

exercise of their mandatory conditioning authority is implicated. EEI opposes the IHC criteria, because it opposes the IHC dispute resolution proposal in which they would be applied.

58. With regard to IHC criterion (a), the Menominee Tribe states that a study may be needed in some cases to determine if there is a nexus between project operations and resource impacts, and that this criterion should be applied liberally to accommodate that need. For instance, it may be reasonable to assume that unscreened turbines at a project cause entrainment mortality, but no data exist indicating the extent of such mortality or its biological impacts at the project site. GLIFWC similarly states a requester should not have to demonstrate a nexus when common sense dictates that there is one. VANR appears to assert that a requester should only have to articulate a relationship between the study request and a regulatory requirement.

59. We believe the nexus requirement is important to ensure that the licensing process is the vehicle for making informed decisions pursuant to the FPA and other applicable laws, rather than for development of information at the applicant's expense that may be useful to the requester in some other context. The same rule of reason must apply to the application of this criterion as to the application of any other criteria.

60. Some tribes state that the reference to agency jurisdiction over resources in criterion (b) should be removed, because it could be construed to exclude tribal participation in dispute resolution.⁷⁸ Similarly, one of the drafting groups recommended that this criterion be modified to take into account tribal and public participation in study plan development. As discussed below, we are proposing a study dispute resolution process for the integrated process which encompasses the participation of tribes in the development of the applicant's Commission-approved study plan, and in formal dispute resolution to the extent their mandatory conditioning authority under the Clean Water Act is implicated.⁷⁹

61. Wausau indicates that agency management goals may not be an appropriate determinant of what studies are necessary, citing the possibility that a resource agency could establish the

removal of dams in general as a management goal, which could lead to lengthy and expensive dam removal studies where there is no realistic prospect that a dam will be removed. SCE similarly states that the requester should have to demonstrate that agency management goals are appropriate, then show that the study is designed to directly address the nexus between impacts and management goals.

62. Our intention is that the criteria will be applied as a whole, so that the mere fact that a study request can be related to an agency management goal will not ensure that the study is required to be conducted. This necessarily implies that judgment calls will be made, and it is our intention that those calls be made in light of the principle that the integrated licensing process should to the extent reasonably possible serve to establish an evidentiary record upon which the Commission and all agencies or tribes with mandatory conditioning can carry out their responsibilities. We do not intend to second guess the appropriateness of agency or Tribal resource management goals, but must consider study requests based on those management goals in light of all applicable criteria, such as the "nexus" criteria, as well as the potential for conflict with important Commission policies, practices, or rules.

63. Regarding IHC criteria (e) and (f), some tribes believe that where tribal trust resources are concerned, study cost is irrelevant once the reasonableness of the need for the data has been established.⁸⁰ We cannot agree. Our responsibility to balance all aspects of the public interest with respect to any project proposal necessarily encompasses the exercise of independent judgement concerning the relative cost and value of obtaining information.

64. We conclude that the IHC study criteria are sound and reasonably objective, and propose to require participants in the integrated process to support their information-gathering or study requests with reference to those criteria, with minor modifications, such as the inclusion of tribal management plans and public interest considerations mentioned above. Our proposed criteria require an entity making an information-gathering or study request to, as applicable:

(1) Describe the goals and objectives of the study and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the

agencies or tribes with jurisdiction over the resource to be studied;

(3) If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate filed season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge;

(7) Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.⁸¹

65. NHA and SCE would add the following three criteria:

1. If a study request has previously been the subject of dispute resolution, or if the Study Plan was undisputed, requests for that study would be rejected except in extraordinary circumstances.⁸²

2. Study requests intended to establish a "pre-project conditions" baseline would be rejected.

3. The cost of the study must be justified relative to the value of the incremental information provided.⁸³

66. NHA's first additional criterion has merit, particularly in light of the fundamental purpose of the proposed rule. It is not, however, really a study criterion, but a statement concerning treatment of additional information requests and will therefore be considered elsewhere.⁸⁴ With regard to the baseline issue, we note that all of the criteria will be applied in light of important Commission policies. Thus, we will not include this as a criterion, but will continue to adhere to our environmental analysis baseline policy.⁸⁵ NHA's third criterion is similar

⁸¹ See proposed 18 CFR 5.10.

⁸² NHA and EEI frame this also in terms of "rebuttable presumption" that no additional studies would be required under these circumstances.

⁸³ In a similar vein, PG&E suggests that criteria should include whether a real problem has been identified, how the information will be used, and the cost of the information relative to its value.

⁸⁴ See this section, *infra*, Section III.E.2, and proposed 18 CFR 5.13 and 5.14.

⁸⁵ As stated above, existing environmental conditions, not pre-project conditions in the case of

⁷⁸ Menominee, BRB-LST, GLIFWC, Shoshone.

⁷⁹ Consistent with the recommendation of one of the drafting groups, we have also modified the study criteria to require parties requesting information development or studies to address any known resource management goals of Indian tribes or non-governmental organizations.

⁸⁰ Menominee, St. Regis Mohawks, GLIFWC.