

fishway prescriptions pursuant to section 18, or required consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS) and attendant studies under the ESA; and delayed receipt of state water quality certification.²⁴

26. Some or all of these factors may be present in any license proceeding. However, the principal causes of delay are the need for additional information or studies after the application is filed, untimely receipt of biological opinions under the ESA, and state water quality certification.²⁵ The longer the delay in a licensing proceeding, the more likely the cause is to be lack of water quality certification.²⁶

27. The potential benefit of an integrated licensing process can be judged by the extent to which it addresses these causes of delay in licensing. The process we are proposing addresses these causes by: merging pre-filing consultation with the Commission's NEPA scoping; enhancing consultation with Indian tribes; improving coordination of processes with Federal and state agencies, especially those with mandatory conditioning authority; increasing public participation during pre-filing consultation; and developing a study plan and schedule, including mandatory, binding study dispute resolution. With these features, the proposed process should make it much more likely that the Commission, Federal agencies with mandatory conditioning authority, and state agencies or Indian tribes with water quality certification authority obtain all the information they need to carry out their respective statutory responsibilities by the time the application is filed. This process should also encourage early settlement discussions by fostering early development of information necessary to inform settlement negotiations.²⁷

28. Some commenters made process proposals that they characterize as

modifications to the traditional process but which incorporate some, but not all, of the elements of the proposed integrated process. NHA, for instance, would allow the license applicant to unilaterally determine whether to use an integrated process or to defer NEPA scoping until after the license application is filed, and would not provide for binding pre-filing study dispute resolution. California would include expanded pre-filing public participation and dispute resolution, but would defer NEPA scoping until late in the pre-filing process. For these and other reasons, these proposals fall short of the goal. These proposals do however also contain other elements which, as discussed below, have been included in the proposed process.

B. Traditional Process and ALP To Be Retained

29. Our proposal to establish an integrated process raises the issue of whether there is a need to retain the traditional process or ALP. Industry commenters generally favor retaining both processes.²⁸ They argue that a single process is not suitable for every case, and that they need flexibility to choose a process that best suits the circumstances of each project.²⁹ NHA suggests that licensee process choice is needed to prevent participants from withholding agreement to an appropriate process as leverage to extract substantive or other procedural advantages. NHA also states that the traditional process remains suitable for projects that have few complications or issues. EEI adds that the traditional process may be most suitable for cases where the stakeholders are extremely polarized and unlikely to work cooperatively, and is less costly for licensees than the ALP. EEI and some licensees also state that the ALP, which tends to be labor-intensive for all concerned, is best suited to large projects with the revenues to support an intensive collaborative effort, but makes little sense for the operator of a small project.³⁰ Idaho Power adds that it can be difficult to get full participation in

pre-filing consultation by agencies, tribes, and NGOs with large agendas and limited resources. Xcel states that both the traditional and ALP processes have been used successfully, and that the study criteria and timelines of the IHC and NRG proposals are rigid and less likely to foster settlements. At least one Native American commenter suggests that the limited resources of many Indian tribes favor a choice of processes, although it does not endorse leaving the choice to applicants.³¹ Some commenters also suggest that the traditional process needs to be retained as a fallback in the event that an integrated process or ALP breaks down.³²

30. EEI and NHA also urge us to allow license applicants to tailor the licensing process to individual projects; that is, regardless of the process used, allow waiver of procedural requirements and the incorporation into ongoing processes of features from an integrated process.³³ EEI, for instance, states that the National Energy Policy Act of 1992³⁴ and the Council on Environmental Quality regulations³⁵ permit license applicants to prepare draft environmental assessments and to have a third party (*i.e.*, a contractor funded by the applicant, but working under the Commission's direction) prepare a draft environmental impact statement (EIS). It requests that the Commission modify its regulations to permit this in any process at the applicant's option, rather than only where an ALP is used. These arguments are considered below.³⁶

31. Environmental groups, some Federal and state agencies, and tribes argue that the Commission should have one process that is sufficiently flexible to accommodate the circumstances of any specific proceeding. Broadly stated, they suggest that this flexibility would be achieved by allowing for the applicant and stakeholders to agree to modify process steps and schedules, subject to Commission assent, in order to ensure that all parties understand and agree to the process applicable to each proceeding, and by providing guidance on acceptable terms of settlement agreements. These commenters maintain that multiple processes will make it very difficult for participants with limited resources, and that it is already difficult for environmental groups that rely heavily on volunteers to

²⁴ Other actions that have increased the time required for licensing include a policy established in 1993 of issuing draft environmental analyses for comment in all license proceedings and increasing reluctance by states to grant waiver of water quality certification. See 603 Report, p. 32.

²⁵ *Id.*, pp. 37–39.

²⁶ *Id.*, p. 43.

²⁷ Some of these broadly-stated features and more specific features discussed below are consistent with, or were developed in the context of, the drafting groups. These include early Commission contact with Indian tribes, development of a pre-application document, inclusion of tribal and public interest considerations in information development and study plan criteria. One drafting group also discussed concepts related to the filing of a draft license application that are the subject of specific requests for comment.

²⁸ NHA, Idaho Power, AEP, EEI, DM&GLH, APT, SCL, SCE, WPPD, Xcel, NEU, Troutman, Southern, NYSEDEC. On this point, the industry majority appears to enjoy some support from NYSEDEC and WDOE. Michigan DNR and WDOE state that they are less concerned with the number of processes than with funding, coordination, mutually agreeable time frames, and other matters. PG&E however suggests that an integrated process would eliminate the need for the traditional and alternative process.

²⁹ NHA, Idaho Power, AEP, EEI, DM&GLH, APT, SCL, SCE, WPPD Xcel, ORWB; NEU; Troutman; Southern; NEU.

³⁰ SCE, CHI, EEI, Idaho Power.

³¹ GLIFWC.

³² EEI, Troutman, Menominee.

³³ EEI.

³⁴ Pub. L. 102–486, 106 Stat. 2776–3133 (Oct. 24, 1992).

³⁵ 40 CFR part 1500, *et seq.*

³⁶ See Section III.F.3.b.