HEARING, BRIEFING, AND DECISION

221.50 When and where will the hearing be held?
221.51 What are the parties' rights during the hearing?
221.52 What are the requirements for presenting testimony?
221.53 How may a party use a deposition in the hearing?
221.54 What are the requirements for exhibits, official notice, and stipulations?
221.55 What evidence is admissible at the hearing?
221.56 What are the requirements for transcription of the hearing?
221.57 What is the standard of proof?
221.58 When will the hearing record close?
221.59 What are the requirements for post-hearing briefs?
221.60 What are the requirements for the ALJ's decision?

Subpart C—Alternatives Process

221.70 How must documents be filed and served under this subpart?
221.71 How do I propose an alternative?
221.72 What will NMFS do with a proposed alternative?
221.73 How will NMFS analyze a proposed alternative and formulate its modified prescription?
221.74 Has OMB approved the information collection provisions of this subpart?

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

Source: 70 FR 69840, Nov. 17, 2005, unless otherwise noted.

Subpart A—General Provisions

§ 221.1 What is the purpose of this part, and to what license proceedings does it apply?

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

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

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

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

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

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

(c) Reservation of authority. Where NMFS notifies FERC that it is reserving its authority to develop one or more prescriptions during the term of the license, the hearing and alternatives processes under this part for such prescriptions will be available if and when NMFS exercises its reserved authority. NMFS will consult with FERC and notify the license parties regarding how to initiate the hearing process and alternatives process at that time.
(d) **Applicability.** (1) This part applies to any hydropower license proceeding for which the license has not been issued as of November 17, 2005 and for which one or more preliminary prescriptions or prescriptions have been or are filed with FERC.

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

§ 221.2 What terms are used in this part?

As used in this part:

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

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

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

**Day** means a calendar day.

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

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

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

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

**FERC** means the Federal Energy Regulatory Commission.


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

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

**License proceeding** means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR parts 4 or 5.

**Material fact** means a fact that, if proved, may affect a Department’s decision whether to affirm, modify, or withdraw any condition or prescription.

**NEPA document** means an environmental assessment or environmental impact statement issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.

**NMFS** means the National Marine Fisheries Service, a constituent agency of the Department of Commerce, acting by and through the Assistant Administrator for Fisheries or one of NMFS’s six Regional Administrators, as appropriate.


**Party** means, with respect to NMFS’s hearing process under subpart B of this part:

1. A license party that has filed a timely request for a hearing under:
   (i) Section 221.21; or
   (ii) Either 7 CFR 1.621 or 43 CFR 45.21, with respect to a hearing process consolidated under §221.23;

2. A license party that has filed a timely notice of intervention and response under:
   (i) Section 221.22; or
   (ii) Either 7 CFR 1.622 or 43 CFR 45.22, with respect to a hearing process consolidated under §221.23;

3. NMFS, if it has filed a preliminary prescription; and

4. Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under §221.23.

**Person** means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any federal, state, tribal, county, district, territorial, or local government or agency.