Department of Energy
Washington, DC 20585

April 15, 2003

The Honorable Joe Barton
Chairman
Subcommittee on Energy and Air Quality
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On March 5, 2003, Kyle McSlarrow, Deputy Secretary of Energy, testified regarding comprehensive national energy policy.

Enclosed are the answers to 13 questions that Congressmen Waxman, Dingell, Pickering and Whitfield submitted for the hearing record. The remaining answers are being prepared and will be forwarded to you as soon as possible.

If we can be of further assistance, please have your staff contact our Congressional Hearing Coordinator, Lillian Owen, at (202) 586-2031.

Sincerely,

Shannon Henderson
Acting Assistant Secretary
Congressional and Intergovernmental
Affairs

Enclosures

Question from Congressman John Dingell

Question 1(a): Section 3001 of Chairman Barton's draft, entitled "Alternative Fishways and Conditions," would amend the Federal Power Act to permit applicants for hydroelectric licenses to propose "alternative conditions" to those required by the resource agencies for the protection of river systems. It appears that the provision would require the Secretary of the Interior to accept the applicant's proposal unless he or she could demonstrate, subject to judicial review, that the proposal does not provide for adequate protection of the reservation. Does the Administration support this provision and exact language, and why or why not? To what extent are any Administration concerns about the hydropower licensing process addressed by the proposed rule issued by the Federal Energy Regulatory Commission (FERC) on February 20, 2003, entitled "Hydroelectric Licensing under the Federal Power Act"?

Answer: It is the Administration's policy to fulfill its statutory responsibilities to preserve and protect public and Indian trust resources. We also wish to encourage a license applicant's ingenuity in crafting approaches to fulfilling these responsibilities.

The President's National Energy Policy called for making the licensing process more clear and efficient, while preserving environmental goals. The Federal Energy Regulatory Commission (FERC) has made substantial progress in achieving these objectives. In its integrated licensing process, to be completed this summer, FERC and the resource agencies have developed a streamlined process that increases collaboration among all parties. In addition, the Department of the Interior is in the process of designing a fair, objective, expeditious, and transparent appeals process that recognizes the importance of hydroelectric generation and ensures that high standards for resource conservation, efficiency, and reasonableness are maintained.

The development of a substantive appeals process in the agencies, coupled with process improvements underway at FERC may obviate the need for Congressional action. If Congress decides to act, the Department of the Interior would like to work with the Committee on wording to ensure that all objectives are met without unduly extending the licensing process and burdening agency budgets.

Question 1(b): What effect, both procedurally and substantively, would Section 3001 of the Barton Draft have on current law, the responsibilities of the resource agencies and those of the Secretary of the Interior? Are you aware of any other statute designed to protect health or the environment or wildlife under which (a) the head of an agency must carry the burden of proof in order to prove a license application does not meet the statutory standard for approval and (b) a license applicant is the sole party that can propose an alternative to a Federal agency's determinations regarding an application?

Procedurally and substantively the Administration is committed to addressing the issues raised in Section 3001. The Administration believes that the combination of the revised FERC procedures and the appeals process under development at the Department of the Interior will meet these needs in the most efficient and cost-effective manner.

The Administration believes that the public interest is best served when all parties are committed to mitigation measures based on sound science. As in all areas of resource management, the Administration holds its agencies to that high standard by requiring that their conditions and prescriptions be supported by substantial evidence and capable of supporting judicial review. The Administration believes that an applicant's alternatives to agency proposals must meet the same sound science standards.

In developing an appeals process, the Administration believes that the applicant's intimate knowledge of its own systems puts it in an excellent position to propose alternatives. The Administration also believes that other interested and affected parties should be heard in any appeal. This is especially important when hydroelectric projects affect Indian trust resources. The Administration also believes that other groups with specialized knowledge should also be heard.

QUESTION FROM CONGRESSMAN DINGELL

Q 3. Section 7022 of the draft, titled "Regional Transmission Organizations," includes a subsection (d)(3) concerning "Federal Utility Participation in RTO's" denoted "Existing Authorities and Obligations." This section provides that "Where a contract, agreement, or other arrangement . . . conflicts with any statutory authority, duty, or obligation, under any authority of law, of a Federal utility, such authority shall be suspended for the duration of the contract, agreement, or other arrangement." Does the Administration support this provision, and why or why not? What other Federal laws would be affected, and how? In particular, how would obligations of the Bonneville Power Administration and the Tennessee Valley Authority be affected? What would be the legal impact of this provision on existing contract rights between Federal authorities and private parties, and could this provision give rise to claims against the Federal Government for breach of contract.

A. Section 7022 of the draft House bill as introduced dealt with Federal utility participation in a regional transmission organization (RTO). It provided the Secretary the authority, which may then be delegated to a PMA, to enter into contracts or other arrangements to participate in an RTO approved by the Federal Energy Regulatory Commission.

The Administration supports participation by Federal utilities in RTOs. However, and as I said in my written testimony at the Subcommittee hearing on March 5, 2003, we had concerns about section 7022 of the draft House bill because, among other things, it did not explicitly provide for Federal cost recovery when a power marketing administration joins an RTO, or for preserving prior contracts and third-party financing obligations of the PMAs. However, in the full Committee markup of the bill, the Committee substituted a new RTO provision that resolved our concerns. We believe that this new provision, which we support, ensures the sanctity of existing contracts, agreements and financing obligations of the power marketing administrations and TVA, and that compliance with this provision will not give rise to claims against the Federal Government for breach of contract.