

EPACT of 2005

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Added 2 Procedures to Process

- Trial Type Hearing (TTH)
- Alternative Conditions review
- TTH for Federal mandatory conditions
Section 4(e) & Section 18
- Dept of Ag (*7 CFR Part 1*), DOI (*43 CFR Part 45*) and Dept of Commerce (*50 CFR Part 221*) jointly promulgated regs (*11/17/2005*)

Trial Type Hearing

- “Expedited” TTH - 90 days start to finish
- ALJ
- Motions, counter motions, & discovery
- Written Testimony - no depositions
- Brutal, time consuming, and professionally challenging
- NHA panel - Industry, NGO's, Agency staff - “avoid at all cost!”

Case Examples

- Klamath Proceeding
 - BLM, FWS & NMFS
 - 14 issues:
 - Agencies prevailed on 10 issues
 - Licensee prevailed on 1
 - Split decision on 3
- Tacoma Proceeding
 - FS
 - 7 issues:
 - Agencies prevailed on 6 issues
 - Licensee prevailed on 1

GAO Report - 2010

TTH

- 37 issues presented
- Agencies prevailed on 25
- Licensee prevailed on 6
- Split decision on 6

Alternative Conditions

- Licensees and other nonfederal stakeholders can submit alternative conditions to the agencies
- 194 alt conditions and 17 alt prescriptions submitted
- Agencies rejected 40
- 19 Pending at time of GAO rept
- 128 modified or incorporated into a settlement agreement
- 7 Removed by agencies

Alternative Conditions

- Agency must address legislated review criteria
- Criteria include:
 - Cost significantly less to implement
 - Result in improved operation to produce electricity
 - Will provide for the adequate protection and utilization of the reservation (FS/BLM)

Agency

- Must file with FERC written explanation of disposition of alt cond
- Reason for adopting/not adopting alt cond
- Any additional information relied upon not already in record

Agency Must Demonstrate:

- That it gave equal consideration to the following in its determination:
 - Energy supply, distribution, cost & use
 - Flood control
 - Navigation
 - Water Supply
 - Air Quality, and
 - Preservation of other aspects of environmental quality

Review

- Laser like focus (not duties as assigned) and prepares you for TTH or Alt Conditions
- Must do hard work at beginning to lay the foundation to succeed at the end
- Work with your legal staff (OGC, SOL) from the beginning
- Up your game!

Settlement Agreements

- Difficult and time consuming to Negotiate
- Advantages to Settlement Agreements
 - Creative solutions
 - Broader watershed based outcomes
 - Avoids costly, lengthy litigation with uncertain outcomes
 - Predictable outcomes on the ground
 - Leads to Good Neighbor

FERC Policy Guidance

- FERC Issued Settlement Policy
September 21, 2006
- Basic Principles:
 - Provisions based on substantial evidence
 - Provisions consistent with law
 - Relationship established between measure and project effect
 - Specific measures preferred over general
 - Actions should occur in project affected area
 - Commission reserves compliance authority

Agency Practice

- Don't require Direct Payments to agencies!
- Don't adopt entire SA
- DO mimic conditions in SA that apply to agency authority with separate conditions (4(e) or 18)
- Must still provide substantial evidence in support of conditions

**Your
turn
to
fire
away**



Questions or comments