fascinated to see how this process will work out.

Before I ask our colleagues to make any statements, let me introduce the witnesses here today.

I'm pleased to welcome Mark Robinson from FERC; Larry Finfer from the Department of the Interior; Dan Adamson on behalf of the National Hydropower Association; and Andrew Fahlund on behalf of American Rivers.

And I look forward, gentlemen, to your testimony and, again, let me thank you for being here today.

Now let me turn to the ranking member of the committee, Senator Bingaman of New Mexico, for any comments that he might have.

Jeff?

BINGAMAN:

Thank you very much, Mr. Chairman, for having this hearing. I think it's very useful to, as we were discussing before the hearing started, have oversight about some of these provisions that we included in last year's energy bill. I'm anxious to hear about the

agency's efforts to administer these new provisions.

During the course of considering that bill last year, I was glad to see that the hydroelectric relicensing provisions were revised and improved. Changes were made to ensure that all parties to a licensing proceeding, including states and tribes and third parties, are able to participate equally, and I think that was a good change.

I do continue to have concerns that the new process for alternative mandatory conditions and fishway prescriptions and the new trial-type hearings that you were referring to may add complexity and delay to an already complex and a slow process.

So I hope that's not the case. I think this hearing may shed some light on that. I hope it does. I hope the new provisions are being implemented in a manner that maintains protections for federal and Indian lands and fishery resources. I understand the goal of these provisions is to improve the cost-effectiveness and efficiency of conditions and fishways and this is not seen as an opportunity to undermine the conditions and fishways that resource agencies determine are necessary.

So, once again, thank you for having the hearing. I look forward to learning something from each of these witnesses and then I may have a question or two. Thank you.

CRAIG:

Jeff, thank you very much.

Let me turn to Senator Craig Thomas of Wyoming for any comments you have.

Craig?

THOMAS:

Thank you, Mr. Chairman.

I'm pleased to have this meeting and I welcome the witnesses here. This is the third meeting of this kind we've had -- one each week -- and we're going to continue to do that to seek to implement our energy policy that we put into place last year.

Hydropower, of course, is very important and produces about 7 percent of the electricity generated in the United States. It's much higher than that, of course, in the Pacific Northwest -- Wyoming about 5 percent of our electricity comes from hydro. But, nevertheless, the combination is about 10 percent in Wyoming of renewable sources and that's good.

As we've mentioned, I think our bill last year did a good job of establishing a bipartisan process for relicensing hydro and that's a good thing. So I strongly feel we need to continue to implement the provisions of the policy as quickly as possible and as effectively as we can. So I look forward to the witnesses this afternoon.

Mr. Chairman, thank you.

CRAIG:

Craig, thank you for being here.

Now we will turn to our witnesses, and I'm proud to introduce Mark Robinson, director of the Office of Energy Projects of the Federal Energy Regulatory Commission.

Mark, thank you for being here, and your full statement will become a part of the record. Please proceed.

ROBINSON:

Thank you, Senator Craig.

First, I'd like to make sure and pass along the sentiments of my boss, Joe Kelleher, and his desire to compliment you on the work that you did in getting the hydro provisions into EAct 2005. They have made a difference as I think my testimony states and hopefully I'll confirm here today, but he wanted me to make sure and pass that on to you, and I join him in that.

My name is Mark Robinson. I'm the director of the Office of Energy Projects. Our office authorizes the construction of LNG terminals, natural gas pipelines, and natural gas storage facilities. After EAct 2005 we'll be involved in electric transmission lines.

But more significantly today, we're involved in the licensing, the administration and the safety and security of about 1,600 hydroelectric projects across the country -- constituting about half of the nation's hydroelectric power.

And you hear statistics like you've already mentioned today about the hydropower and what it means to electric generation in this country -- 7 percent, 6 percent -- I hear different numbers. But that doesn't really reflect the significance of hydropower to the nation's energy security.

All you have to do is look back a few years when we had low water years in the Northwest as to how that can play out to ensuring the economy of this country. Or even more recently look at the low water year in Spain and how that plays out with our getting LNG delivery into the U.S. Hydropower, in many instances, is the base that everything else works from regardless almost to the percent that hydropower represents in the nation's energy portfolio.

We have about 218 hydroelectric projects coming up for relicensing this decade, constituting 22 gigawatts of power. So it's

a very important timeframe for us to be looking at how we are licensing these projects and ensuring that that electricity is available to the public.

About a year or so ago -- I guess a little longer than that -- the commission tried to prepare itself for these licenses that were coming in by the development and issuance of the integrated licensing process for handling the relicense principally of projects in this country. We spent a lot of time on that with all the agencies, people represented at this table, to make sure that we had it as right as we could at that time and to add discipline to a process that had gotten very long and very expensive.

One of the challenges of EAct 2005 in terms of taking the provisions that were provided principally on the mandatory conditioning authority of the agencies was making sure that that was integrated into our new integrated licensing process and wouldn't add delay. Yes, there was going to be some more steps principally with the agencies, but to make sure that it fit within our process.

And I think with the work done by the Department of Interior, the Department of Commerce and the Department of Agriculture and our own staff at FERC, we've accomplished that. We have a process that allows for those mandatory conditions to be developed, reviewed and brought into the FERC licensing process without delay.

Two things about those conditions, those provisions of EAct 2005 I'd like to mention: the trial-type hearing and the alternative conditions. I think both are important and they work in tandem to improve the conditions that the commission gets.

The trial-type hearing makes sure that the information base that everybody relies on to determine whether or not a fish ladder is needed, whether or not the minimum flow is correct, actually has a sound foundation and I think that's a critical aspect of what EAct 2005 did for hydro.

Then it also, EAct, allowed alternative conditions to come in that would be less costly and maybe allow for the project to operate better, but would also either adequately protect in terms of Section

4(e) or give equal -- I'm sorry -- no less protective of for Section 18 for prescriptions, but allow for other ideas to come in and be tested in the FERC marketplace as well as with the agencies to ensure that we have the right conditions in those licenses.

I think the net result of those provisions is that along with the responsibility that the agencies have to provide those conditions, they now have an accountability aspect to it. They have to take a hard look at what it is they're proposing to make sure that it does, in fact, serve the public interest.

And in many ways it aligns itself with the requirements that the commission has always been under: to ensure that the public interest is met, that the development and non developmental values are both looked at and given equal consideration in providing for those conditions and then posing them in a license.

The agencies now have that similar criteria in developing their conditions, and I think the net result of that ultimately will be less conflict, fewer ALJ hearings after we get over this initial round, I think, and a greater conformance between what the agencies would provide through their mandatory conditioning authority and what the commission would require in any case given the requirements that they have under the Federal Power Act.

I think that's nothing but good in bringing all the federal agencies into harmony in developing these licenses and will ultimately result in better stewardship both for the hydropower resources that we're all required to do to take a look at as well as the natural resources.

Thank you.

CRAIG:

Mark, thank you very much.

Now let me introduce Larry Finfer, acting director, Office of Policy Analysis, U.S. Department of Interior. Welcome before the committee.

FINFER:

Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, thank you for the opportunity...

CRAIG:

Do you want to see if your microphone is on, Larry?

FINFER:

All right.

CRAIG:

Thank you.

FINFER:

Mr. Chairman and members of the committee, thank you for the opportunity to testify on the implementation of Section 241 of EPAAct. I would like to make brief remarks and request my full statement be included in the record.

In issuing new licenses, it is important to ensure that significant natural resource and Indian tribal asset safeguards are put in place. These are addressed in mandatory conditions and prescriptions that are developed by the Departments of Agriculture, Commerce and the Interior and submitted to FERC for inclusion in the license.

CRAIG:

Would you just push the button on your microphone there?

FINFER:

I did.

CRAIG:

I'm probably going to ask you to pull that mike a little closer then.

FINFER:

All right. Is that better?

CRAIG:

Yes.

FINFER:

Historically, agencies have found it necessary to develop such conditions or prescriptions in a distinct minority of licenses. While intended to protect fish, wildlife and other important resources, we recognize they often entail additional costs for utilities and consumers. Licenses may be granted for 30 to 50 years, so it is important to consider all relevant facts and issues and potential alternatives by which to achieve the intended goals.

Section 241's implementation presented our three departments with significant challenges. I am pleased to report that we are meeting them, and we believe we have a process that meets your expectations.

Our first challenge was to promulgate rules for the trial-type hearing process. EPAct required the departments to establish rules jointly within 90 days, in consultation with the FERC and to include provisions for the opportunity to undertake discovery and cross-examine witnesses. It limited the length of hearings to 90 days and their scope to disputed issues of material fact.

We formed an interagency team to draft the rules and consulted with FERC, whose staff was accessible and helpful, and approved the final product. The main task was to create a process with a notably more rigorous timeframe than usual for administrative appeals in order to comport with the timeframe under which FERC must complete licensings.

The departments published the rules on November 17, 2005, as interim final rules with a request for comments. In publishing the rules, we indicated we would review the comments received and our initial experience in implementing the new process, and consider issuing final rules in about 18 months.

The rules set forth an efficient process for hearings and procedures for considering alternatives. Under the rules, any party to a proceeding may request a hearing or submit alternatives. Hearings will be conducted by administrative law judges. Agencies have the option to consolidate hearing requests into a single

proceeding.

Once a hearing request is received, parties may file responses and/or notices of intervention after which agencies file answers to their request. In the answer, an agency may stipulate to some or all of the facts which may preclude the need for a hearing on some or all issues. It may also consider whether an alternative should be accepted, and if doing so might preclude the need for a hearing.

If more than one agency receives a hearing request, they jointly determine whether to consolidate and who should hear the case. This pre-docketing phase takes 90 days after which the 90-day hearing clock begins.

The 90-day hearing phase provides for discovery and other essential steps followed by the hearing, post-hearing briefs and the ALJ's decision which is binding with respect to the facts. The hearing is timed to occur prior to FERC's issuance of a joint NEPA document in order to assure that the results are considered in a manner that reduces licensing delays. We will strive to ensure the deadlines are met.

After the rules are published, parties to proceedings with proposed conditions and prescriptions had till December 17 to request hearings or propose alternatives. We received 19 requests, covering 17 projects, all of which were submitted by licensed applicants and we consulted among ourselves and with FERC to develop schedules.

Since then, new requests received were for the Hells Canyon and Klamath projects. Klamath is the first for which requests for hearings and alternatives were received from parties in addition to licensed applicants.

The first hearings will address the Hells Canyon and Klamath projects. The current schedule calls for hearings on the Hells Canyon to be conducted in June and decisions by the respective ALJs in July. The Klamath schedule is expected to result in hearings by Commerce and Interior, unless a decision is made to consolidate, in August with a decision in September. Other proceedings have been

scheduled for later this year and in 2007.

In some cases, the departments and involved parties are considering settlements. And, in two cases, settlements have already been achieved, and the hearing requests have been withdrawn.

Each agency has identified ALJs to conduct hearings. Agri and Interior have done so through their respective ALJ offices. Commerce has augmented an existing MOU with the Coast Guard to cover these requests and training has been conducted.

These initial steps in implementing 241 are encouraging. We have a process in place to meet Congress' expectations. Cooperation continues to address hearing requests and alternatives. While interagency coordination and the consideration of alternatives are not new features, they actually enhanced this level of cooperation and resulted in a heightened and more rigorous consideration of alternatives.

Mr. Chairman, I am pleased to answer any questions you may have.

CRAIG:

Larry, thank you very much for that testimony.

Now let us turn to Dan Adamson, vice chair, Legislative Committee, National Hydropower Association here in Washington.

Dan, welcome.

ADAMSON:

Good afternoon, Senator Craig, Senator Bingaman, and Senator Thomas.

I'm Dan Adamson. I'm an attorney with the law firm of Davis Wright Tremaine. I'm here today to testify on behalf of the National Hydropower Association, NHA. Our statement has also been endorsed by the Edison Electric Institute, American Public Power Association, and NRECA.

Before I get into my statement, senator, just on behalf of NHA and the other trade associations, we want to thank you for the efforts you've made. It took almost 10 years to get this enacted, and I think you did an extraordinary job and it's a textbook example of how to get legislation passed on a very politically and technically complex subject. So we really appreciate what you've done, as well as that of all the other senators and House members that made this possible.

Licensing reform was needed because there were serious problems, as you've referred to, with the exercise of mandatory conditioning authority. The gist of the problem was this: If an agency issued a mandatory condition that either wasn't supported by the facts or ignored another more cost-effective alternative, the licensee or any other party essentially had no recourse; that would just go into the license.

And I'll give you one example. There's a project in Washington State called Box Canyon and that case, which is pretty recent, the Fish and Wildlife Service prescribed fish passage for bull trout, and that sounds good.

The only problem is the field surveys all indicated there were no bull trout there. And so the licensee had no recourse. And just as an example, you know, establishing fish passage for fish that don't exist doesn't do anything for the environment. All it does is impose cost on rate payers.

NHA and its partners strongly support the interim rule that Larry Finfer and his colleagues and Mark Robinson and others put together to implement the new law. We think, for the most part, it really does a good job of being consistent with congressional intent, and there are three provisions I want to highlight.

First, they decided that the new reforms would apply to pending licensing proceedings. That was critical. If they hadn't done that, this law would essentially have no impact for about five years, and I don't think that's what Senator Craig or any other of the people that worked on this intended.

They also clarified that the reforms apply to the exercise of reserve conditioning authority, which happens a lot. And they also put independent ALJs in charge of deciding whether or not a party has a right to a hearing. That's turning out to be very important. We do have a few concerns about the rule, however.

The first is the rule provides for hearings on preliminary conditions which aren't the conditions that will actually be imposed on you as a licensee. So our preference would be that those hearings be on the final conditions because those are the ones that are actually going to apply if they go through.

Another concern is we think it's very important to clarify that the new equal consideration requirement applies to all mandatory conditions.

Finally, as far as a trial-type hearing, we're concerned that the timetable for the hearing is so tight and inflexible that when you hit a very complex proceeding with literally hundreds of factual issues, it may be difficult to make the process work well.

So although we're generally very happy with what the departments have done, and we think, you know, considering the amount of time they had, it was really an extraordinary accomplishment, we'd like to see a revised rule issued later this year to fix these problems and some others.

Now that the rule has been issued or into early implementation and as has been mentioned a number of licensees have filed requests for alternative conditions and requests for a hearing, but we're still in the early stage. None of the alternative conditions have been acted on and only one hearing -- the Hells Canyon hearing that

you referred to -- has just started.

Nevertheless, the early indications from our standpoint are positive. It looks to us like the departments are trying to be more thorough and careful in the preparation of their conditions to make sure that they're supported by the facts, and that's very good news and that's consistent I think with congressional intent.

And just to mention one company, a Vista corporation, which has a project in Idaho and Washington State called Post Falls Spokane River. They are trying to settle, as they always have -- they've settled in other hydro proceedings -- but if they're not able to settle these hydro reforms offer kind of an alternative path forward for them and many other licensees that's very positive.

I just want to give a quick plug for extending the production tax credit for incremental hydro. This is very important to a lot of NHA's members and it is key to developing new hydro. And unfortunately, the timeframes in the current law aren't well suited to hydro, which is a long lead time development.

In conclusion, the hydro reforms are really making a difference. It's very positive. They are going to result in more economic energy production. They are going to preserve the environment and in some cases improve environmental protection.

And we really commend you, Senator Craig, and all the other folks that have worked on this legislation.

Thank you very much.

CRAIG:

Dan, thank you for that testimony.

Now let's turn to Andrew Fahlund, vice president of Protection

and Restoration, American Rivers. Andrew, welcome to the committee.

FAHLUND:

Thank you very much, Mr. Chairman, distinguished members.

Good afternoon, and thank you for inviting me to testify at this important oversight hearing.

My name is Andrew Fahlund and I'm vice president for Conservation Programs at the American Rivers, the leading national voice for rivers and river communities. I'm also a member of the Steering Committee of the Hydropower Reform Coalition, a consortium of 130 groups from around the nation whose common goal is ecological and recreational enhancement at hydropower dams.

American Rivers staff have logged hundreds of hours collaborating with utility agencies, American Indian tribes and others to improve the efficiency and effectiveness of the hydropower licensing process. These actions speak to the fact that we are not obstructionists opposed to change. We are advocates for efficiency, fairness and, of course, strong protections for public trust resources.

Over the course of the debate surrounding the energy bill, American Rivers stated its consistent opposition to the hydropower title cautioning that the proposed hydropower provisions would bias the process in favor of licensees who have vastly more resources than other parties. We also cautioned that it would lead to a steady erosion in the implementation of many vital and important environmental conditions.

Although proponents claimed that the energy bill did not eliminate so-called mandatory conditions, fish passage and protections for public land, we warned that the imposition of overwhelming red tape on resource agencies and a hideously litigious process would provide enough incentive to curtail their use.

While it is still early to be certain what the outcomes will be on many of these proceedings, it appears that our fears were not unreasonable. The mere request for a trial-type hearing, no matter how trivial, imposes a significant burden on all stakeholders, including the agencies.

Each party must gather evidence, line up witnesses, file interventions, meet onerous and complex service requirements, hire costly lawyers and begin pretrial discussions all within a few short weeks. Most licenses used to be decided through negotiation and settlement.

These new rules mark the beginning of a war of attrition, one that will divert time and attention from negotiation and settlement toward litigation. The new process is extremely burdensome for agencies which have been granted no additional funding to participate in trial-type hearings.

The alternatives process requires federal resource agencies consider 11 new factors in developing their environmental conditions. Congress needs to appropriate additional funding to the agencies to ensure that they can carry out these new mandates.

Thus far there's been a proverbial gold rush of requests for this sort of administrative litigation with the high-priced lawyers appearing to be the only ones guaranteed to benefit. There have been 13 requests for hearings addressing roughly 100 separate disputes and dozens of requests for alternative conditions.

The rules invite hearing requests -- trial-type hearing requests that are not even about disputes over material facts, but are instead disputes over policy and law. Industry seems to consider almost anything these days a material fact.

FERC, which has a process of requesting trial-type hearings on disputed issues and material fact, has the ability to screen whether a request is worthy of a trial or could be resolved through a paper process. We strongly urge the agencies to adopt similar discretion -- that they strictly limit hearings to true disputes over facts and

that Congress support those changes.

The FERC process is already complex but with the passage of the Energy Policy Act, 47 more pages were added to the rules. These rules establish a set of steps, timelines and requirements so complex that licensed applicants, agencies and non governmental organizations alike are struggling to understand and comply with them.

And it's no wonder, the agencies moved forward with implementing the new rules without any consideration of any public comment from any party. The so-called interim final rules aren't even complete. The rules fail to answer who has the burden of proof in a trial-type hearing: the hearing requestor or the agency that proposed the conditions. This is fundamental.

The rules see comments on this question ignoring the fact that perhaps dozens of trial-type hearings will take place before the rules are reissued. Hearing examiners will have to determine the burden of proof on ad hoc basis during that period. In FERC's trial-type hearings as in all administrative law it is the hearing requestor that has that burden of proof. We continue to urge the agencies to follow FERC's lead and for Congress to support them.

I would like to commend the Senate Energy and Natural Resources Committee and you, Mr. Chairman, for exercising your oversight role and urge you to maintain this oversight to prevent the loss of reasonable and important environmental conditions to red tape litigation and political pressure.

The committee also must ensure that the new process for hydropower licensing is adequately funded. The (inaudible) licenses expire today have never been subject to modern environmental laws. Hydropower licensing is a once in a lifetime opportunity to bring a 19th century technology up to 21st century standards. We hope that these rules and this law will not stand in the way of that.

Thank you.

CRAIG:

Andrew, thank you for your testimony. We appreciate it.

We'll follow our five-minute rule here for our questioning today and let me start that off, and let me ask this question of all of the witnesses.

Regarding the new equal consideration provision that requires the respective secretaries to demonstrate in writing that they give equal consideration to the effects of a mandatory condition on power and non power issues, it is my understanding that the Department of Commerce has taken the position that equal consideration applies only if an alternative condition is submitted.

Is that your understanding of the act or do you believe that the equal consideration requirement applies to all mandatory conditions regardless of whether alternatives are offered? Please?

ROBINSON:

No, that's not my understanding. Equal consideration should be applied to both preliminary conditions and final conditions. It would make little sense to have two sets of criteria within the same agency to design different outcomes.

In fact, it would be very helpful if under the preliminary conditions the agencies provided that equal consideration record with the preliminary conditions to demonstrate why it's in the public interest.

CRAIG:

OK. Anyone else? Yes.

FINFER:

Mr. Chairman, I can't answer for the Department of Commerce, but I can say that in the Interior Department this issue has been raised to a policy level and is being considered now and what we hope is that we can have a position soon and discuss it with the other departments and arrive at a consistent outcome.

CRAIG:

OK.

ADAMSON:

Well, I'd say when in doubt read the statute and the statute is very clear: It provides that equal consideration has to be documented, quote, "with any condition under Section 4(e)," or, quote, "any prescription under Section 18."

So I think it's pretty clear that equal consideration was intended across the board.

CRAIG:

Andrew, any comment on this provision?

FAHLUND:

Well, I guess my only comment is perhaps a little less

responsive to your question and more just a general restatement of what I said in my testimony which is that I think however you slice it, these agencies are in dire need of support and additional funding for their participation.

When you look across the board, agencies throughout the country are struggling to just keep up with the workload under the past rules and statutes. To keep up with this additional burden I think is going to require some additional support.

CRAIG:

Sure.

Well, you make an excellent point and, as I think we get into this, we'll see the burden of the agencies and it's their job to be forthcoming with the necessary requests for resources. This being the authorizing agency, we should be due diligent in that area. I appreciate that comment.

Another question of all of you: In your opinion, what constitutes a disputed issue of material fact for purposes of invoking the right to a trial-type hearing? Isn't it important that an independent administrative law judge make this determination?

ROBINSON:

Well, I think a material issue disputed fact is one that is pertinent to the issue or to the condition that's -- in whatever stage it's in, preliminary or final. And it does seem appropriate to have an ALJ to have the opportunity to decide whether or not, in fact, that is an issue of fact.

FINFER:

Mr. Chairman, that is exactly what the rules do; they do provide for the ALJ to make that determination, and material fact is defined as an issue which, if proved, would affect the department's decision to affirm, modify or even withdraw a condition. And in so doing, the rule also states that it does not cover legal or policy issues.

CRAIG:

Dan?

ADAMSON:

I think it's really important, and if you look at the early results in the hearing process, what the agency council has done is essentially state that every single issue raised -- every single one by industry is not a material fact.

And the judge just dealt with this issue in the Hells Canyon proceeding and he said, "No, you're wrong," to the agency council, "You're pretending as if this statute hasn't passed."

And so he didn't agree that every issue the company raised was a material fact, but I'd say about three-fourths of them. And so if you let Interior staff that have actually worked on the condition -- or Commerce -- I don't mean to pick on Interior -- decide whether or not a licensed applicant or a, you know, environmental group or what have you has the right to a hearing, you know, they have a lot of stake in that hearing not taking place, so you have to have the judge decide and he or she will be the determinant as to whether or not you get a hearing.

CRAIG:

OK. Any additional comment, Andrew?

FAHLUND:

I would urge that if the ALJs are to decide whether an issue is a material fact, I think that reaching some form of summary judgment very immediately before everybody pours enormous investment and time into a trial-type hearing is really critical because if you don't actually cut out the frivolous lawsuits, if you will, from the ones that are actually meaningful and probative, then you're simply just creating this war of attrition that I was talking about before.

You're just going to overwhelm the agencies and the ALJs and it's our understanding that at least with the Departments of Commerce and Interior that it's the district offices that are going to pay for each one of these things. And you know, you can just imagine a district manager confronted with the threat of all of these potential trials is going to, you know, quickly back off and run away despite the merits of their case. You know, this is just the realities of doing business out in the field.

CRAIG:

Thank you, all.

Let me turn to Senator Bingaman.

Jeff?

BINGAMAN:

Thank you.

Mr. Robinson, one of the points that was made in the testimony,

Mr. Fahlund's testimony, relates to -- I believe this was made in his testimony -- American Rivers has brought suit challenging what they call retroactive application of the rules; that is that the rules allow licensed applicants to challenge conditions and prescriptions that were final before the date that the rules were enacted or before the date of the enactment of the statute.

Is that an accurate statement as to what the rules provide? And if so, how is that justified?

ROBINSON:

I think, and Mr. Finfer can correct me if I'm wrong here, I believe the rules apply to those projects that are still pending as of November 17, 2005 -- the projects that are pending at the commission still have not been licensed as of November 17, 2005.

BINGAMAN:

And that date was the date that the rules became...

ROBINSON:

Published.

BINGAMAN:

... were published?

ROBINSON:

Correct.

BINGAMAN:

OK. But they are not -- a person is not able to challenge retroactively with regard to license applications where they've already been finalized. Is that right? I mean, where the rules have been finalized.

ROBINSON:

As long as the license had not been issued prior to November 17, 2005 anything that was in that licensing proceeding that's still pending was available for going for alternative conditions or an ALJ hearing.

BINGAMAN:

So even if the condition was final, if the license hadn't been issued, you could go back and challenge.

ROBINSON:

We had final 4(e) conditions in Section 18 prescriptions that were within the proceeding which was not completed, that were then available to go back to the Interior, Commerce, Agriculture for review.

BINGAMAN:

Do you think that's an acceptable arrangement...

ROBINSON:

Absolutely.

BINGAMAN:

... to go ahead and challenge those even though they were finalized?

ROBINSON:

Absolutely. The proceeding is still pending and it's not unusual for us to either have even reservations of authority for a Section 18 or 4(e) to do those conditions after the license has been issued.

(UNKNOWN)

Can I respond, Senator?

BINGAMAN:

Sure. Go ahead.

(UNKNOWN)

Thank you, Senator.

A mandatory condition has no force and effect until FERC issue a license and it often happens in these proceedings that it's years after the condition has been submitted that it's in a license and the departments always reserve their right to change the condition. So there's nothing reactive. You know, they have no force and effect until a license is issued. They don't apply to you.

BINGAMAN:

OK. Let me ask another question. And again, I guess, Mr. Fahlund has raised this argument about war of attrition and just the amazing burden that is being put on the various agencies here.

As I understand it, in your testimony, Mr. Adamson, you say that the resource agencies appear to be, quote, "rethinking their approach to conditioning projects." I believe that's what you said.

Is that, in fact, happening? Are the agencies rethinking their approach to conditioning projects and because of the fear that they've got this amazing legal challenge now available to them essentially backing off on the issuance of conditions? I mean, is that a real danger?

ADAMSON:

Senator, if I may, the act certainly underscored the fact that we need to provide for a foundation for the fact that there may be a trial-type hearing; therefore, we've got to outline our facts in a very meticulous way, provide detailed documentation and a very clear pathway of how they led to a condition and that is to anticipate that, indeed, a hearing may happen.

But it doesn't follow from that that we would necessarily pull our punches on protecting resources. In fact, I would say quite the contrary has occurred because -- at least so far.

The best example I can point to is the Klamath project conditions that were proposed by Commerce and Interior. Those were developed with full knowledge of the new Section 241 and the understanding that hearing an alternative request might be received, in fact, were likely to be received.

And yet, these conditions are very comprehensive across the range of resource issues and we're very confident in them and we believe they're sufficiently protective and we're not the only ones who feel that way.

In fact, Earthjustice, an organization that's been strongly criticized by resource agencies, and which, in fact, is representing the plaintiffs in the lawsuit against the rules, commented very favorably to The Washington Post after those conditions were submitted to FERC on Klamath.

And just to quote, their representative said, "It feels hopeful and it feels different. Credit is due the government scientists who are finally saying the right thing and the politicians who are allowing them to say it."

I don't believe Earthjustice would have said that if they felt we were skimping on protection.

BINGAMAN:

Mr. Fahlund, do you have a comment on this same issue?

FAHLUND:

Just a brief response and that is that while I very much appreciate, like Earthjustice did, the example set in the Klamath, I think that what we're going to find is that the highest profile

cases are going to receive those resources necessary to do their job and the ones that do not have those resources are not -- and that's where that war of attrition is going to take place.

And so, projects where, you know, groups like American Rivers and others are really pushing aggressively on one side and the industry is pressing on the other, those are certainly going to merit the attentions and the resources of the agencies while others, I think, are going to fall by the wayside.

BINGAMAN:

Thank you very much, Mr. Chairman.

CRAIG:

Senator Thomas. Craig?

THOMAS:

Thank you.

It's kind of interesting, gentlemen. I understand your principle responsibility apparently is regulation and licensing, but do any of you have any discussion or any thought or is there anything going on in your industry about efficiency or more production increasing? That's what we're talking about in energy these days. Do you have any feeling about that, any of you?

(UNKNOWN)

I think there was some aspect of EPAct 5005 which you've also

seen by the early evidence of for efficiency upgrades and additional capacity at hydroelectric projects and the incentives associated with those. We've had two applications so far for projects and I'm hopeful we'll see more -- four of those efficiency upgrades that were based solely on those incentives that you provided.

We also have four applications for increases in capacity at projects that may qualify for those incentives as well. Along with that, we've seen an uptick in the number of applications for new projects and I've been involved with licensing projects now for 29 years and probably over the last 15 years it's been rare that we would get an application. I think we have something in order of 16 pending license applications now.

ADAMSON:

Senator Thomas, I think, on behalf of the industry this legislation will make hydro more cost-effective and it will probably preserve in certain cases hydro that might otherwise go ahead because of the license to process.

And then I mentioned previously the production tax credit on incremental hydro. A number of our members are building projects or upgrading projects in response to that. So we think it's very important to have more hydro resources at existing plants to increase their capacity and hopefully new projects as Mark Robinson has mentioned.

THOMAS:

Thank you.

Mr. Finfer, how many new rules impacted the agency's method of -- have the new rules impacted the agency's method of studying conditions? How many alternatives have you granted or denied?

FINFER:

Senator, in answering Senator Bingaman's question, I indicated that the early notice was that we were still proceeding as we had before in meeting our responsibilities. In terms of actual actions to date, we have not acted in a complete way on any of the conditions or alternatives that have been proposed to us.

That process is just under way. We are just having the first two hearings in June and in August, respectively; after which we'll have the results of the hearings and the alternatives will be assessed. And there will be more proceedings this fall and this winter. So as of now, no actual findings have occurred.

THOMAS:

So there haven't been any settlements reached?

FINFER:

In terms of settlements, yes. Settlement processes are continuing even when these requests have been filed. And in fact, in two cases for which hearings have been requested, settlements have been arrived at and the hearing requests have been withdrawn. There are more settlements among this group that are under way and which could potentially occur.

THOMAS:

How do the agencies intend to implement the equal consideration provision of 33(b)?

FINFER:

We mentioned some of that in our rule and specifically that equal consideration does not mean equal treatment but literally what it says in plain language is that we will weigh the various impacts and concerns and try and consider them faithfully and equitably. The new process puts in place a very structured requirement whereby the secretary involved has to produce a finding and determine whether to accept the condition.

In fact, the process, of course, requires us to accept the condition unless we can demonstrate why it should not be accepted. As I've mentioned, we have not gone through that process yet for any condition.

THOMAS:

It sounds pretty complicated.

Mr. Robinson, has FERC invoked the dispute resolution process yet?

ROBINSON:

No, we have not. We haven't gotten that far down the process.

But if I could just make one comment about this war of attrition very quickly; I actually see this quite differently than the way it's been represented. I think over time what we'll see is a coming together of these licensed conditions, mandatory or otherwise, because we're all now working under the same standards that Congress has set for us.

We're going through a period here where people are feeling their ways through but as Mr. Finfer said, we're seeing movement already

toward settlement discussions where previously it was just, here's your condition, take it. And I think that's a really positive step to try to work these things out and will result in less conflict; not a war of attrition, but less conflict and more public interest licensing being done at the commission as a result of EPAct.

THOMAS:

It sounds like a pretty complicated process though.

Thank you, Mr. Chairman.

CRAIG:

Thank you very much, Craig.

Let me go right back to that question. Then under what circumstances will FERC invoke the new dispute resolution process?

ROBINSON:

Well, if the secretary, after having a trial-type hearing and alternative condition, comes to the commission and says, "Here is our final conditions," and the commission looks at those and believes that they are not consistent with equal consideration standards, the commission has the opportunity to refer that -- it's not a must, but can refer that to the dispute resolution process at the commission.

I think that's a 90-day period that we're allowed for that and then that finding would be provided back to the secretary for a final statement from the secretary on whether or not those are, in fact, their final terms and conditions.

CRAIG:

Mark, could FERC report back to this committee in about six months to see what additional process is being made in implementing the hydro provisions of EPAct?

ROBINSON:

I think it's important that we do that. We are just at the early stages. There's very much promising -- there's a lot promising going on that's not even in the ALJ or the alternative condition process, but the rollout from this and the way the agencies are dealing with licensees, I think that's one of the real pluses here.

But I think in six months we'll have a much better picture on how the actual process of the ALJ process or the alternative condition process is actually working. So we'd be happy to.

CRAIG:

Well, I think it is important that we monitor it closely because several expressions have been made as to what is believed might happen. But until it happens or we see clear evidence that there is difficulty, I do believe we're at a bit of a rush to the line at the moment and once this thing levels off and we get through this process several times, will we have a clear vision of what is or is not happening there?

Senator Bingaman had asked you, in relation to concern that American Rivers expressed as to, "Would you do your job well?," and I think I heard Mr. Fahlund suggest that depending on the profile of a project it would be kind of pick and chose. I can't let that one lie.

Are you suggesting, Mr. Fahlund, there will be a double standard within the agencies as to how they would handle one licensing process versus another?

FAHLUND:

I would posit that in any situation where you're managing scarce resources, you have to allocate those resources in the best way that you see fit and I think that, you know, if you have a project that has a higher profile, I think that you're more likely to allocate those resources to that project if you have -- you know, if those resources are limited.

So I do, in fact, stand by my statement and I think that -- and again, this is just speculation at this point because we haven't seen the results of too many of these things yet, but I fully expect to see agencies either never issuing conditions in the first place or backing off from them very, very quickly simply because they can't handle the cost of actually even trying to fight a frivolous petition for a trial-type hearing.

CRAIG:

And I have to come back again, do you think American Rivers would allow that kind of action to stand without public exposure to it or bringing it to the attention of the Congress if this were to happen?

FAHLUND:

Well, I think actually bringing it to the attention of the Congress is precisely why I was encouraging these continued oversight hearings, but American Rivers will try to bring it to the attention to the public. But, of course, we can't see what's going on in the minds and in the backrooms of the agency when they're making those kinds of decisions.

All we can do is point to the fact that -- we can point to the absence of conditions that we think should clearly be there, but unfortunately EPCRA didn't set up a situation where an absence of a condition is very easily challenged. It certainly makes challenging existing conditions very easy -- too easy in my view.

CRAIG:

Well, we will monitor closely as I am confident you will as we go through this and that we get the necessary and appropriate effect.

FAHLUND:

We would certainly appreciate that.

CRAIG:

Mr. Finfer, as we were developing the hydro legislative piece, some critics warned that the opportunity for the trial-type hearing would discourage settlements. Has that happened or are settlements -- I think you've already said -- are still under way? That has not happened?

FINFER:

Mr. Chairman, it's early but we are not seeing that settlements are being discouraged. In fact, some settlements have already occurred among projects for which hearings have been scheduled and more discussions are under way among a number of the ones that are still active.

And I would also add that since the Klamath conditions were submitted, the stakeholder-driven settlement process that's taking place there for Klamath does not appear to have been deterred by the fact that the hearings were requested on Klamath. So the early indication is that settlements are not being deterred.

FAHLUND:

Mr. Chairman, may I respond to that...

CRAIG:

Yes.

FAHLUND:

... because I think this brings up a really important point and that is while I don't think that settlement, at least in the Klamath, has been derailed altogether, it has been postponed. It's essentially been frozen in place until the trial-type hearing process is completed because we simply just can't work on both tracks at the same time. No one can. It's just too resource intensive for that period of time.

And Mr. Adamson, and I might shock him right now, but he made a recommendation about the timeline being -- or a suggestion that the timeline is tight, and I think that we would encourage the agencies to have a provision, an ability to impose a stay on trial-type hearing proceedings. Just hold it in abeyance for a period of time to facilitate settlement agreement, particularly where folks have very limited resources and can only kind of work in one venue at a time.

We've done that with the commission. I think it's been by and

large effective. They have -- you know, I don't think people have abused that stay process too much, but I think it would be helpful to consider as an addendum.

FINFER:

Yes, Senator, I agree that some type of a limited stay, maybe 30 to 60 days, just to figure out if you can sit down and work things out so you're not just thrust right into the hearing immediately.

CRAIG:

Mr. Robinson?

ROBINSON:

Congress, I think, quite rightly when they passed this act put a 90-day provision in there to complete these hearings. We've worked hard with the agencies to make this work within the ILP timeframe. Keep in mind, this is a five-year process we're talking about and people have been talking for years and years and years by the time they get to the point that they would have a trial-type hearing on alternative conditions. To think that we need another 30 days at that point, it's just going to build in the expectation that we'll get a stay or get another delay.

I would encourage the agencies to stay with the timeframes that are in the rule and in the law.

CRAIG:

Well, gentlemen, one of the reasons you're before us today looking at new law and how to implement it is because of the way the

old law was handled: 12 and 14 year processes that cost millions and millions of dollars.

And it was what drove this Congress to make change; hopefully, the change to be transparent and open, but predictable, procedural in a way that there's some relationship as we work through these kinds of processes.

And so I certainly don't believe people ought not have access or that there not be appropriate time, but time here has been so badly abused in the past, at least this senator is very sensitive to it.

Now I understand startup, and I understand getting into a new law and process and procedure and making it work well, and I think all of us understand a little flexibility in that process. But that's why the Congress was specific as it relates to time.

Mr. Finfer, why didn't the resource agencies proceed with a notice of comment period before issuing the hydro rule?

FINFER:

Senator, we took a look at the issue and decided that these rules were actually procedural and interpretive rather than substantive, and hence did qualify for the exemption from notice of comment under the Administrative Procedure Act.

Further, the act included a mandate to put the rule in place in 90 days and it was a very emphatic mandate. So we decided that those two factors together gave us reason to publish as interim final, but with a request for comment. We were hoping that that offered the best and that it allowed the parties to get into the process sooner but still provided the opportunity for comment which they ought to have the right to and which, in fact, we need because it is a new process.

CRAIG:

Why is it appropriate that the rule apply to pending procedures? That was discussed earlier. For the record, how did Interior see that?

FINFER:

Well, in the act, the phrase -- the operative phrase that's used throughout -- is licensed applicant, and it didn't say an applicant for a license who applies after the date of enactment. It said licensed applicant and just reading the plain language, we believe that this was the appropriate reading of the statute and hence applied it accordingly.

And I should add, the opportunity for people with existing conditions and prescriptions to use the process was limited. They had to file in the first 30 days after the rule was published; that is by December 17. So that was a one-time opportunity. The window was not left opened forever.

CRAIG:

So how many are we talking about?

FINFER:

We received for these 19 requests of various types covering 17 projects and those are the requests along with the few new ones like Hells Canyon and Klamath that we are processing right now.

CRAIG:

Mr. Robinson, from your perspective, how is the ability to request a trial-type hearing and offering alternatives an improvement over the previous process, and how do you respond to the criticism that the new process will add additional time to an already lengthy process?

ROBINSON:

Well, as it's structured now it adds no time at all. And under any circumstance the alternative conditions adds no time, equal consideration adds no time.

The problem you had before is that you could literally -- and I worked on proceedings where you get a condition and there's no facts identified at all. But you have no recourse except appealing the license order years later in a court of appeals.

And, in fact, what this will do is give you or an environmentalist -- I know Andrew is not happy with this law and not happy with this proceeding. But I predict that within five years -- I predict that American Rivers or some other environmental group will use this condition because they think that a decision is not supported by the facts.

So, you know, it's going to go both ways over time, but right now you have an opportunity to solve this problem at the get-go instead of waiting for years and then having a Cushman-like situation where relicensing is sitting around in a court of appeals for 10 years, which is I think what we're trying to avoid.

CRAIG:

In this testimony, Andrew asserts that environmental conditions present negligible cost to power supply. Would you agree, and how will electricity rate-payers benefit from the hydro relicensing reform?

ROBINSON:

Well, I think that it definitely has an impact. I mean, I just think of a couple of proceedings. One is Box Canyon where the price of power from that project has doubled according to FERC because of relicensing. So that's certainly a rate-payer impact. Another recent project, just to pick one out of the hat, is Baker River project. There's been a settlement there. It's another project in Washington State so the licensee supports that. But that settlement did more than double the cost.

And so, I think if you look, for example, in the Northwest overtime at all the projects as they go through relicensing and add together cumulatively the increase in cost from every project, you get a pretty substantial impact.

But sure, one proceeding, if it's a really large company, it's going to be spread out amongst a lot of people. But, cumulatively, it all adds up.

CRAIG:

Andrew, when Congress first began to look at hydro licensing reform, we developed language that American Rivers criticized as licensee applicant only. Your organization advocated that all parties to the proceedings be given the same opportunity to request a trial-type hearing and offer alternatives. In our bipartisan agreement we did just that.

Do you agree that any party, including an organization such as American Rivers, can trigger a hearing?

FAHLUND:

Absolutely, Senator. And I guess what you're hearing from me today is that American Rivers may be able to participate as a practical matter in some of these proceedings. Again, getting back to the prioritization issue, we'll have to prioritize as anyone does.

My concern, and I'm representing 130 groups from around the country, most of whom have very limited resources, and I think the ability of those organizations to keep up and participate as a practical matter even though they have the legal possibility of participating, I think it's going to be increasingly difficult.

CRAIG:

OK. Do you agree that any party can offer alternatives?

FAHLUND:

Yes, sir. The problem there is that the alternatives that are -- the way the alternative condition language is written, only conditions that must be included by an agency, they have to be cheaper or no less, I guess, better for power production and they're less protective, but what about if the agency low balls for the condition?

I think that that was always a concern of ours and something that we always believed we should have the right to an equitable appeal on.

CRAIG:

So now that American Rivers is beginning to see where the law is taking us with the agencies involved and it's, I gather by your testimony, your continued opposition, is the opposition what you

envisioned the process to become and be or is it, as you have said, a process that could become more costly to the least among us?

FAHLUND:

I think that the way we view the -- it's very hard to judge from sitting where we are right now. I mean, these things are just getting started and so we really haven't launched into it. So it is -- in all fairness, it's very hard to judge, but I do think that every indication is that our concerns have been realized and that this is going to be a lot messier than I thought it needed to be.

I would have preferred an opportunity to get at what Dan has been describing -- his interest, at least -- but doing it in a much more streamlined, efficient and equitable way.

Now given that that's not an option before us and that we have to do the best with what Congress passed, I certainly hope that we can work with everyone here to make this work well and work effectively without any compromise to environmental protections. I'd love to come back here in a year and eat crow but I...

CRAIG:

I might give you that opportunity.

FAHLUND:

You might.

(LAUGHTER)

But I don't know that I will be. I might be crowing, so.

CRAIG:

Well, I think, Mr. Finfer and others in their testimony have stated it well. We're talking about a process that's valid for a period from 30 to 50 years, and we ought to try to get it right.

FAHLUND:

Yes.

CRAIG:

At the same time, we ought not, in dealing with the federal government, make it such a phenomenally difficult process that it drives costs beyond where -- unless you simply believe hydro ought to be extracted from the rivers and streams of America -- then it ought not be so costly as to drive it through to the consumer who's finally beginning to awaken to the new realities of energy costs in our country.

So I think all of us are extremely concerned about that and I think you agree with me as all of you do that it's tremendously important that we get the facts and the conditions right and that's why a reasonable dialogue, a trial-like proceedings, where there is dispute, that there are alternatives that can be argued effectively.

I became quite frustrated that agencies had, in the name of the environment, an absolute authority or dictatorial ability when, in fact, they may not be the experts or their expertise may not be where it ought to be to arrive at the right environmental conditions to continue to maintain an effective, efficient hydro operating facility.

So we will stay tuned as all of you proceed. We'll watch it very, very closely.

Andrew, I'd love to have you eat crow but more importantly I'd also love to have you come back and say, "No, they're getting it wrong and here's what we can do to improve it."

And that's going to be certainly our part of the job here also. But I must tell you to date, gentlemen, I'm pleased with what I see and I hope we can continue to move down this road toward an effective open process that brings this thing into a predictable timeline and time is money. There's no question about it.

And if timeframes are shortened once this procedure is in place, maybe the cost concerns that you have will be lessened to some degree but certainly there will be an obligation on the part of all parties involved.

So I want to thank you all very much for being with us today, taking time. We'll have you back before us. And as I've asked you, Mark, to report within six months as to where this procedure is taking us. By then you would have actually have had a chance to see how it's working in a trial-like proceedings and whether, in fact, we're getting what we have asked for here.

Gentlemen, thank you all very much for coming. We appreciate your time and your testimony.

The committee will stand adjourned.

CQ Transcriptions, May 8, 2006
List of Speakers

U.S. SENATOR PETE V. DOMENICI (R-NM) CHAIRMAN

U.S. SENATOR LARRY E. CRAIG (R-ID)

U.S. SENATOR CRAIG THOMAS (R-WY)

U.S. SENATOR LAMAR ALEXANDER (R-TN)

U.S. SENATOR LISA MURKOWSKI (R-AK)

U.S. SENATOR RICHARD BURR (R-NC)

U.S. SENATOR MEL MARTINEZ (R-FL)

U.S. SENATOR JAMES M. TALENT (R-MO)

U.S. SENATOR CONRAD BURNS (R-MT)

U.S. SENATOR GEORGE ALLEN (R-VA)

U.S. SENATOR GORDON SMITH (R-OR)

U.S. SENATOR JIM BUNNING (R-KY)

U.S. SENATOR JEFF BINGAMAN (D-NM) RANKING MEMBER

U.S. SENATOR DANIEL K. AKAKA (D-HI)

U.S. SENATOR BYRON L. DORGAN (D-ND)

U.S. SENATOR RON WYDEN (D-OR)

U.S. SENATOR TIM JOHNSON (D-SD)

U.S. SENATOR MARY L. LANDRIEU (D-LA)

U.S. SENATOR DIANNE FEINSTEIN (D-CA)

U.S. SENATOR MARIA CANTWELL (D-WA)

U.S. SENATOR ROBERT MENENDEZ (D-NJ)

U.S. SENATOR KEN SALAZAR (D-CO) WITNESSES:

MARK ROBINSON,

DIRECTOR OF THE OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY
REGULATORY
COMMISSION

LARRY FINFER,

ACTING DIRECTOR,

OFFICE OF POLICY ANALYSIS,

U.S. INTERIOR DEPARTMENT

DAN ADAMSON,

VICE CHAIRMAN,

LEGISLATIVE COMMITTEE, NATIONAL HYDROPOWER
ASSOCIATION

ANDREW FAHLUND,

VICE PRESIDENT OF PROTECTION AND RESTORATION, AMERICAN
RIVERS