

file the Pre-Application Document will enhance the combined pre-filing consultation and NEPA scoping that now occurs in the ALP, and pre-filing consultation under the traditional process as well.

### c. Study Plan Development

50. Involving all interested parties and Commission staff from the outset of consultation will not alone bring about timely development of information and studies. There is general agreement that a Commission-approved study plan is needed as well,<sup>64</sup> but divergent views on the appropriate development and content of study plans.

51. Industry commenters contend that agencies and NGOs often request studies not based on any demonstrable nexus between project operations and resource impacts, unreasonably oppose the use of existing data from the project in question or other projects, and are insensitive to the cost of the study to the applicant. They recommend that the Commission establish clear criteria for acceptable study and information-gathering requests, and some believe that clearly articulated criteria would significantly reduce the number of study disputes.<sup>65</sup> The "nexus" criterion is the one they most often identify as necessary.<sup>66</sup> Some request that we make explicit that site-specific studies are not always needed, since in many cases extrapolation of data from studies at similarly situated projects is appropriate.<sup>67</sup> Some industry commenters, while supporting the concept of study criteria, oppose a prescriptive approach to defining the scope of studies, suggesting that the matter is best resolved in the context of specific cases or in alternative licensing proceedings.<sup>68</sup>

52. Agency, tribal, and NGO commenters generally agree that established study criteria are desirable, but disagree with the industry concerning the development and application of criteria. For instance, HRC and others state that criteria for

acceptable studies should include potential cumulative impacts of projects throughout the relevant river basin, because project impacts may extend far beyond project boundaries.<sup>69</sup> HRC adds that studies should be directed not merely at identifying project impacts, but also at determining the causes of those impacts and the sustainability of affected resources in a basin-wide cumulative impacts context. These commenters also tend to view the "nexus" issue differently, stating that a "common sense" test should apply to the establishment of a nexus between project operations and resource impacts.<sup>70</sup> In addition, several commenters indicate that deference should be shown to state agency study requests.<sup>71</sup>

53. Licensees note that, notwithstanding the Commission's well-established and judicially-approved policy that the baseline for environmental analysis is existing conditions,<sup>72</sup> participants continue to request studies intended to establish a pre-project baseline that would serve as a standard for purposes of establishing environmental mitigation requirements. They recommend that the Commission incorporate its policy into regulations establishing study criteria.<sup>73</sup> Some state agencies respond that state laws or policies require water quality standards to be established with reference to pre-project conditions, and that the record necessary to support certification is not complete until such studies are complete.<sup>74</sup> ADK states that the continuing dispute is unproductive and requests only that we resolve the matter once and for all.

54. We conclude that a Commission-approved study plan is an essential component of any integrated licensing process, and that such a plan will be most effective in reducing study disputes and allowing agreed-upon studies to go forward expeditiously if reasonably objective criteria by which to judge study requests are established.

55. The IHC developed six study dispute resolution criteria. These criteria are:

(a) Whether the request describes available, project-specific information, and provides a nexus between project operations and effects on the resources to be studied.

(b) Whether the request includes an explanation of the relevant resource management goals of the agencies with jurisdiction over the resource to be studied.

(c) Whether the study objectives are adequately explained in terms of new information to be yielded by the study and its significance relative to the performance of agency roles and responsibilities in connection with the licensing proceeding.

(d) If a study methodology is recommended, whether the methodology (including any preferred data collection and analysis techniques) is consistent with generally accepted practice in the scientific community.

(e) Whether the requester has considered cost and practicality, and recommended a study or study design that would avoid unnecessary costs while still fully achieving the stated study objectives.

(f) If the license applicant has provided a lower cost alternative, whether the requester has considered this alternative and, if not adopted, explained why the lower cost alternative would not be sufficient to achieve the stated study objectives.<sup>75</sup>

56. Several commenters endorse the IHC study criteria, and some, as discussed below, also suggest additions or modifications.<sup>76</sup>

57. A few commenters found fault with the IHC criteria. The principal criticism is that the criteria are focused on the needs of agencies with mandatory conditioning authority, notwithstanding that the Commission's public interest analysis must include issues raised by tribes or NGOs which may have resource goals and management plans of their own, or for which no formal goals or management plans may exist.<sup>77</sup> These commenters also take the position that a dispute resolution process should be open to any party, not just to Federal or state agencies or tribes to the extent that

<sup>64</sup> E.g., NHA, SCE, HRC. PG&E's dispute resolution proposal calls for neutral, objective criteria. In most cases, these would be voluntarily applied by the parties to resolve disputes among themselves. Disputes brought to the Commission would not actually be resolved, because the Commission would issue only "opinions" based on the neutral, objective criteria.

<sup>65</sup> SCE, Kleinschmidt, NHA, WPPD, Menominee, Oregon, Long View.

<sup>66</sup> NHA, EEL, Wausau, Ameren/UE, Spaulding, Xcel, APT, Duke, SCE.

<sup>67</sup> Xcel, NHA, Southern, NHA.

<sup>68</sup> NHA. EEI states that the scope of required studies is already too broad and that the Commission should require only studies based on demonstrated nexus between project operations and resource impacts.

<sup>69</sup> HRC, NYSDEC, PPMC, Salish-Kootenai.

<sup>70</sup> GLIFWC, VANR.

<sup>71</sup> Michigan DNR, Wisconsin DNR, California, RAW.

<sup>72</sup> See *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999); *Conservation Law Foundation v. FERC*, 216 F.3d 41 (DC Cir. 2000).

<sup>73</sup> Wausau, WE Energies, Duke, DM&GLH, Domtar, Skancke, FPL, APT, SCE, NHA. In a related vein, Ameren/UE suggests that applicants who choose the ALP are under continuous pressure to agree to unneeded studies as the price for continued cooperation of special interest groups, and that the Commission should relieve these applicants of this pressure by itself deciding on all study requests. That would however be inconsistent with the collaborative thrust of the ALP.

<sup>74</sup> Wisconsin DNR, NYSDEC.

<sup>75</sup> September 12, 2002 Notice, Attachment A, p. 11.

<sup>76</sup> Menominee, Duke, WPPD, Wisconsin DNR, Michigan DNR, Ameren/UE, NHA, HRC.

<sup>77</sup> PG&E, HRC. For instance, an NGO might support the establishment of certain instream flows in a bypass reach for aesthetic, biological health, or recreation purposes, but have no formal planning process of the kind that resource agencies typically employ.