

Subpart B—Hearing Process

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AUTHORITY: 16 U.S.C. 797(e), 811, 823d.

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Subpart A—General Provisions**§ 221.1 What is the purpose of this part, and to what license proceedings does it apply?**

(a) *Hearing process.* (1) The regulations in subparts A and B of this part contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory prescriptions that the Department of Commerce, acting through the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) may develop for inclusion in a hydropower license issued by the Federal Energy Regulatory Commission (FERC) under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these prescriptions is granted by FPA section 18, 16 U.S.C. 811, which authorizes the Secretary of Commerce to prescribe fishways.

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(2) The hearing process under this part does not apply to recommendations that the Department of Commerce may submit to FERC under FPA section 10(a) or (j), 16 U.S.C. 803(a), (j).

(3) The FPA also grants the Department of Agriculture and Interior the authority to develop mandatory conditions, and the Department of the Interior the authority to develop mandatory prescriptions, for inclusion in a hydropower license. Where the Department of Commerce and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 221.23:

(i) A hearing conducted under this part will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this part will be conducted by one of the other Departments, pursuant to 7 CFR 1.601 *et seq.* or 43 CFR 45.1 *et seq.*, as applicable.

(4) The regulations in subparts A and B of this part will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 221.60(a).

(b) *Alternatives process.* The regulations in subparts A and C of this part contain rules of procedure applicable to the submission and consideration of alternative prescriptions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a fishway prescribed by NMFS under section 18.

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

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(d) *Applicability.* (1) This part applies to any hydropower license proceeding for which the license has not been issued as of November 17, 2005 and for which one or more preliminary prescriptions or prescriptions have been or are filed with FERC.

(2) If NMFS has already filed one or more preliminary prescriptions or prescriptions as of November 17, 2005, the special applicability provisions of § 221.4 also apply.

§ 221.2 What terms are used in this part?

As used in this part:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under subpart B of this part.

Alternative means a prescription that a license party other than NMFS or another Department develops as an alternative to a preliminary prescription from NMFS or another Department, under FPA sec. 33, 16 U.S.C. 823d.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Department of Commerce's designated ALJ office means the ALJ office that is assigned to preside over the hearings process for NMFS.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Intervention means a process by which a person who did not request a hearing under § 221.21 can participate as a party to the hearing under § 221.22.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).