

United States Government Accountability Office

Report to the Chairman, Committee on Energy and Natural Resources, United States Senate

August 2010

HYDROPOWER RELICENSING

Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed





Highlights of GAO-10-770, a report to the Chairman, Committee on Energy and Natural Resources, United States Senate

Why GAO Did This Study

Under the Federal Power Act. the Federal Energy Regulatory Commission (FERC) issues licenses for up to 50 years to construct and operate nonfederal hydropower projects. These projects must be relicensed when their licenses expire to continue operating. Relevant federal resource agencies issue license conditions to protect federal lands and prescriptions to assist fish passage on these projects. Under section 241 of the Energy Policy Act of 2005, parties to the licensing process may (1) request a "trialtype hearing" on any disputed issue of material fact related to a condition or prescription and (2)propose alternative conditions or prescriptions. In this context, GAO was asked to (1) determine the extent to which stakeholders have used section 241 provisions in relicensing and their outcomes and (2) describe stakeholders' views on section 241's impact on relicensing and conditions and prescriptions. GAO analyzed relicensing documents filed with FERC and conducted a total of 61 interviews with representatives from relevant federal resource agencies, FERC, licensees, tribal groups, industry groups, and environmental groups.

What GAO Recommends

GAO recommends that cognizant officials who do not adopt a proposed alternative include reasons why in their statement to FERC. The resource agencies generally agreed, but commented that no explanation is required when an alternative is withdrawn as a result of negotiations.

View GAO-10-770 or key components. For more information, contact Frank Rusco at (202) 512-3841 or RuscoF@gao.gov.

HYDROPOWER RELICENSING

Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed

What GAO Found

Since the passage of the Energy Policy Act in 2005, nonfederal stakeholderslicensees, states, environmental groups, and an Indian tribe—used section 241 provisions for 25 of the 103 eligible hydropower projects being relicensed, most of which occurred within the first year. Of these 25 projects, stakeholders proposed a total of 211 alternative conditions and prescriptions. In response, the federal resource agencies (U.S. Department of Agriculture's Forest Service, Department of Commerce's National Marine Fisheries Service, and several bureaus in the Department of the Interior) accepted no alternatives as originally proposed but instead modified a total of 140 and removed a total of 9 of the agencies' preliminary conditions and prescriptions and rejected 42 of the 211 alternatives; the remaining alternatives are pending as of May 17, 2010. Under section 241, resource agencies must submit a statement to FERC explaining the basis for accepting or rejecting a proposed alternative. While agencies generally provided explanations for rejecting alternative conditions and prescriptions, with few exceptions, they did not explain the reasons for not accepting alternatives when they modified conditions and prescriptions. As a result, it is difficult to determine the extent, type, or basis of changes that were made and difficult to determine if and how the proposed alternatives affected the final conditions and prescriptions issued by the agencies. As of May 17, 2010, nonfederal stakeholders requested trial-type hearings for 18 of the 25 projects in which section 241 provisions were used, and three trial-type hearings were completed. Of the remaining 15 projects, requests for hearings were withdrawn for 14 of them when licensees and agencies negotiated a settlement agreement before the administrative law judge made a ruling, and one is pending because the licensee is in negotiations to decommission the project. In the three hearings held to date, the administrative law judge ruled in favor of the agencies on most issues.

According to the federal and nonfederal relicensing stakeholders GAO spoke with, the section 241 provisions have had a variety of effects on the relicensing process and on the license conditions and prescriptions. While most licensees and a few agency officials said that section 241 encourages settlement agreements between the licensee and resource agency, some agency officials said that section 241 made agreements more difficult because efforts to negotiate have moved to preparing for potential hearings. Regarding conditions and prescriptions, some stakeholders commented that under section 241, agencies put more effort into reviewing and providing support for their conditions and prescriptions, but environmental groups and some agency officials said that in their opinion, agencies issued fewer or less environmentally protective conditions and prescriptions. Many agency officials also raised concerns about increases in workload and costs as a result of section 241. For example, their estimated costs for the three hearings to date totaled approximately \$3.1 million. Furthermore, many of the stakeholders offered suggestions for improving the use of section 241, including adjusting the time frame for a trial-type hearing.

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Abbreviations

ALJ	administrative law judge
Commerce	U.S. Department of Commerce
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FWS	Fish and Wildlife Service
Interior	U.S. Department of the Interior
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
USDA	U.S. Department of Agriculture

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United States Government Accountability Office Washington, DC 20548

August 4, 2010

The Honorable Jeff Bingaman Chairman Committee on Energy and Natural Resources United States Senate

Dear Mr. Chairman:

U.S. hydroelectric power (hydropower) projects generated over 272 gigawatt hours of power in 2009, or about 7 percent of all electricity generated in the United States. Hydropower projects—which include dams, reservoirs, stream diversion structures, powerhouses containing turbines driven by falling water, and transmission lines—have several advantages over other energy sources. Hydropower generation from existing facilities produces little, if any, air pollution and greenhouse gas emissions and can be adjusted quickly to match real-time changes in the demand for electricity. In addition, hydropower projects can provide other benefits, including flood control, irrigation, and recreation. However, hydropower also has some disadvantages. For example, hydropower projects may prevent fish from moving upstream or downstream, disrupting the spawning cycle, and the projects' turbines can kill or injure fish passing through them. Hydropower projects can also alter stream flows in ways that impair wildlife habitats and water quality.

Under the Federal Power Act (FPA),¹ as amended, the Federal Energy Regulatory Commission (FERC)² issues licenses to construct and operate nonfederal hydropower projects, such as those owned by public utilities or private industry, including those located on federal lands. As of May 17, 2010, FERC has issued licenses for 1,016 hydropower projects. FERC can issue licenses for up to 50 years, and when these licenses expire, projects must be relicensed in order to continue operating.³

¹16 U.S.C. §§ 791a-825r (2010).

²FERC is composed of up to five commissioners who are appointed by the President and confirmed by the Senate.

³If a license expires while a project is undergoing relicensing, FERC issues an annual license, allowing a project to continue to operate under the conditions found in the original license until the relicensing process is complete.

While resource agencies and licensees may begin the relicensing process up to 10 years before its expiration, the current FERC relicensing process—the Integrated Licensing Process—begins 5 to 5-1/2 years before a license is due to expire according to FERC's timeline. After initial meetings with FERC and other stakeholders, the licensee proposes a study plan to review project operations and potential impacts of the hydropower project, including environmental, recreational, and cultural impacts. FERC reviews this plan and comments from other stakeholders, such as federal resource agencies; makes revisions; and finalizes this plan. The licensee conducts the studies identified in the plan and submits a license application with proposed mitigations for impacts. After FERC receives the application, federal resource agencies may submit preliminary conditions, prescriptions, and recommendations. Section 4(e) of FPA makes licenses for projects on federal lands reserved by Congress for other purposes—such as national forests—or that use surplus water from federal dams subject to mandatory conditions imposed by the head of the federal agency responsible for managing the lands or facilities.⁴ These conditions may be used to protect federal lands and their environmental, recreational, and cultural resources; for this report, these are referred to as conditions. Similarly, section 18 of FPA requires FERC to include license prescriptions for fish passage issued by federal fish and wildlife agencies;⁵ for this report, these are referred to as prescriptions. In addition, the Electric Consumers Protection Act of 1986 added section 10(j) to FPA. This section authorizes federal and state fish and wildlife agencies to recommend license conditions to benefit fish and wildlife that FERC must include in the license unless it (1) finds them to be inconsistent with law and (2) has already established license conditions that adequately protect fish and wildlife.

For many years the hydropower industry had expressed concerns that agency conditions and prescriptions added unnecessary costs to their hydropower operations. Licensees contend that prior to the implementation of section 241 of the Energy Policy Act of 2005, if they

^bThese agencies currently include the U.S. Department of the Interior's Fish and Wildlife Service and the U.S. Department of Commerce's National Marine Fisheries Service.

⁴These agencies currently include the U.S. Department of Agriculture's Forest Service and several bureaus in the U.S. Department of the Interior. In its comments on a draft of this report, the Department of Commerce's National Oceanic and Atmospheric Administration noted that the agency considers National Marine Sanctuaries to be federal reservations under section 4(e), and that the agency disagrees with FERC's contrary view. See Finavera Renewables Ocean Energy, Ltd., 124 FERC ¶ 61063 (2008).

disagreed with the preliminary conditions and prescriptions their only option was to ask the resource agencies to hold further discussions and to review the license terms.⁶ The agencies could decide on further review or issue final conditions and prescriptions. Section 241 of the Energy Policy Act of 2005 authorizes parties to the licensing process to (1) request a "trial-type hearing" of not more than 90 days on any disputed issue of material fact related to a condition or prescription and (2) propose alternative conditions or prescriptions.⁷ Section 241 also requires the U.S. Department of Agriculture (USDA), U.S. Department of the Interior (Interior), and U.S. Department of Commerce (Commerce)-in consultation with FERC-to jointly establish by rule, procedures governing the processes for trial-type hearings and alternative conditions and prescriptions. The agencies issued three substantively identical interim rules on November 17, 2005, addressing trial-type hearings and procedures for the consideration of alternative conditions and prescriptions submitted by any party to a license proceeding. These interim rules allow licensees and other nonfederal stakeholders to request a hearing or submit alternatives within 30 days after the deadline for the agencies' filing of preliminary conditions and prescriptions with FERC. When the interim rules were issued, some projects had already passed the phase of the relicensing process where the section 241 provisions could be used under the normal procedures defined by the interim rules, but were allowed to use the provisions because they had not had new licenses issued as of November 17, 2005. These projects are referred to as "transition projects" in this report. In 2005, the resource agencies stated they would consider revising the interim rules based on the comments received and the initial results of implementation, and issue revised final rules within 18 months of the effective date of the interim rules. However, the 2005 interim rules remain in effect because the agencies have not yet issued final rules.

In this context, you asked us to (1) determine the extent to which licensees and other nonfederal stakeholders have used the section 241 provisions in relicensing projects and the outcomes associated with their use and (2) describe federal and nonfederal stakeholders' views on section

⁶Licensees also had and continue to have the option to seek rehearings of FERC licensing decisions as well as to challenge these decisions in court.

⁷Material fact is defined as a fact that, if proved, may affect a federal resource agency's decision whether to affirm, modify, or withdraw any preliminary condition or prescription.

241's impact on the relicensing process and on the conditions and prescriptions in relicensing.

To determine the extent to which licensees and other nonfederal stakeholders have used section 241's provisions for trial-type hearings and alternative conditions and prescriptions, we analyzed FERC summary documents. To determine the outcomes of the use of section 241 provisions, we analyzed the relicensing documents filed with FERC for all 25 projects in which nonfederal stakeholders used section 241 between November 17, 2005, and May 17, 2010. Our review included an analysis of whether each alternative condition or prescription was accepted or rejected and whether the preliminary condition or prescription associated with this alternative was modified or removed. We have included criteria for our categorization in tables 3 and 4 in this report. We also met with FERC officials for further information about the use and results of the section 241 provisions. To determine stakeholders' views on section 241's impact on the relicensing process and the license conditions and prescriptions, we conducted 32 interviews with officials from FERC; Interior's Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, National Park Service, Office of the Solicitor, Office of Environmental Policy and Compliance, Office of Hearings and Appeals, Fish and Wildlife Service (FWS), and U.S. Geological Survey; USDA's Forest Service; Commerce's National Marine Fisheries Service (NMFS); and the U.S. Department of Energy's Bonneville Power Authority. We also conducted 29 interviews with nonfederal stakeholders involved in the relicensing process about their views of section 241. These stakeholders included all of the licensees who used the section 241 provisions for the 25 relicensing projects, as well as a nonprobability sample of three other licensees that have been engaged or recently engaged in the relicensing process during the period of our review; environmental organizations involved in hydropower issues; hydropower industry groups; and tribal groups that have been affected by hydropower. We visited stakeholders and hydropower projects in California, Oregon, North Carolina, and Washington State. We selected these projects because their licensees were either undergoing relicensing or had recently been relicensed and these projects offered a variety of different characteristics including public and private ownerships and eastern and western U.S. locations. While we collected a variety of views on the effects of section 241, each hydropower project is unique, and the effects of section 241 on one project may not apply or may apply differently to another project. Thus, the results of our interviews cannot be projected to the entire universe of all hydropower projects in relicensing.

We conducted this performance audit from May 2009 to August 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

FPA includes several provisions designed to protect fish, wildlife, and the environment from the potentially damaging effects of a hydropower project's operations. Specifically:

- Section 4(e) states that licenses for projects on federal lands reserved by Congress for other purposes—such as national forests—are subject to the mandatory conditions set by federal resource agencies, including the Forest Service and the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and FWS.⁸
- Section 10(a) requires FERC to solicit recommendations from federal and state resource agencies and Indian tribes affected by a hydropower project's operation on the terms and conditions to be proposed for inclusion in a license.
- Section 10(j) authorizes federal and state fish and wildlife agencies to recommend license conditions to benefit fish and wildlife. FERC must include section 10(j) recommendations in the hydropower licenses unless it (1) finds them to be inconsistent with law and (2) has already established license conditions that adequately protect fish and wildlife.
- Section 18 requires FERC to include license prescriptions for fish passage prescribed by resource agencies, such as FWS and NMFS.

Under section 241 and the interim rules, licensees and other nonfederal stakeholders may request a trial-type hearing with duration of up to 90 days on any disputed issue of material fact with respect to a preliminary condition or prescription. An administrative law judge (ALJ), referred by

⁸The Electric Consumers Protection Act of 1986 amended section 4(e) of FPA to require FERC to give "equal consideration" to water power development and other resource needs, including protecting and enhancing fish and wildlife, in deciding whether to issue an original or a renewed license.

the relevant resource agency, must resolve all disputed issues of material fact related to an agency's preliminary conditions or prescriptions in a single hearing. The interim rules contain procedures for consolidating multiple hearing requests involving the same project.

Under section 241 and the interim rules, licensees and other nonfederal stakeholders may also propose alternatives to the preliminary conditions or prescriptions proposed by the resource agencies. Under section 241, resource agencies are required to adopt the alternatives if the agency determines that they adequately protect the federal land and either cost significantly less to implement or result in improved electricity production.⁹ If the alternatives do not meet these criteria, the agencies may reject them. In either case, under section 241, resource agencies must formally submit a statement to FERC explaining the basis for any condition or prescription the agency adopts and reason for not accepting any alternative under this section. The statement must demonstrate that the Secretary of the department gave equal consideration to the effects of the alternatives on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality). In addition, the resource agencies often negotiate with the stakeholders who submitted the alternatives and settle on modifications of the agencies' preliminary conditions and prescriptions.

FPA requires licensees to pay reasonable annual charges in amounts fixed by FERC to reimburse the United States for, among other things, the costs of FERC's and other federal agencies' administration of the act's hydropower provisions. To identify these costs—virtually all of which are related to the relicensing process—FERC annually requests federal agencies to report their costs related to the hydropower program for the prior fiscal year. FERC then bills individual licensees for their share of FERC's and the other federal agencies' administrative costs, basing these shares largely on the generating capacity and amount of electricity generated by the licensees' projects. FERC deposits the licensees' reimbursements—together with other annual charges and filing fees that it collects—into the U.S. Treasury as a direct offset to its annual appropriation. Receipts that exceed FERC's annual appropriation are deposited in the General Fund of the U.S. Treasury.

⁹For fishway prescriptions, the alternative must be "no less protective" than the agency's original prescription.

Section 241 Provisions Were Used in 24 Percent of Eligible Relicensing Projects, Resulting in Modified Conditions or Prescriptions for Most Projects and Three Hearings	Nonfederal stakeholders—licensees, states, environmental groups, and an Indian tribe—used the section 241 provisions for 25 of the 103 (24 percent) eligible hydropower projects being relicensed, although the use of these provisions has decreased since its first year. In response to the use of these provisions, resource agencies modified most of the conditions and prescriptions that they had originally proposed. In addition, trial-type hearings were completed for three projects, with the resource agencies prevailing in most of the issues in these hearings.
Nonfederal Stakeholders for 25 Projects Have Used Section 241 Provisions, but Use Has Decreased Since Fiscal Year 2006	From November 17, 2005, through May 17, 2010, 103 hydropower projects being relicensed, including 49 transition projects, were eligible for nonfederal stakeholders to use the section 241 provisions to submit alternative conditions or prescriptions or request a trial-type hearing. Nonfederal stakeholders have used the provisions for 25 of these 103 projects, including 15 of the 49 transition projects. Table 1 shows the 25 projects, the nonfederal stakeholder proposing alternatives, the affected federal resource agency, and whether the stakeholder requested a trial- type hearing. In each of these projects, the licensee submitted one or more alternatives. In addition, in the DeSabla-Centerville, Klamath, and McCloud-Pit projects, stakeholders other than the licensee also submitted alternatives.

Table 1: The 25 Projects That Used Section 241 Provisions, Nonfederal Stakeholder Proposing Alternatives, Affected FederalResource Agency, and Requests for Trial-Type Hearing, November 17, 2005, to May 17, 2010

Project name (State)	Nonfederal stakeholder proposing alternatives [®]	Affected federal resource agency	Trial-type hearing requests
Ames (Colorado)	Public Service Company of Colorado	Forest Service	No
Bar Mills (Maine)	FPL Energy Maine Hydro LLC	FWS, NMFS	Yes
Borel (California)	Southern California Edison Company	Forest Service	No
Boulder Creek (Utah)	Garkane Energy Cooperative, Inc.	Forest Service	Yes
Condit (Washington)	PacifiCorp	FWS, NMFS	Yes

Project name (State)	Nonfederal stakeholder proposing alternatives ^a	Affected federal resource agency	Trial-type hearing requests
DeSabla-Centerville (California)	Pacific Gas and Electric Company; California Sportfishing Protection Alliance, Friends of Butte Creek, American Whitewater, and Friends of the River	Bureau of Land Management, Forest Service	Yes
Donnells-Curtis (California)	Pacific Gas and Electric Company	Forest Service	No
Hells Canyon (Idaho and Oregon)	Idaho Power Company	Bureau of Land Management, FWS, Forest Service	Yes
Kern Canyon (California)	Pacific Gas and Electric Company	Forest Service	Yes
Klamath (California and Oregon)	PacifiCorp, Oregon Department of Fish and Wildlife, California Department of Fish and Game, Hoopa Valley Tribe ^b	Bureau of Land Management, Bureau of Reclamation, FWS, NMFS	Yes
McCloud-Pit (California)	Pacific Gas and Electric Company; American Whitewater and Friends of the River; McCloud RiverKeepers; California Trout, Trout Unlimited and McCloud River Club	Forest Service	No
Merrimack River (New Hampshire)	Public Service Company of New Hampshire	FWS	Yes
Pit 3, 4, and 5 (California)	Pacific Gas and Electric Company	Forest Service	Yes
Poe (California)	Pacific Gas and Electric Company	Forest Service	Yes
Portal (California)	Southern California Edison Company	Forest Service	Yes
Priest Rapids (Washington)	Public Utility District No. 2 of Grant County, Washington	FWS, Bureau of Reclamation	Yes
Rocky Reach (Washington)	Public Utility District No. 1 of Chelan County, Washington	FWS	No
Santee Cooper (South Carolina)	South Carolina Public Service Authority	FWS, NMFS	Yes
South Feather (California)	South Feather Water and Power Agency	Forest Service	No
Spokane River (Idaho and Washington)	Avista Corporation	Bureau of Indian Affairs	Yes
Spring Gap-Stanislaus (California)	Pacific Gas and Electric Company	Forest Service	Yes
Tacoma (Colorado)	Public Service Company of Colorado	Forest Service	Yes
Upper North Fork Feather River (California)	Pacific Gas and Electric Company	Forest Service	Yes
Vermilion Valley (California)	Southern California Edison Company	Forest Service	No
Yadkin-Pee Dee (North Carolina)	Progress Energy Inc.	FWS, NMFS	Yes

Source: GAO analysis of FERC data.

^aThe "Nonfederal stakeholders proposing alternatives" column does not include stakeholders whose submission of an alternative was rejected by the resource agency because the alternative did not meet the requirements of the regulations for section 241.

^bThe Hoopa Valley Tribe submitted an alternative on April 27, 2006, but withdrew it on January 8, 2007, according to NMFS records.

The use of section 241 provisions has decreased since the first year. In fiscal year 2006, nonfederal stakeholders used section 241 provisions for 19 projects undergoing relicensing. By comparison, after fiscal year 2006, nonfederal stakeholders used the provisions for only 6 projects. Fifteen of the 19 projects in which stakeholders used the provisions in fiscal year 2006 were transition projects. These transition projects included 11

projects that had expired original licenses and were operating on annual licenses at the time that the interim rules were implemented, which helped create the initial surge of projects eligible to use section 241.

As table 2 shows, the number of eligible nontransition projects—projects that had received preliminary conditions and prescriptions from federal resource agencies after section 241 was enacted—for which nonfederal stakeholders have sought to use section 241 provisions has declined since the first year. However, the number of nontransition projects becoming subject to these provisions has not widely varied.

Table 2: Number of Nontransition Projects Eligible for Section 241 Provisions andNumber of Projects for Which Nonfederal Stakeholders Used These Provisions,Fiscal Years 2006 through 2010

Fiscal year	Number of eligible nontransition projects	Number of projects for which nonfederal stakeholders used section 241
2006 ^ª	13	4
2007	9	1
2008	12	2
2009	12	2
2010 ^b	8	1
Total	54	10

Source: GAO analysis of FERC data.

^aData for fiscal year 2006 are from November 17, 2005, through September 30, 2006. ^bData for fiscal year 2010 are from October 1, 2009, through May 17, 2010.

Proposed Alternatives Often Resulted in Modified Conditions and Prescriptions Huternatives and other nonfederal stakeholders had proposed a total of 211 alternatives—194 alternative conditions and 17 alternative prescriptions—for the 25 projects where section 241 provisions were used. However, these numbers do not necessarily reflect the number of issues considered because section 4(e) conditions and section 18 fishway prescriptions are counted differently. For example, a resource agency may issue a section 4(e) condition for each part of a particular topic. However, NMFS or FWS will typically issue single section 18 fishway prescriptions with multiple sections. Of the 25 projects, stakeholders proposed alternative conditions for 19 and alternative prescriptions for 9.¹⁰ Table 3 provides the number of alternative conditions

¹⁰Stakeholders for three projects—Hells Canyon, Klamath, and Priest Rapids—proposed both alternative conditions and prescriptions.

proposed, accepted, rejected, and pending, and the number of preliminary conditions modified or removed for 19 of the 25 projects.

Table 3: Number of Alternative Conditions Proposed, Accepted, Rejected, and Pending and Preliminary Conditions Modified or Removed for 19 Projects, November 17, 2005, through May 17, 2010

	Alte	Alternative conditions				tions	
Project name	Proposed [®]	Accepted ^b	Rejected°	Pending	Modified in settlement ^d	Removed	
Ames	2	0	0		2	0	
Borel	4	0	0		4	0	
Boulder Creek	6	0	0		4	2	
DeSabla- Centerville	7	0	5		2	0	
Donnells-Curtis	11	0	0		11	0	
Hells Canyon	38	0	13		25	0	
Kern Canyon	11	0	0		11	0	
Klamath	18	0	16		2	0	
McCloud-Pit	19			19			
Pit 3, 4, and 5	8	0	0		8	0	
Poe	14	0	0		14	0	
Portal	6	0	0		6	0	
Priest Rapids	3	0	0		0	3	
South Feather	2	0	0		2	0	
Spokane River	12	0	4		7	1	
Spring Gap- Stanislaus	14	0	0		14	0	
Tacoma	2	0	2		0	0	
Upper North Fork Feather River	12	0	0		12	0	
Vermilion Valley	5	0	0		4	1	
Total	194	0	40	19	128	7	

Source: GAO analysis of FERC data.

^aProposed alternatives do not include an alternative in which the resource agency rejected its submission because the alternative did not meet the requirements of the regulations for section 241.

^bAn alternative is counted as accepted if the resource agency states it is accepting the alternative on the basis that the alternative meets both of the section 241 criteria of adequate protection and less costly to implement.

[°]An alternative is counted as rejected if the resource agency states it is not accepting the alternative on the basis that the alternative does not meet one or both of the section 241 criteria of adequate protection and less costly to implement.

^dA condition is counted as modified in settlement if the resource agency does not explicitly accept or reject the proposed alternative. If an alternative is withdrawn in settlement and the resource agency does not explicitly accept or reject the proposed alternative, this outcome is included in this column.

Table 4 provides the number of alternative prescriptions proposed, accepted, rejected, and pending and the number of preliminary prescriptions modified or removed in settlement for 9 of the 25 projects.¹¹

Table 4: Number of Alternative Prescriptions Proposed, Accepted, Rejected, and Pending, and Preliminary Prescriptions Modified and Removed, for 9 Projects, November 17, 2005, through May 17, 2010

		Alternative pres	scriptions		Preliminary prescrip	otions
Project name	Proposed [®]	Accepted ^b	Rejected [°]	Pending	Modified in settlement ^d	Removed
Bar Mills	2	0	0		2	0
Condit	1			1		
Hells Canyon	1	0	1		0	0
Klamath	1	0	1		0	0
Merrimack River	1	0	0		1	0
Priest Rapids	6	0	0		4	2
Rocky Reach	1	0	0		1	0
Santee Cooper	2	0	0		2	0
Yadkin-Pee Dee	2	0	0		2	0
Total	17	0	2	1	12	2

Source: GAO analysis of FERC data.

^aProposed alternatives do not include an alternative in which the resource agency rejected its submission because the alternative did not meet the requirements of the regulations for section 241.

^bAn alternative is counted as accepted if the resource agency explicitly states it is accepting the alternative on the basis that the alternative meets both of the section 241 criteria of no less protective and less costly to implement.

[°]An alternative is counted as rejected if the resource agency explicitly states it is not accepting the alternative on the basis that the alternative does not meet one or both of the section 241 criteria of no less protective and less costly to implement.

^dA prescription is counted as modified in settlement if the resource agency does not explicitly accept or reject the proposed alternative. If an alternative was withdrawn in settlement, and the resource agency does not explicitly accept or reject the proposed alternative, this outcome is included in this column.

As the tables show, instead of accepting or rejecting alternative conditions and prescriptions, resource agencies most frequently modified the original conditions and prescriptions in settlement negotiations with the

¹¹In commenting on a draft of this report, Commerce's National Oceanic and Atmospheric Administration noted that resource agencies use the term "modified prescription" as a "term of art" to refer to the agencies' final prescription, regardless of whether the final prescription actually differs from the preliminary one. In this report, we count a preliminary prescription as modified if the resource agency does not explicitly accept or reject the proposed alternative.

nonfederal stakeholders. In all, resource agencies did not formally accept any alternatives as originally proposed and instead

- modified a total of 140 preliminary conditions and prescriptions for 22 of the 25 projects,
- rejected a total of 42 alternative conditions and prescriptions in 5 projects, and
- removed a total of 9 preliminary conditions and prescriptions in 4 projects.

Licensees submitted 204 of the 211 alternative conditions and prescriptions. State agencies or nongovernmental organizations submitted the remaining 7 alternative conditions, 4 of which were rejected by the resource agencies, and 3 were being considered as of May 17, 2010.

Section 241 directs the Secretary of the relevant resource agency to explain the basis for any condition or prescription the agency adopts, provide a reason for not accepting any alternative condition under this section, and demonstrate that it gave equal consideration to the effects of the alternatives on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality). Similarly, the agencies' interim rules provide, "The written statement must explain the basis for the modified conditions or prescriptions and, if the Department did not accept an alternative condition or prescription, its reasons for not doing so."¹² While the agencies provided an explanation for rejecting all 42 alternative conditions and prescriptions, they did not explain the reasons for not accepting a proposed alternative for 127 of the 140 modified conditions and prescriptions. Without an explanation, it is difficult to determine the extent, type, or basis of changes that were made and difficult to determine if and how the proposed alternatives affected the final conditions and prescriptions issued by the agencies.

¹²*Federal Register*, vol. 70, no. 221, November 17, 2005, 69805.

Three Trial-Type Hearings Were Completed, and Resource Agencies Have Prevailed on Most of the Issues Decided in These Hearings

As of May 17, 2010, nonfederal stakeholders requested trial-type hearings for 18 of the 25 projects in which the section 241 provisions were used, and 3 trial-type hearings were completed. Most of these requests were made by licensees. The requests for hearings in 14 of the 18 projects were withdrawn when nonfederal stakeholders and resource agencies reached a settlement agreement before the ALJ made a ruling, and 1 request is pending as of May 17, 2010, because the licensee is in negotiations to decommission the project.

Prior to a trial-type hearing, an ALJ holds a prehearing conference to identify, narrow, and clarify the disputed issues of material fact. The ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the prehearing conference, which can include dismissing issues the ALJ determines are not disputed issues of material fact. For the three projects that have completed trial-type hearings, the number of issues in these projects was reduced from 96 to 37 after prehearing conferences. In addition, in a fourth project in which the federal resource agencies and the licensee eventually reached a settlement before going to a hearing, the number of issues was reduced from 13 to 1 after the prehearing conference.

As table 5 shows, the three trial-type hearings were held for the Klamath project, in California and Oregon; the Spokane River project, in Idaho and Washington; and the Tacoma project, in Colorado, all of which are nontransition projects. In addition to the licensees requesting hearings, one nongovernmental organization and one tribe requested a hearing for the Klamath project. The Spokane River and Tacoma hearings were completed in 90 days, the time allotted by the interim rule, while Klamath required 97 days. As table 5 shows, of the 37 issues presented, the ALJ ruled in favor of the federal resource agency on 25 issues, ruled in favor of the licensee on 6 issues, and offered a split decision on 6 issues.

			Outcom	nes	
Project name	Affected federal resource agency	Rule for licensee	Rule for federal resource agency	Split ruling	Total issues presented
Klamath	Bureau of Land Management, FWS, NMFS	1	10	3	14
Spokane River	Bureau of Indian Affairs	4	9	3	16
Tacoma	Forest Service	1	6	0	7
Total		6	25	6	37

Table 5: Projects with Trial-Type Hearings, the Affected Federal Agency, and Their Outcomes

Source: GAO analysis of FERC data.

Stakeholders Cited a Variety of Effects from Section 241 Provisions on the Relicensing Process and on the License Conditions and Prescriptions and Suggested Improvements	According to the relicensing stakeholders we spoke with, section 241 provisions have had a variety of effects on relicensing in three areas: (1) settlement agreements between licensees and resource agencies, (2) conditions and prescriptions that the resource agencies set, and (3) agencies' workload and cost. Most licensees and a few resource agency officials that we spoke with said that section 241 encourages settlement agreements between the licensee and resource agency. In contrast, other agency officials we spoke with said that section 241 made the relicensing process more difficult to reach a settlement agreement with the licensee. Regarding conditions and prescriptions, some stakeholders commented that under section 241, resource agencies generally researched their conditions and prescriptions more thoroughly, while all seven of the environmental groups' representatives and some resource agency officials we spoke with said that resource agencies issued fewer or less environmentally protective conditions and prescriptions. Resource agency officials also raised concerns about increases in workload and costs as a result of section 241. Finally, many of the stakeholders offered suggestions for improving the use of section 241.
Most Licensees Reported That Section 241 Made Settlements Easier, but Some Resource Agency Officials Said It Made Settlements More Difficult	Most of the licensees and a few resource agency officials we spoke with said that section 241 encourages settlement agreements between the licensee and resource agency. Several licensees commented that before section 241 was enacted, they had little influence on the mandatory conditions and prescriptions and that the resource agencies had made decisions on which conditions and prescriptions to issue without the potential oversight of a third-party review. One licensee commented that resource agencies had little incentive to work collaboratively with the licensee during relicensing prior to section 241. Several licensees and a few resource agency officials said that under section 241, some resource agencies have been more willing to negotiate their conditions and prescriptions to avoid receiving alternatives and requests for trial-type hearings.

• If licensees request a trial-type hearing, resource agencies and licensees have to devote time and resources to preparing for the potential upcoming trial-type hearing instead of negotiating a settlement.

•	Section 241 made the relicensing process less cooperative and more antagonistic when, for example, a licensee did not conduct the agencies' requested studies, the agencies had less information to support their conditions and prescriptions. As a case in point, one NMFS regional supervisor told us that a licensee declined to conduct a study about the effects of its dams' turbines on fish mortality. However, the licensee subsequently requested a trial-type hearing because, it argued, the agency had no factual evidence to support the agency's assertion that the turbines injured or killed fish.
•	Some licensees used their ability to request a trial-type hearing as a threat against the agencies' issuance of certain conditions, prescriptions, or recommendations. For example, two NMFS biologists and their division chief told us that a licensee had threatened to issue a trial-type hearing request on fish passage prescriptions if NMFS made flow rate recommendations that it did not agree with.
	The Hydropower Reform Coalition, a coalition of conservation and recreational organizations, commented that from its experience, participation in settlement negotiations under section 241 is "almost exclusively limited to licensees." It also commented that agreements reached by the license applicant and resource agency are not comprehensive settlement agreements in which licensees, state and federal resource agencies, tribes, nongovernmental organizations, and other interested parties are involved in the agreement.
Stakeholders Differed on the Effects of Section 241 on the Resource Agencies' Conditions and Prescriptions	Some licensees said agencies now put more effort into reviewing and providing support for their conditions and prescriptions because licensees or other nonfederal stakeholders could challenge the terms in a trial-type hearing. Several agency officials commented that they generally conduct more thorough research and provide a more extensive explanation about mandatory conditions and prescriptions than they had for projects prior to section 241. A few agency officials also commented they are requesting licensees to conduct more extensive studies about the effects of their hydropower projects to ensure that the agencies have sufficient information for writing conditions and prescriptions.
	Views differed on whether conditions and prescriptions were as protective or less protective since section 241 was enacted. All seven environmental group representatives that we spoke with expressed concerns that resource agencies were excluding and writing less protective conditions, prescriptions, and recommendations to avoid trial-type hearings. For

	example, one group commented that in one hydropower project, under section 241, agency officials settled for stream flow rates that were lower than necessary for protecting and restoring the spawning habitat for fish that swam in the project area. Some agency officials said the conditions and prescriptions they have issued are as protective as those issued prior to the enactment of section 241. Others said that they now issue fewer or less environmentally protective conditions or prescriptions to avoid a costly trial-type hearing. In addition, some other officials commented that instead of issuing conditions and prescriptions that could result in a trial- type hearing, agencies have either issued recommendations or reserved authority to issue conditions and prescriptions at a later time. While a reservation of authority allows the resource agency to issue conditions and prescriptions after the issuance of the license, one regional agency official told us that in his experience, this rarely occurs. At one regional office, two staff biologists and their division chief told us that while they still issue prescriptions that meet the requirements of resource protection, these prescriptions are less protective than they would have been without the possibility of a trial-type hearing.
Many Agency Officials Said That Section 241 Has Increased Their Workload, Added Costs, and Adversely Affected Their Ability to Complete Other Work	Many agency officials said that the added efforts they put into each license application since the passage of section 241 has greatly increased their workloads for relicensing. Several agency officials also told us that even greater efforts are needed when a trial-type hearing is requested. To complete the work needed for a trial-type hearing, agencies often need to pull staff from other projects. According to these officials, at the local level, pulling staff from other projects can result in the agency's neglect of its other responsibilities. Officials commented that whether they win or lose a trial-type hearing, agencies must provide the funding for an ALJ, expert witnesses, and their attorneys at a trial-type hearing. Although they did not track all costs, the Bureau of Indian Affairs, Bureau of Land Management, Interior's Office of the Solicitor, FWS, Forest Service, and NMFS provided individual estimates that totaled to approximately \$3.1 million in trial-type hearings for the following three projects: ¹³
•	Approximately \$300,000 for the Tacoma project.
•	Approximately \$800,000 for the Spokane River project.

 $^{^{\}rm 13}\!{\rm These}$ three figures are based on the agencies' best estimates, and we did not test for data reliability.

	• Approximately \$2 million for the Klamath project. ¹⁴
	Among all the resource agencies, only NMFS has dedicated funding for section 241 activities. However, this funding only covers administrative costs related to a trial-type hearing and does not fund NMFS's program staff or General Counsel staff for a hearing.
Stakeholders Have Suggestions to Improve Section 241	 Many of the agency officials, licensees, and other stakeholders we spoke with had suggestions on how to improve section 241 and the relicensing process. For example, several licensees and agency officials raised concerns that the 90-day period for a trial-type hearing, including a decision, was too short and resulted in the need to complete an enormous amount of work in a compressed time frame. Some said that an ALJ who did not have a background in hydropower issues needed more time to review the information presented following the hearing. Some stakeholders suggested allowing the ALJ to make his or her decision outside of the 90-day period. Other stakeholders, however, commented that an extension of the 90-day period could result in greater costs for all parties. One regional hydrologist suggested using a scientific peer review panel rather than an ALJ to hear arguments. Some stakeholders also suggested providing an opportunity to delay the start date of a trial-type hearing if all parties were close to reaching a settlement. The stakeholders we spoke with also had several suggestions that were specific to their interests, which included the following: A couple of licensees noted that while the provisions of section 241 may be used after preliminary conditions and prescriptions are issued, they would like to be able to use these provisions after the issuance of final conditions and prescriptions. These licensees assert that if they do not have this option, their only recourse is to sue in an appeals court, after the license has been issued. These licensees were not aware of any instance in which the terms had drastically changed between negotiations and the issuance of the final license.

¹⁴The relicensing of the Klamath project is on hold pending a decommissioning agreement.

- Several environmental group representatives commented that while section 241 allows stakeholders to propose alternative conditions and prescriptions, they would like to be allowed to propose additional conditions and prescriptions to address issues that the resource agencies have not addressed in their preliminary conditions and prescriptions. Three of these representatives also commented that the section 241 criteria for the acceptance of an alternative-adequately or no less protective and costs less to implement-favored licensees, not conservation groups. Instead, one representative suggested that the criterion for an alternative should be that it is more appropriately protective and not that it costs less to implement. In addition, another representative suggested that all interested parties should be allowed to participate in negotiations to modify the preliminary conditions and prescriptions after the submission of an alternative. In his experience, these negotiations have been limited to the stakeholder who uses the provisions of section 241 and the resource agency.
- A few resource agency officials suggested that licensees who lose the trialtype hearing should pay court costs, such as the costs of the ALJ. They also suggested that licensee reimbursements for the relicensing costs go directly to the resource agencies rather than the General Fund of the U.S. Treasury.
- Almost 5 years have passed since the interim rules were issued, and several stakeholders that we spoke with expressed interest in having an opportunity to comment on a draft of the revised rules when they become available and before these rules become final. In addition, on June 2, 2009, the National Hydropower Association—an industry trade group—and the Hydropower Reform Coalition submitted a joint letter addressed to Interior, NMFS, and USDA expressing interest in an opportunity to comment on the revised rules before they become final.¹⁵

¹⁵In American Rivers v. U.S. Department of the Interior, Civ. No. C05-2086P, 2006 WL 2841929 (W.D.Wash.), a federal district court held that the interim rules were procedural rules exempt from the requirement that the agency provide the public notice and an opportunity to comment prior to issuing regulations. Nevertheless, the agencies are not prohibited from providing an opportunity for notice and comment before they finalize the existing rules, and indeed did take comments on the interim rules, although after it went into effect. See 70 Fed. Reg. 69804 (2005).

Conclusions	Section 241 of the Energy Policy Act of 2005 changed the hydropower relicensing process, including permitting licensees and other nonfederal stakeholders to propose alternative conditions and prescriptions. All parties involved in relicensing a hydropower project have an interest in understanding how the conditions and prescriptions for a license were modified, if at all, in response to proposed alternatives. Indeed, the interim rules require agencies to provide, for any condition or prescription, a written statement explaining the basis for the adopted condition and the reasons for not accepting any alternative condition or prescription. While we found that the agencies have provided a written explanation for all 42 rejected conditions and prescriptions. The absence of an explanation makes it difficult to determine the extent or type of changes that were made.
	Furthermore, when the interim rules that implemented section 241 were issued on November 17, 2005, the federal resource agencies stated that they would consider issuing final rules 18 months later. Instead, nearly 5 years later, final rules have not yet been issued. Given this delay and the amount of experience with section 241's interim rules, many stakeholders we spoke with had ideas on how to improve section 241 and several expressed interest in providing comments when a draft of the final rules becomes available.
Recommendations for Executive Action	To encourage transparency in the process for relicensing hydropower projects, we are recommending that the Secretaries of Agriculture, Commerce, and the Interior take the following two actions:
•	Direct cognizant officials, where the agency has not adopted a proposed alternative condition or prescription, to include in the written statement filed with FERC (1) its reasons for not doing so, in accordance with the interim rules and (2) whether a proposed alternative was withdrawn as a result of negotiations and an explanation of what occurred subsequent to the withdrawal; and
•	Issue final rules governing the use of the section 241 provisions after providing an additional period for notice and an opportunity for public comment and after considering their own lessons learned from their experience with the interim rules.

Agency Comments, Third-Party Views, and Our Evaluation	We provided the departments of Agriculture, Commerce, and the Interior; FERC; the Hydropower Reform Coalition; and the National Hydropower Association with a draft of this report for their review and comment. FERC had no comments on the report. Commerce's National Oceanic and Atmospheric Administration (NOAA), Interior, USDA's Forest Service, the Hydropower Reform Coalition, and the National Hydropower Association provided comments on the report and generally agreed with the report's recommendations.
	While Forest Service, Interior, and NOAA generally agreed with our recommendation that they file a written statement with FERC on their reasons for not accepting a proposed alternative, they all cited a circumstance in which they believed that they were not required to do so. Specifically, the three agencies commented that under the interim rules,
	they do believe that they are required to explain their reasons for not accepting a proposed alternative when the alternatives were withdrawn as a result of negotiations. Two of the agencies, Interior and NOAA, agreed to indicate when a proposed alternative was voluntarily withdrawn, and NOAA acknowledged that providing an explanation on what occurred
	after the withdrawal of an alternative may be appropriate in some circumstances. We continue to believe that providing an explanation for not accepting a proposed alternative is warranted, even when the proposed alternative is voluntarily withdrawn as a result of negotiations,
	and we have modified our recommendation to address this situation. The agencies could add transparency to the settlement process by laying out the basis for the modifications made to the preliminary conditions and prescriptions; the reasons the agencies had for not accepting the proposed alternative, including those alternatives withdrawn as a result of
	negotiations; and an explanation of what occurred subsequent to the withdrawal. Further, no provision of the interim rules discusses withdrawal of proposed alternatives or provides an exemption from the requirement to explain why a proposed alternative was not accepted. ¹⁶ The agencies have an opportunity to clarify their approach to withdrawn

¹⁶The preamble to the interim rules notes that a license party might choose to withdraw a proposed alternative in the wake of an ALJ's adverse finding on an issue of material fact, and that in such circumstances the agencies would not need to address the withdrawn alternative. 70 Fed. Reg. 69814. As we observed above, however, the regulatory language itself contains no discussion of withdrawals, even in the trial-type hearing context. Moreover, an ALJ finding along the lines discussed in the preamble (and the related agency briefs in the hearing record) would provide some transparency with regard to the potential shortcomings of the proposed alternative. In the much more common case of a settlement between the agencies and the licensee, such transparency is often lacking.

conditions and prescriptions as they consider revisions to the interim rules.

Interior and NOAA commented that they agreed with our recommendation regarding the issuance of final rules and are considering providing an additional public comment opportunity. According to Interior and NOAA, the resource agencies are currently working on possible revisions to the interim rules.

NOAA also commented that resource agencies use the term "modified prescription" as a "term of art" to refer to the agencies' final prescription, regardless of whether the final prescription actually differs from the preliminary one. As we noted in table 4 of this report, we counted a preliminary prescription as modified if the resource agency does not explicitly accept or reject the proposed alternative. In response to this comment, we added an additional clarifying footnote in the report.

Interior suggested that we clarify in our report that agencies have no reason to write less protective recommendations because recommendations cannot be the basis for trial-type hearing requests. We did not change the language in our report because we believe that Interior's assertion that agencies have no reason to write less protective recommendations may not always be the case. For example, as stated in our report, NMFS officials told us that a licensee had threatened to issue a trial-type hearing request on fish passage prescriptions if NMFS made flow rate recommendations that it did not agree with.

The Hydropower Reform Coalition suggested that we collect additional information and conduct further analysis on the use of the section 241 provisions. We did not gather the suggested additional information or conduct additional analysis because in our view, they fell outside of the scope and methodology of our report.

Appendixes I, II, III, IV, and V present the agencies', the Hydropower Reform Coalition's, and the National Hydropower Association's comments respectively. Interior, NOAA, and the Hydropower Reform Coalition also provided technical comments, which we incorporated into the report as appropriate. As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees; the Secretaries of Agriculture, Commerce, and the Interior; the Chairman of the Federal Energy Regulatory Commission; and other interested parties. In addition, this report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or ruscof@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed are listed in appendix VI.

Sincerely yours,

Front Rusco

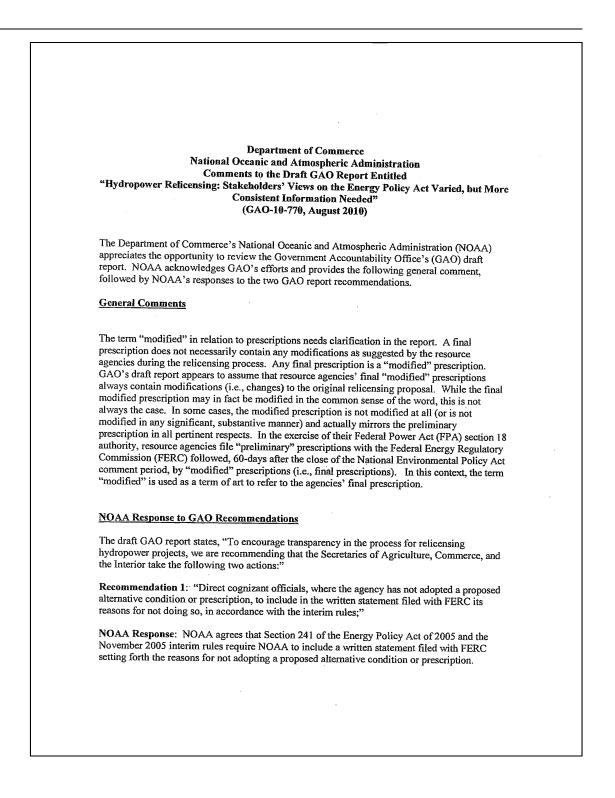
Frank Rusco Director, Natural Resources and Environment

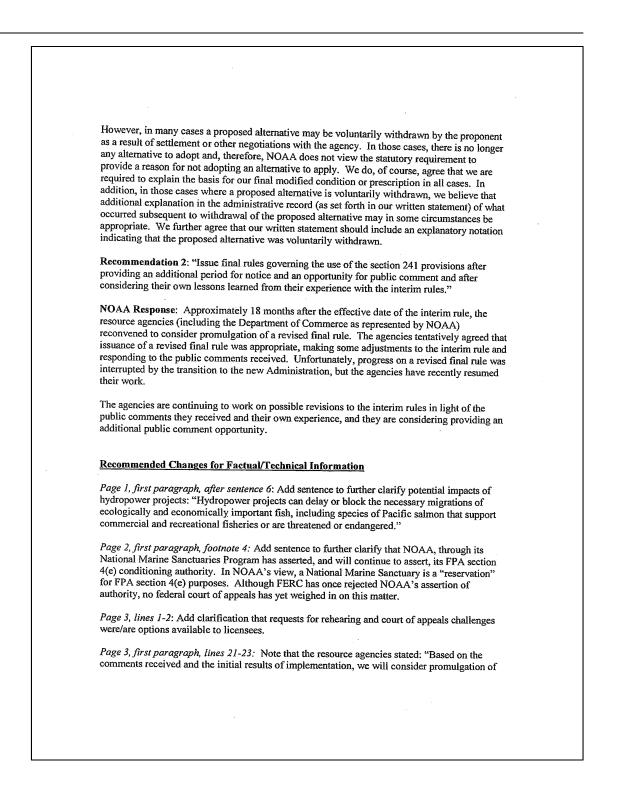
Appendix I: Comments from the U.S. Department of Agriculture

USDA Department of Agriculture	Forest Service	Washington Office	1400 Independence Avenue, SW Washington, DC 20250
		File C	Sode: 1430-1
Frank Rusco			Date: JUL 2 0 2010
Director, Natural Resource U.S. Government Account 441 G. Street, N.W. Washington, DC 20548	es and Environment tability Office		
Dear Mr. Rusco:			
 understand a highly compl agency's comments on the <u>Recommendation Num</u> 	and recomme ex, interagency proc two recommendation ther 1: The Secretar	ndations, and apprecia ess, and to assist in im- ons are as follows: y of Agriculture. [sha	11. Stateholders Views of the 'The Forest Service generally tes the time and effort of the GAO to proving our procedures. The II] direct cognizant officials, where
statement filed with FF	pted a proposed alte ERC its reasons for n e Agency currently of	rnative condition or pro tot doing so, in accorda does provide analyses of	escription, to include in a written ince with the interim rules.
rejecting every propose Agency does not inclue Agency providing writ	ed alternative pendin de proposed alternati ten statements to FE onent subsequently y	ig at the time written st ives that have been wit RC. We often negotia withdraws its alternativ	atements are filed with FERC. The hdrawn by proponents prior to the te a mutually acceptable revised e from consideration. We believe
providing an additional lessons learned from th resource agencies state initial results of implen interim rules." GAO n reads, "Based on the co	I period for notice ar leir experiences with d that they would re- mentation and issue r nakes essentially the proments received an vised final rule within	ad comment opportunit the interim rules." Or vise the interim rules b evised rules within 18 same statement on page ad the initial results of i	I, "Issue final rules after y and after considering their own a page 3, GAO states, "In 2005, the ased on comments received and the months of the effective date of the ge 20. In fact, the interim final rule implementation, we will consider ctive date of this rule." Reference
If you have any questions c 202-205-1321 or dcarmical	or concerns please co @fs.fed.us.	ontact Donna M. Carmi	cal, Chief Financial Officer, at
Sincerely,			
and a start of the second start			
THOMAS L. TIDWELL Chief			

Appendix II: Comments from the U.S. Department of Commerce

UNITED STATES DEPARTMENT OF COMMERCE The Secretary of Commerce Washington, D.C. 20230
July 16, 2010
Mr. Frank Rusco Director Natural Resource and Environment U.S. Government Accountability Office 441 G Street, NW Washington, DC 20548
Dear Mr. Rusco:
Thank you for the opportunity to review and comment on the Government Accountability Office's draft report entitled, "Hydropower Relicensing: Stakeholders' Views on the Energy Policy Act Varied, but More Consistent Information Needed" (GAO-10-770). On behalf of the Department of Commerce, I have enclosed the National Oceanic and Atmospheric Administration's programmatic comments to the draft report.
Sincerely, Mary Locke Gary Locke
Enclosure

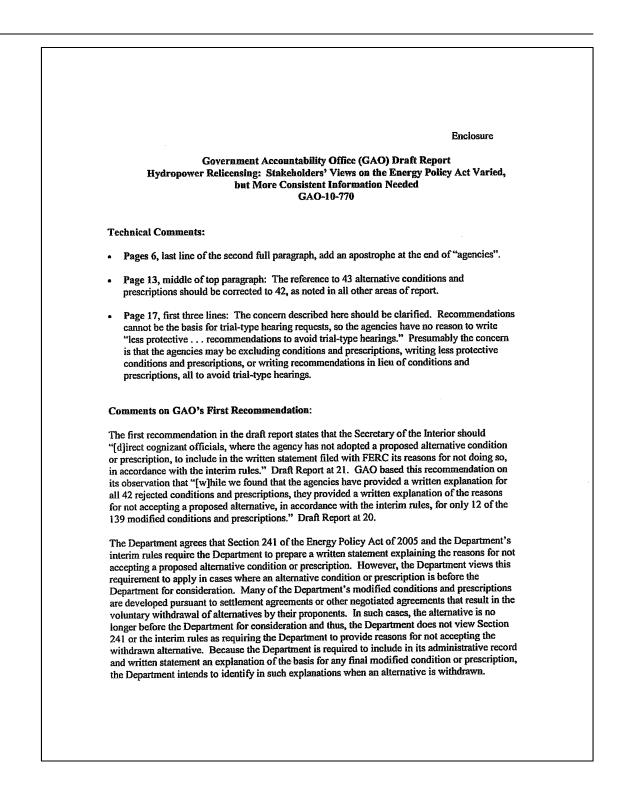


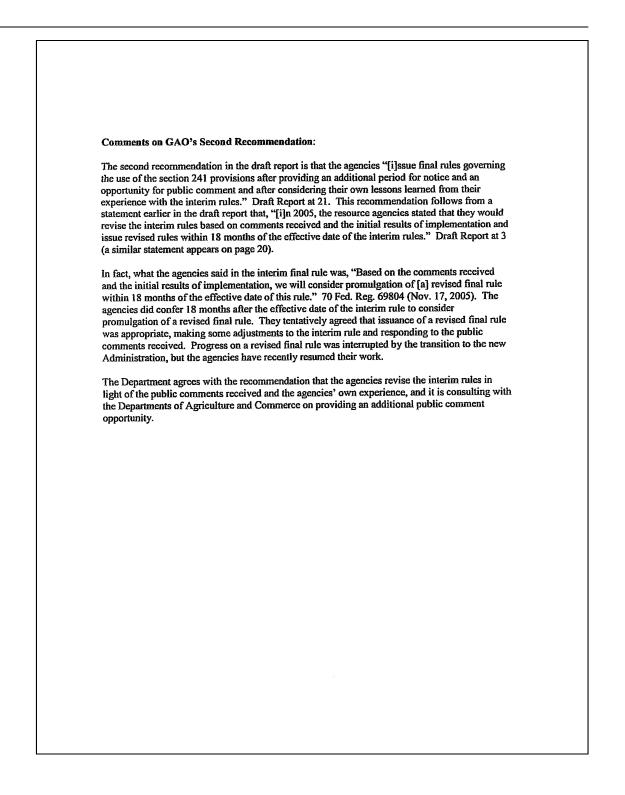


[a] revised final rule within 18 months of the effective date of this rule." 70 Fed. Reg. 69,804 (Nov. 17, 2005).
Page 5, bullet 1: Add sentence to further clarify that NOAA's National Marine Sanctuaries Program asserts that projects within National Marine Sanctuaries are also subject to mandatory 4(e) conditions. In NOAA's view, a National Marine Sanctuary is a "reservation" for FPA section 4(e) purposes. Although FERC has once rejected NOAA's assertion of authority, no federal court of appeals has yet weighed in on this matter.
Page 6, second paragraph, line 2: Correction - add 'preliminary' before conditions or prescriptions.
Page 7, footnote 8: Provide a more comprehensive explanation of alternatives to fishway prescriptions.
<i>Page 12, table 4</i> : For the Santee Cooper Project, NMFS rejected the alternatives per the requirements of Section 33 of the FPA. <i>See</i> Section 3 of NMFS' Modified Prescriptions for Fishways (July 20, 2007).
Page 13, lines 9-12: This statement is not clear - ("While the agencies provided an explanation for rejecting all 43 alternative conditions and prescriptions, they did not explain the reasons for not accepting a proposed alternative for 127 of the 139 modified conditions and prescriptions.")
Page 20, first full paragraph, lines 8-12: This statement is not clear (see comment above for page 13).
<i>Page 20, second full paragraph:</i> Note that the resource agencies stated: "Based on the comments received and the initial results of implementation, we will consider promulgation of [a] revised final rule within 18 months of the effective date of this rule." 70 Fed. Reg. 69,804 (Nov. 17, 2005).
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Appendix III: Comments from the U.S. Department of the Interior

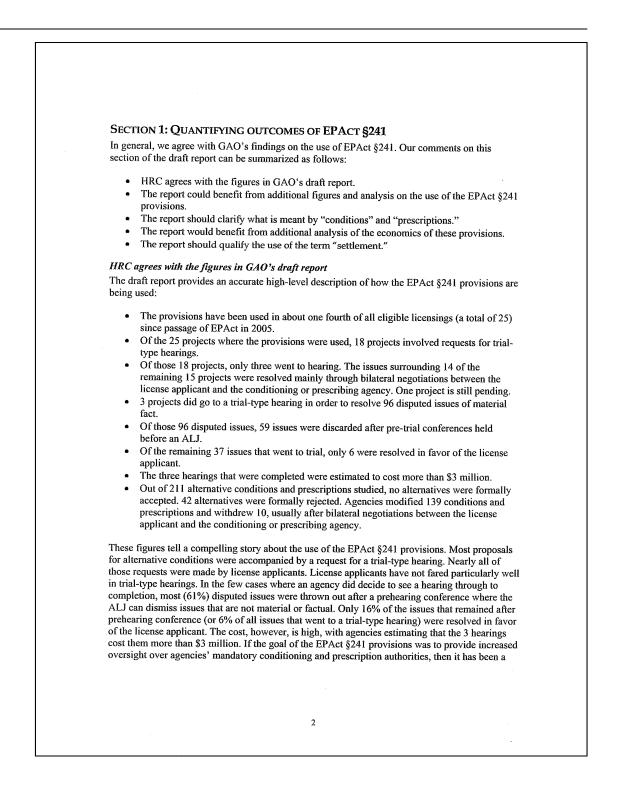
	United States Department of the Interior
	OFFICE OF THE SECRETARY Washington, D.C. 20240
	JUL 18 1 .
	Il Resources and Environment nt Accountability Office .W.
Dear Mr. Rusco	:
on the draft Gov Stakeholders' Vi (GAO-10-770), process for relic	roviding the Department of the Interior the opportunity to review and comment remment Accountability Office Report entitled, <i>Hydropower Relicensing:</i> <i>iews on the Energy Policy Act Varied, but More Consistent Information Needed</i> The Department shares GAO's interest in encouraging transparency in the ensing hydropower projects and generally concurs with the recommendations A Report. The Department's comments and suggestions are enclosed for your
If you have any Chief Division c (703) 358-2551.	questions or need additional information, please contact Kathy Garrity, Acting of Policy and Directives Management, U.S. Fish and Wildlife Service at
	Sincerely,
	Rhea S. Sun Assistant Secretary Policy. Management and Budget
Enclosure	

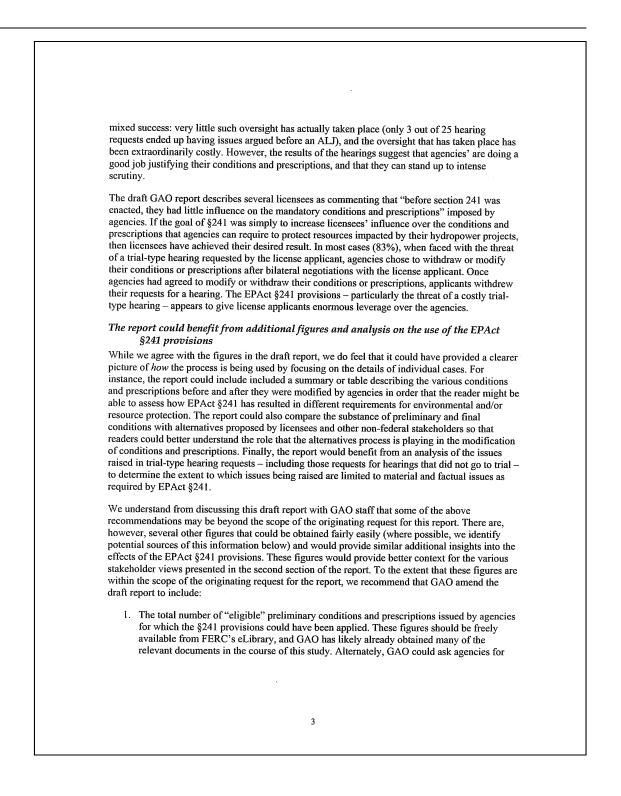




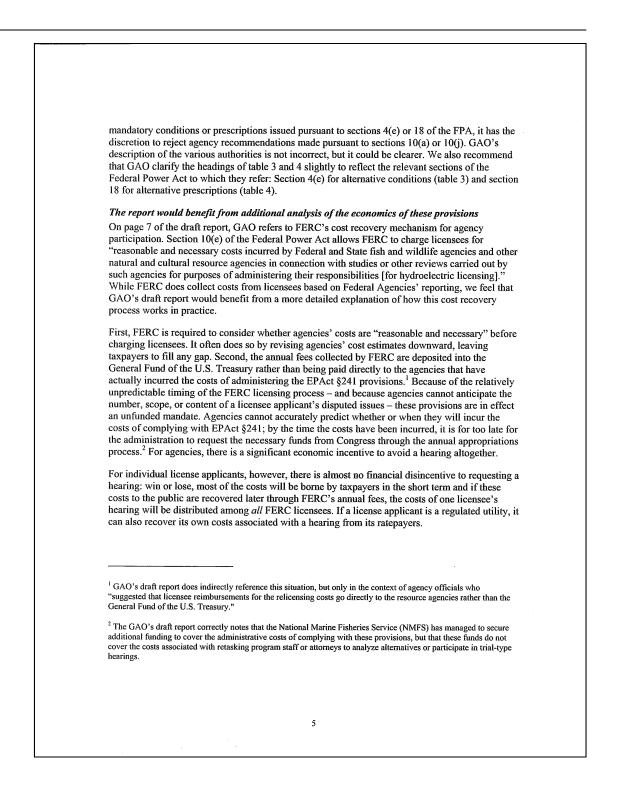
Appendix IV: Comments from the Hydropower Reform Coalition

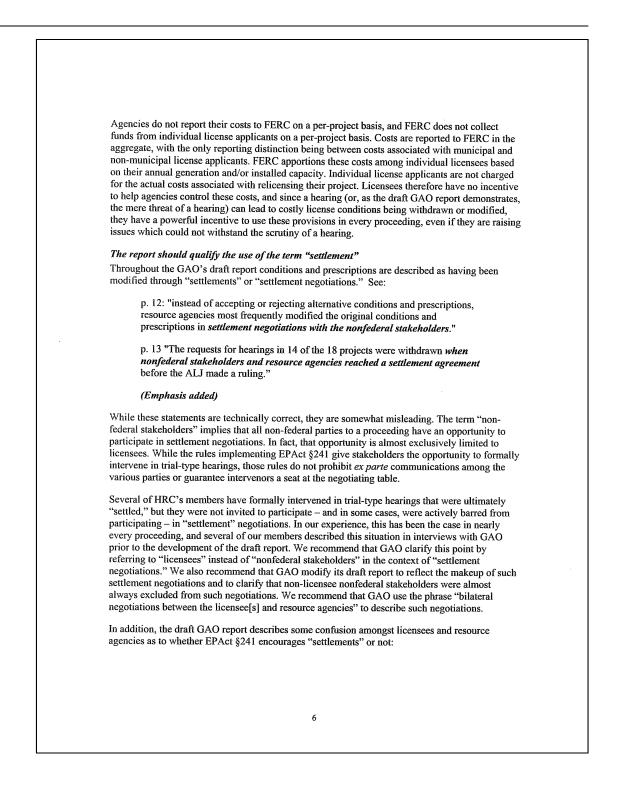
1101 14 th Street N.W. • Suite 1400 Washington, DC 20005 www.hydroreform.org
and people back in rivers.
July 12, 2010
Mr. Frank Rusco Director, Natural Resources and Environment
Government Accountability Office
441 G St., NW Washington, DC 20548
masunigion, DC 20040
Dear Mr. Rusco:
On behalf of the Steering Committee and members of the Hydropower Reform Coalition (HRC), thank you for the opportunity to submit comments on the GAO's draft report on the effects of section 241 of the Energy Policy Act of 2005 (EPAct §241). The Hydropower Reform Coalition (HRC) consists of more than 150 member organizations that seek to improve the water quality, fisheries, recreation, and general environmental health of rivers that have been degraded by hydropower dam operations. Our member organizations have a strong interest in the Federal Energy Regulatory Commission's (FERC) hydropower licensing process and have appeared before FERC in numerous licensing proceedings and rulemakings. HRC members have also participated in all of the proceedings before FERC where the EPAct § 241 provisions were used. Additionally, the HRC actively participated in the rulemaking proceeding implementing EPAct §241.
On balance, we think that GAO did an excellent job. We agree with most of the report's substantive findings, and strongly support both of GAO's recommendations. We also feel that the draft report would benefit both from minor clarifications and from additional information and analysis. Our comments address those areas and clarify HRC's position on EPAct §241.
GAO's draft report has three sections: the first quantifies the outcomes of EPAct §241, the second reports on stakeholders' experiences with the provisions, and the third makes two recommendations for how the process could be improved. Our comments will address each section in turn. For each of the three sections, we offer our interpretation and views on the report's findings based on our experience with EPAct §241. For the first section, we recommend several minor changes and clarifications that we believe would improve the report. For the section section, we clarify HRC's views on EPAct §241 and offer our interpretation of some of the report's findings based on our own experience. For the third section, we address GAO's recommendations and offer some of our own recommendations for how the EPAct §241 process could be improved.
Steering Committee: Alabama Rivers Alliance • American Rivers • American Whitewater • Appalachian Mountain Club California Hydropower Reform Coalition • California Sportfishing Protection Alliance • Friends of the River • Idaho Rivers United • Michigan Hydro Relicensing Coalition • Natural Heritage Institute • New England FLOW

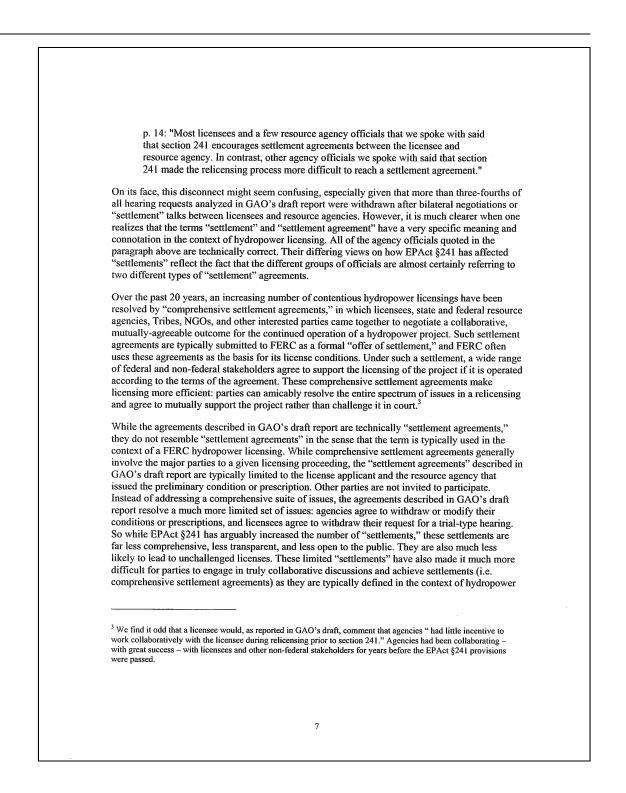


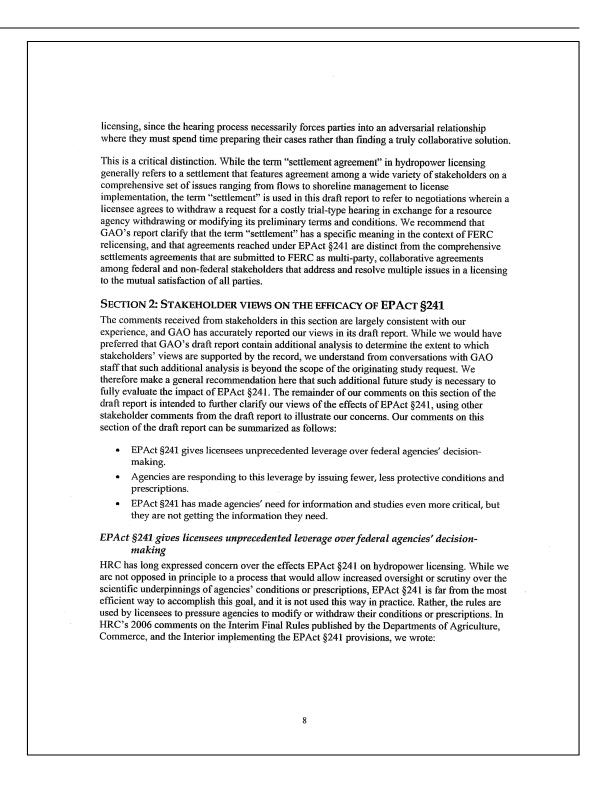


copies of all preliminary and final conditions and prescriptions submitted since the passage of the 2005 EPAct.
2. The percentage of "eligible" preliminary conditions or prescriptions for which alternatives were actually proposed (e.g. "Agencies received a total of X proposed alternatives for Y
out of Z eligible preliminary conditions and prescriptions. Out of the Y preliminary conditions and prescriptions where alternatives were proposed, M preliminary conditions
and prescriptions involved more than one proposed alternative"). In other words, how many conditions and prescriptions went unchallenged? This figure could be obtained by applying the figures in $G \wedge O$'s duel report to the figures in $H \to h$
applying the figures in GAO's draft report to the figures in #1 above.3. The number of discrete conditions and prescriptions that were modified when a request for a trial-type hearing was withdrawn. This figure could also be obtained by applying the
4. The number of discrete conditions and prescriptions that were modified via the alternatives
process in the <i>absence</i> of a formal request for a trial-type hearing. This figure could be obtained by applying the figures in GAO's draft report to the figures in #1 above.
 A more detailed description of which "nonfederal stakeholders" are exercising their rights to use these provisions, using the materials that GAO relied on to prepare its report. For instance:
 a. The number of alternatives proposed and/or trial-type hearings requested by license applicants.
 b. The number of alternatives proposed and/or trial-type hearings requested by NGOs. c. The number of alternatives proposed and/or trial-type hearings requested by Tribes.
6. The number of issues that were dismissed in a prehearing conference because they were neither "material" nor "factual." This information should be readily available in transcripts
or summaries of prehearing conferences. 7. For each of the projects where a trial-type hearing was requested, a list of the non-federal takeholders their formally intervence in the hearing. Then for the hearing is a second s
stakeholders that formally intervened in the hearing. These figures can be easily obtained by the agencies case referrals for hearing requests, which they are obliged to file within 5 days of responding to any hearing request. Each hearing request referral must contain a list
of all intervenors. Additionally, agencies should have in their records a copy of each notice of intervention that was filed for each proceeding.
 For each of the projects where a trial-type hearing was requested and later withdrawn as the result of a negotiated agreement, a list of the non-federal stakeholders that participated
or were invited to participate in such negotiations. These figures could be obtained relatively easily by asking each of the parties identified in #7 above if they participated or were invited to participate in such negotiations.
The report should clarify what is meant by "conditions" and "prescriptions"
On page 5 of the draft report, GAO briefly describes the various authorities available to federal and state agencies for recommending or prescribing hydropower license conditions, describing sections 4(e), 10(j), 10(a), and 18 of the Federal Power Act. While GAO's description is accurate,
we recommend that GAO clarify that the EPAct §241 provisions are only applicable to mandatory conditions under section 4(e) and fishway prescriptions under section 18 of the Federal Power Act (FPA). We also recommend that GAO clarify the key difference between mandatory conditions or
prescriptions and advisory recommendations: While FERC does not have the authority to reject
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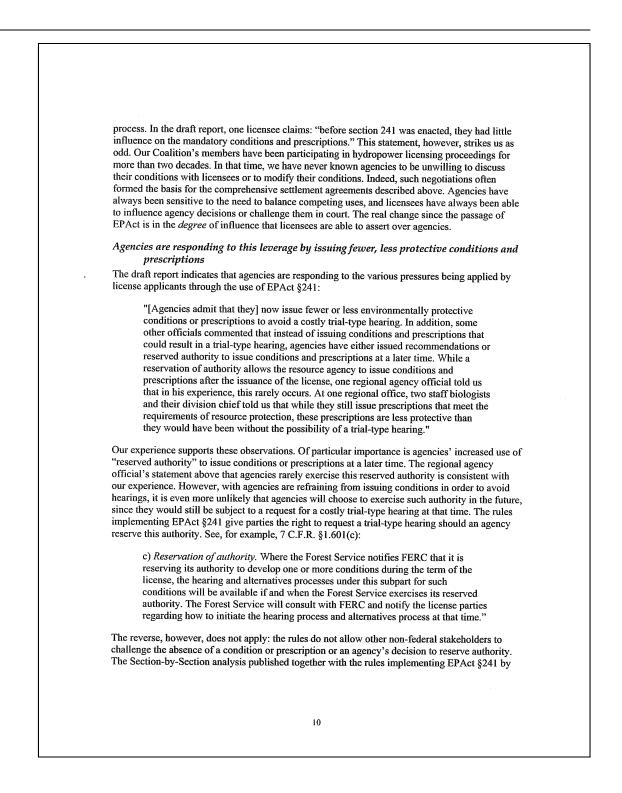


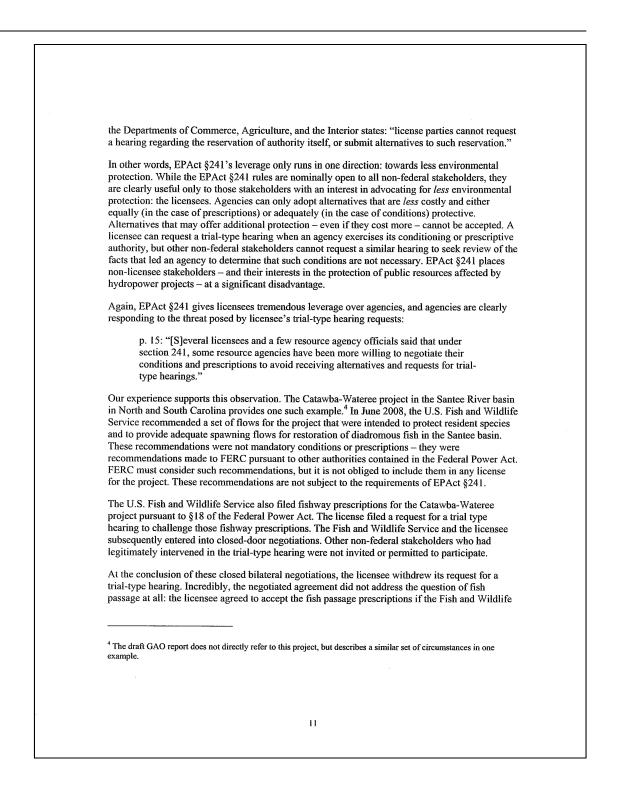




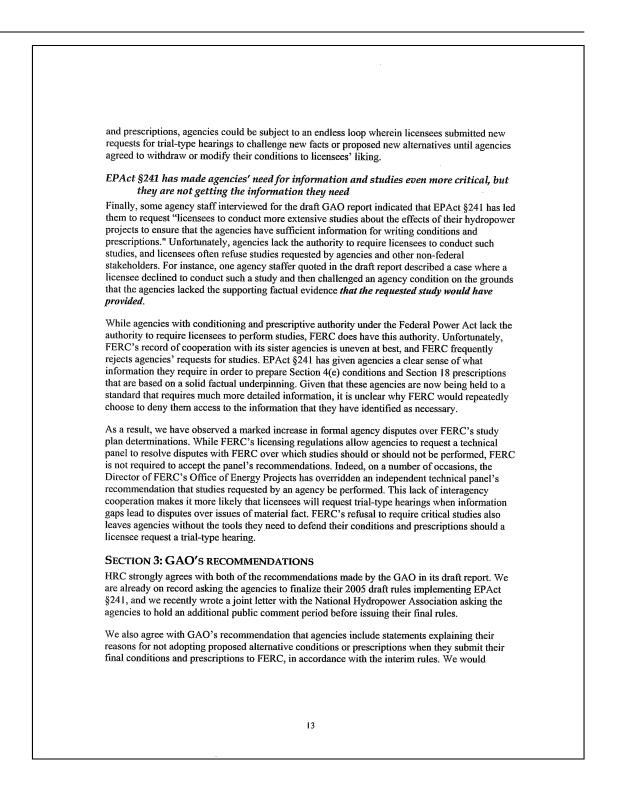


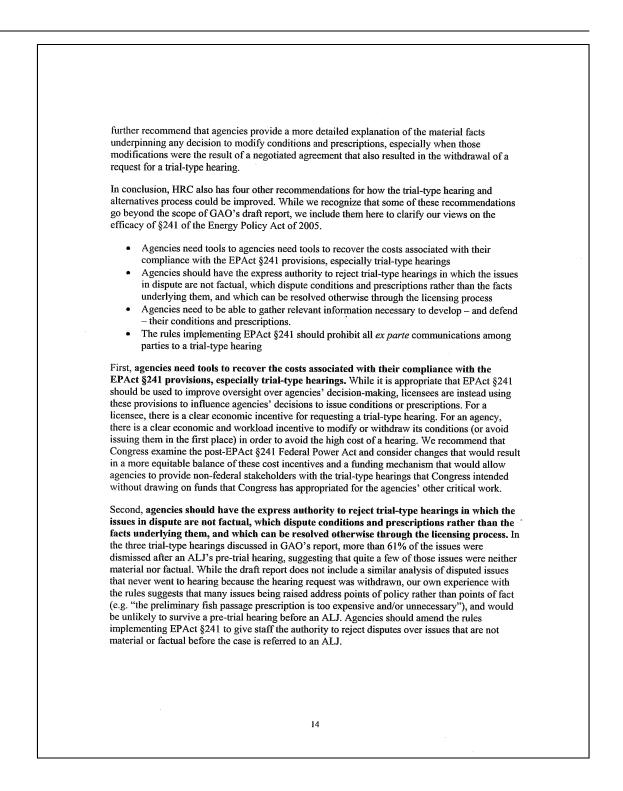






Service changed its minimum flow recommendations. The compromise made by the Fish and Wildlife Service is evident in the text of the agreement: ⁵	
"The Utilities will not pursue Trial Type Hearings ("TTH") before an Administrative Law Judge pursuant to FPA §§4(e) or 18 to contest the USFWS's FPA §§4(e) or 18 diadromous fish requirements so long as the USFWS's ESA §7 requirements, FPA §§4(e) conditions, 10(a) and 10(j) recommendations, and 18 prescriptions do not materially vary reservoir elevation limitations, required flow releases, low inflow protocols or the high inflow protocols as set for the in: (A) the CRA; (B) Existing project Licenses at the Ninety-Nine Islands and Gaston Shoals projects; (C) a settlement agreement among the SCDNR, the USFWS, and SCE&G for the Saluda Hydroelectric Project; and (D) this Accord."	
Subsequent to signing and filing with FERC the Santee Accord, the U.S. Fish and Wildlife Service altered its previous river flow recommendations for diadromous fish to match flows proposed by the licensee. ⁶	
Here, the licensee clearly used EPAct §241 as leverage against the Fish and Wildlife Service. The use of the provisions here do not appear to have been intended to seek third party oversight over agency conditions and prescriptions, but rather to simply coerce the agency into changing its recommendations issued under a separate authority. The licensee apparently did not even seek changes to the fish passage prescriptions that triggered the EPAct §241 review. Instead, it used the threat of a trial-type hearing to pressure the agencies to change separate recommendations made pursuant to other authorities to which EPAct §241 does not even apply: Sections 10(a) and 10(j) of the Federal Power Act, and Section 7 of the Endangered Species Act. When licensees interviewed for the draft report talk about providing agencies with an "incentive" or having "influence" over agency conditions, this is the result they are describing.	
The clearest indication that licensees are using EPAct §241 as leverage over agency decision- making rather than as an opportunity for oversight over agencies' science is the interest expressed by some licensees in gaining the ability to request trial-type hearings or propose alternatives to agencies' <i>final</i> conditions and prescriptions <i>if they differ from the terms that were agreed upon</i> <i>during negotiations</i> . Once a licensee has agreed to withdraw a request for a trial-type hearing (because agencies have agreed to submit final conditions or prescriptions that are more to the licensee's liking), it loses its leverage over agencies, and its "only recourse is to sue in an appeals court, after the license has been issued." ⁷ If licensees were allowed to challenge final conditions	
⁵ Santee River Basin Accord for Diadromous Fish Protection, Restoration, and Enhancement, FERC Accession Number 20080619-5006, p. 3	
⁶ ERRATA to COMMENTS and RECOMMENDATIONS, Notice of Application Ready for Environmental Analysis, Catawba-Wateree Hydroelectric Project FERC No. 2232-522; North Carolina and South Carolina, FERC Accession Number 20080718-0219, p. 3.	
⁷ The option to seek judicial review was also available to licensees before the passage of EPAct §241.	
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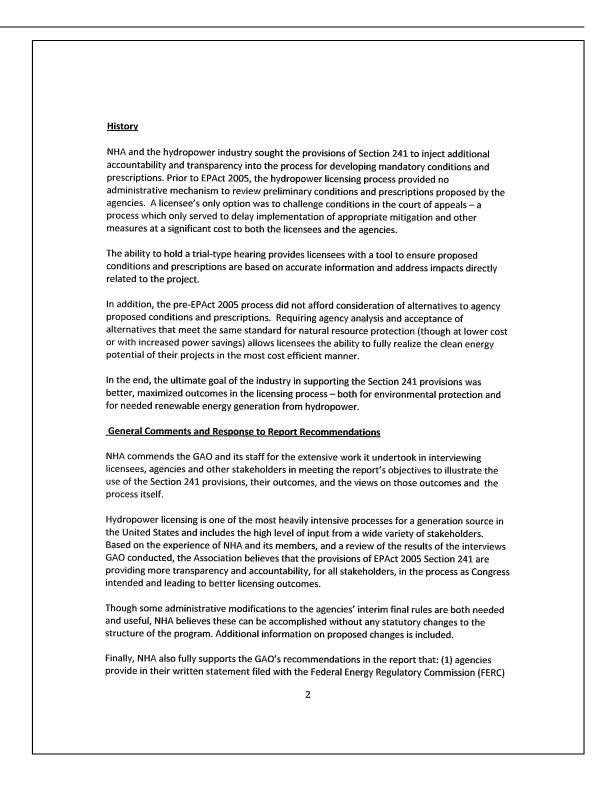


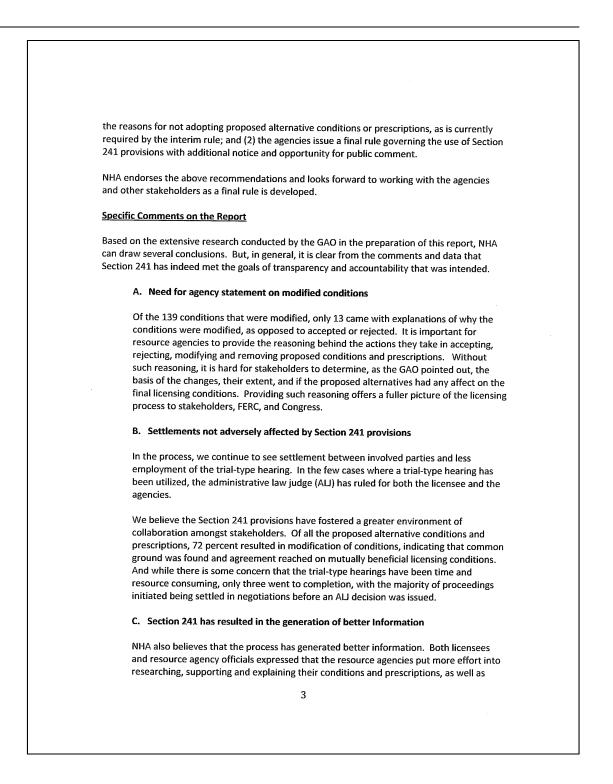


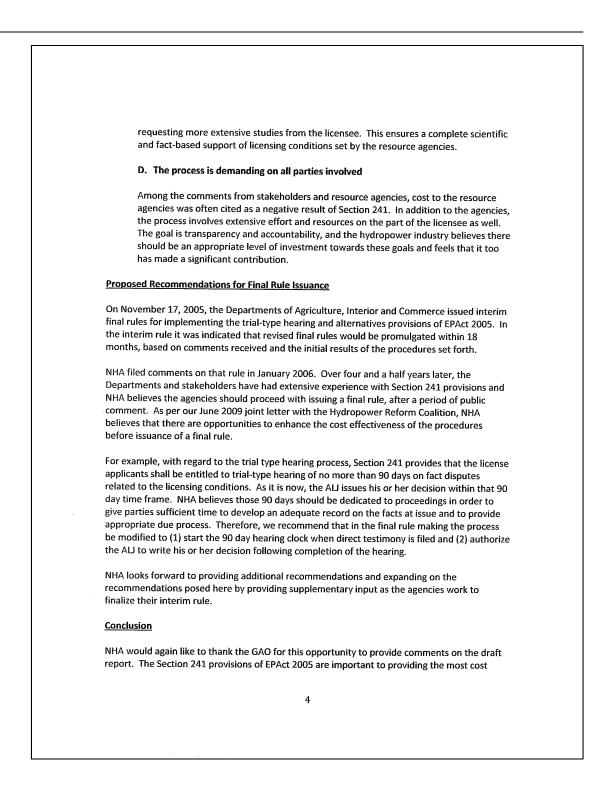
Third, agencies need to be able to gather relevant information necessary to develop - and defend - their conditions and prescriptions. Given the extraordinarily high standards for supporting evidence created by EPAct §241, FERC should substantially improve its cooperation with agencies with mandatory conditioning authority under Section 4(e) and prescriptive authority under Section 18 of the Federal Power Act. By refusing to require licensees to perform studies requested by agencies, FERC effectively prevents those agencies from exercising their authorities under the Federal Power Act. FERC should use its existing authorities under the Federal Power Act to require licensees to perform all studies that agencies have indicated are necessary to develop such conditions and prescriptions. Alternately, Congress should amend the Federal Power Act to either a) allow agencies with mandatory conditioning or prescriptive authority to require licensees to perform relevant studies, or b) to give agencies the ability to perform such studies on their own and bill licensees for the costs. Finally, the rules implementing EPAct §241 should prohibit all ex parte communications among parties to a trial-type hearing. Determinations regarding alternative conditions and all trial-type hearings should be subject to ex parte rules to prevent parties who have intervened in a proceeding from being denied equal access to agency decision-makers. The alternatives process is essentially a paper hearing conducted by the agency on the record. The prohibition on ex parte communication is necessary to ensure that the agency's decision regarding a condition or prescription made on a public record is not influenced by private, off-the-record communications from any party interested in the outcome. Such a prohibition is standard in other regulations for hearings promulgated by these agencies. Again, we appreciate this opportunity to comment on the GAO's draft report. If you have any questions about our comments, please feel free to contact me at 202-347-7550 or jseebach@americanrivers.org. Sincerely, John Seebach Chair Hydropower Reform Coalition 15

Appendix V: Comments from the National Hydropower Association

<text><text><text><text><text><text><text><text><text></text></text></text></text></text></text></text></text></text>	Mr. Frank Rusco Director, Natural Resources and Environment Government Accountability Office 441 G Street, NW Washington, DC 20548 Re: Comments on the GAO EPAct 2005 Section 241 Report Dear Mr. Rusco, The National Hydropower Association (NHA) appreciates this opportunity to provide comments to the Government Accountability Office (GAO) on the draft report of the Section 241 trial type hearing and alternative condition and prescription provisions of the Energy Policy Act of 2005
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Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact	Frank Rusco, (202) 512-3841 or RuscoF@gao.gov
Staff Acknowledgments	In addition to the contact named above, Ned Woodward, Assistant Director; Allen Chan; Jeremy Conley; Richard Johnson; Carol Herrnstadt Shulman; Jay Smale; and Kiki Theodoropoulos made key contributions to this report.

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