

to proposed criterion (7). Both our proposed criterion (7) and NHA's recommended criterion (3) involve a significant degree of subjectivity, to which a rule of reason must be applied. The Commission requests comments on whether our proposed criterion (6) or NHA's recommended criterion (3) more appropriately deals with the issue of study costs.

67. SCE also proposes that we add a criterion that "study results will aid the decision-making process in a substantive way."<sup>86</sup> We are not entirely certain what SCE means, but the proposed criteria implicitly require that study requests not be frivolous and add some appreciable evidentiary value to the record.

68. Duke and the Michigan and Wisconsin DNRs state that the study criteria might include standard study plan formats, including standardized formats for reporting results. Michigan and Wisconsin DNR state that this would better enable states and tribes to meet their own responsibilities with respect to water quality and coastal zone management plan certification, as well as fishery and energy management goals. AMC recommends that a scientific peer review process be employed to develop a list of approved study methodologies.

69. We do not find that the guidance proposed by Duke and the Michigan and Wisconsin DNRs is appropriate for a rulemaking, because study plan development tends to be project-specific. We note however that Appendix D of the Commission's Hydroelectric Project Licensing Handbook, which may be viewed on the Commission's website, includes guidelines for preparing Exhibit E, the environmental exhibit. This appendix provides, in some detail, the information that should be considered for inclusion in a license application. Study plans can be developed from the information needs there described, and can be adapted to site-specific needs for information and in light of anticipated impacts.

70. Several commenters indicate that an effective study plan must include one or more opportunities for additional study requests to account for circumstances where studies result in

existing projects, is the baseline for analysis in our NEPA documents. We have also stated however that, while it does not change the focus of our analysis, reliable information on pre-project conditions may help to inform our decisions about what environmental enhancement measures may be appropriate for a new license. *See* City of Tacoma, 67 FERC ¶ 61,152 (1994), *reh'g denied*, 71 FERC ¶ 61,381 at pp. 62,491–92 (1995).

<sup>86</sup> SCE, p. 19.

data very different from the data expected or otherwise demonstrate that additional information is required to make a fully informed decision.<sup>87</sup> Licensee commenters generally acknowledge that such circumstances may occur, but stress their need for certainty with respect to costs and timeliness. They request that any new rule establish a presumption that an applicant which completes the approved study plan has obtained all of the information necessary for the Commission and agencies with mandatory conditioning authority to carry out their responsibilities, and that any request thereafter for additional information would be granted only upon a showing of extraordinary circumstances.<sup>88</sup>

71. We recognize the tension between licensees' desire for certainty and the need for finality in compiling the decisional record, and, on the other hand, the likelihood that circumstances will occur during the course of studies and data gathering which require additional information or a course correction in order to develop the necessary information. We are proposing therefore that each Commission-approved study plan under the integrated licensing process include specified points at which the status of information development and other relevant factors are reviewed and an opportunity for amendments provided. As the information-gathering and studies proceed however, the standard for new requests will increase.<sup>89</sup> Also, because the integrated process would include stakeholder participation in study plan development, periodic review of results and opportunities for amendments, and study dispute resolution, the integrated process does not contemplate any additional opportunity for participants to request information and studies after the license application is filed.

72. Finally, AMC contends that where studies are conducted by consultants who are paid by and answer to license applicants, the consultants are under explicit or implicit pressure from the applicant to find minimal or no impact on resources from project operations. It recommends that study plans require applicant-funded consultants to report directly to, and work under the direction of, a stakeholder group. We decline to adopt this proposal. Allegations of institutional bias might

<sup>87</sup> Wisconsin DNR, Washington, VANR, NMFS.

<sup>88</sup> NHA, Idaho Power, Van Ness, Kleinschmidt, PG&E, Southern, SCE.

<sup>89</sup> *See* Section III.E.2 and proposed 18 CFR 5.14 and 5.15.

be directed at technical experts in the employ of any party to a license proceeding. AMC notes that applicants have agreed to such arrangements in at least one instance, and that it worked well for the participants, but we decline to establish a process that compels applicants to fund consultants who answer to other participants.

#### d. Study Dispute Resolution Process

73. Early resolution of study disputes was identified by many commenters as critical to improving timeliness.<sup>90</sup>

74. The pre-filing study dispute resolution process provided in the Commission's existing regulations<sup>91</sup> is seldom used. Commenters cite various reasons for this. Some say it is because the decision of the Director of the Office of Energy Projects (OEP) is not binding.<sup>92</sup> Others suggest that the absence of specific study criteria in the regulations creates uncertainty that leads parties to continue attempts to negotiate study requirements until after the application is filed.<sup>93</sup> Some Federal and state agencies indicate that they do not use the process because the Commission only considers the need for information to support its own decisions, which may be different from the information these agencies require for a complete record to support the exercise of their own authorities.<sup>94</sup> HRC notes that the current rules do not provide for resolution of disputes between the applicant and NGOs. A few other commenters, mostly from the industry, state that the existing process, or the existing process with minor modifications, works well enough.<sup>95</sup>

75. Commenters generally support the establishment of a more clear and effective dispute resolution process.<sup>96</sup> There are, however, substantial differences concerning the details of what that process should be. It is helpful to use the IHC dispute resolution proposal as a frame of reference to discuss these differences.

<sup>90</sup> *See* Section III.D.1, *supra*. Also, NRG, DM&GLH, Skancke, New York Rivers, Oregon, NMFS.

<sup>91</sup> *See* 18 CFR 4.38(b)(5) and (c)(2); 16.8(b)(5) and (c)(2).

<sup>92</sup> NHA, PG&E, NYSDEC, Van Ness, AMC, WPPD, SCE, Kleinschmidt.

<sup>93</sup> California, Oregon, Long View

<sup>94</sup> Interior, NYSDEC, NCWRC.

<sup>95</sup> SCE, Idaho Power, EEL, NAH, ADK.

<sup>96</sup> NHA, PRT, APT, CRITFC, NYSDEC, CTUIR, Menominee, AMC, Oregon, SCE, Kleinschmidt, WPPD, KCCNY, HRC, AmRivers, HRC, Menominee, Wisconsin DNR, EEI, Idaho Power, DM&GLH, APT, Duke, PG&E, NCWRC, Long View, Xcel, CSPPA. Some industry commenters recommend that any new dispute resolution process be incorporated into any and all licensing process options. Duke, EEI, Van Ness. This is discussed in Section III.H.