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ONE HUNDRED EIGHTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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October 25, 2004

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BUD ALBRIGHT, STAFF DIRECTOR

The Honorable Gale A. Norton
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Norton:

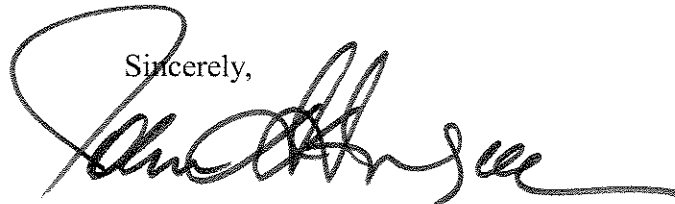
On September 9, 2004, the Department of Interior published a Notice of Proposed Rulemaking titled "Procedures for Review of Mandatory Conditions and Prescriptions in FERC Hydropower Licenses" (Federal Register, Vol. 69, No. 174, RIN 1090-AA91).

As you know, the Department has the statutory duty under Sections 4(e) and 18 of the Federal Power Act to issue mandatory conditions and prescriptions to protect fish, wildlife, and lands affected by hydroelectric facilities. The proposed rule consists of two main parts, the first being a codification of the Department's Mandatory Conditions Review Process (MCRP), and the second being the establishment of an administrative appeals process for recommendations that result from the MCRP.

While I am concerned about the negative consequences that could result from the adoption of this proposed rule, specifically the one-sided appeals process that effectively eliminates certain parties from participating, I am also very concerned about the process that led to its development.

Please respond to the attached questions no later than Monday, November 15, 2004. If you have questions or need additional information, please have your staff contact Bruce Harris with the Committee on Energy and Commerce Democratic staff at (202) 226-3400.

Sincerely,



JOHN D. DINGELL
RANKING MEMBER

The Honorable Gale A. Norton
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Attachment

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Ralph Hall, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

Mr. Earl E. Devaney
Inspector General
U.S. Department of the Interior

**Questions for Secretary of Interior Norton
Regarding Notice of Proposed Rulemaking (NOPR) RIN 1090-AA91
from the Honorable John D. Dingell**

1. The proposal to create an administrative appeals process, which could be initiated by a license applicant only, is nearly identical to a proposal included in both H.R. 6 and S. 2095 (Energy Policy Act of 2003). The supplementary information to the proposed rule references Vice President Cheney's National Energy Policy Development Group (NEPDG) in support of the concepts contained in the proposed rule.

As you may be aware, several Members of Congress have asked the Vice President to detail whom he met with and the impact of those meetings on the President's proposed energy policy. The Vice President has declined to provide this information. Because the NOPR references the NEPDG as a supposition for its publication, I am interested how the Department developed this proposal.

- a. Please include a list of all meetings between Department officials and representatives of the hydropower industry that relate to the concepts contained in the proposed rule including meeting dates, times, participants, and materials exchanged.
 - b. Did the Department conduct meetings with other interested parties (i.e. State officials, Tribal representatives, conservation groups, private citizens) to discuss the concepts contained in this proposal? If so, please detail these meetings in a similar manner.
 - c. Under which statutory authority is the Department promulgating this rule? Please identify the specific statutory provisions on which the Department is relying to issue this proposal.
2. The Notice of Proposed Rulemaking (NOPR), in Section III, C (Pending Legislation) states the following:

“The Department is aware of a proposal for amending the Federal Power Act that is currently being considered by Congress. The Department invites comment about whether elements of the legislative proposal should be incorporated into this rulemaking . . .”

The NOPR then lists five separate concepts contained in the Energy Policy Act of 2003 on which it invites comment. This solicitation strikes me as a rather curious thing to include in a rulemaking. Indeed, I am unfamiliar with the practice of the Executive Branch seeking comment through rulemakings on legislative proposals pending before the Congress.

Has the Department solicited such comments in prior rulemakings? If so, please cite each specific rulemaking under which this practice was employed.

3. The NOPR would codify an existing policy named the Mandatory Conditions Review Process (MCRP). It is my understanding that most parties to the licensing process have generally supported this policy and have urged its adoption as a rule. To that end, has any analysis been done that shows the performance of the Department in implementing MCRP over the past four years? If so, please provide a copy of the analysis and its conclusions.

In addition, please include answers to the following questions if the answers are not contained in the Department's analysis of MCRP:

- a. Has the MCRP caused delays in licensing?
 - b. Has MCRP increased the cost of participating in licensing either for the licensee or other interested parties?
 - c. Has the MCRP affected the frequency of litigation that results from licensing?
 - d. Has the MCRP been open equally to all interested parties in a licensing?
4. Section V (Procedural Requirements), subparagraph 7 of the NOPR states that the Office of the Solicitor has been consulted and has determined that the rule does not unduly burden the judicial system and meets the requirements of Executive Order 12988. It states in part that:

“ . . .the rule will likely result in a decrease in the number of proceedings that are litigated. In addition, it is not anticipated that more than an average of two appeals will be filed in any given year.”

- a. Please provide the analysis employed or formal comment provided by the Office of the Solicitor that supports this conclusion.
 - b. Were the members of the Solicitor's staff with specific expertise in the Department's mandatory conditioning authority under the Federal Power Act consulted during the development of this NOPR? If not, why not? If so, did they concur with the concepts contained in the NOPR?
5. The NOPR states that the proposed administrative appeals process for review of conditions and prescriptions under the Department's Federal Power Act authority “will enable the public and the license applicant to comment on the Department's preliminary conditions and prescriptions.”

The NOPR, however, proposes an administrative appeal process that can be triggered only by the license applicant (Subpart A, Subsection 25.52). By limiting the right to appeal to the license applicant, this proposal confers significant procedural rights to one party that are not granted to other members of the public who may be involved in a licensing application, such as Indian tribes, other Federal agencies, States, and conservationists.

- a. Does the Department believe this provision complies with the Administrative Procedures Act? Please explain the legal basis for your analysis.
 - b. In light of the Department's responsibilities under the Federal Power Act, what is the policy basis for the proposal's limitation of the right to appeal, to stipulate what issues can be raised on appeal, and to propose alternative conditions and prescriptions, to only one of the many interested and affected parties (the license applicant)?
6. Many Native American tribes have treaty rights affected by hydropower projects, especially with respect to fish, which are directly affected by conditions established by the Secretary under Sections 4(e) and 18 of the Federal Power Act. Tribes upon whose reservations some of these hydropower projects are located also have significant interests in the conditions mandated by the Department.

How can the Department adequately meet its tribal trust responsibility when it grants a dam owner an appeal right for a condition but fails to do so for a tribe?

7. The NOPR states that “[t]he Department uses a variety of processes for considering appeals under other programs and authorities” including “the use of administrative law judges and evidentiary hearings.”

Please provide a list of these “other programs and authorities.” For each such program or authority, please indicate whether the Department imposes limitations as to which party may file an appeal or exercise other fundamental procedural rights and provide specific examples.

8. The NOPR specifies that one or more Assistant Secretaries of the Department will review appeals of conditions and prescriptions and “will resolve the appeal and file new modified conditions or prescriptions or a notice that previously filed conditions or prescriptions will not be changed with FERC [Federal Energy Regulatory Commission]” within 60 days after the filing of the appeal (Subsection 25.59).

Does the Department intend such a filing by an Assistant Secretary to constitute final agency action? How would judicial review of such “filings” occur?

9. The NOPR provides a license applicant 30 days after the Department files modified conditions and prescriptions with the FERC to file an appeal. The proposed rule, however, provides only 21 days for Indian tribes, States, Federal agencies, and other members of the public to file comments on such an appeal.

Why did the Department decide it was appropriate to provide such interested parties a shorter time to comment on an appeal than the time period afforded the applicant to make an appeal?

10. The NOPR states the “since the decision to appeal is entirely at the discretion of the applicant, that cost will only be incurred when an applicant decides the cost will be justified by the benefits of the process.” What is the significance of this statement? Would the applicant bear the costs of an appeal, or would the cost be borne by the Department and ultimately the taxpayer? If the cost is not borne by the applicant, what policy supports expending taxpayer funds for only one category of interested parties?
11. The NOPR states that in developing this proposal, the Department considered the use of administrative law judges and evidentiary hearings, but that such an approach was “rejected because of issues of timeliness.” The preamble further states that “[t]he Department considers it important to adhere strictly to applicable FERC filing deadlines and schedules.”
 - a. Is adherence to FERC’s filing deadlines and schedules the sole reason for the Department’s decision to limit the right to appeal conditions and prescriptions to the license applicant?
 - b. The current MCRP, including the rehearing component, appears to fit within the deadlines and schedules of the FERC process but allows any party to participate. Why hasn’t the Department simply proposed to codify the existing MCRP?