

decision criteria, and binding. We believe a modified version of the IHC proposal may satisfy these requirements.

84. Timeliness can be ensured by building into the dispute resolution process deadlines for action by all parties. The advisory panel approach offers the best assurance of impartiality and acceptance by including a panel member with appropriate technical expertise agreeable to the other panelists, and who has no conflicts of interest. Transparency can be assured by requiring a disputing party, the advisory panel, and the Director to explain how they applied the facts in light of the study criteria.

85. We propose to establish what is essentially a two-step dispute resolution process. In Step 1, the applicant files a draft study plan for comment; the participants (including Commission staff) meet to discuss the draft plan and attempt to informally resolve differences. The Commission then approves a study plan with any needed modifications after considering the applicant's proposed plan and the participants' comments (preliminary determination). Step 2 would be a formal dispute resolution process, including the panel described above, in which resource agencies with mandatory conditioning authority under FPA sections 4(e) and 18, and states or tribes with water quality certification authority under Clean Water Act section 401, would be able to dispute the preliminary determination to the extent their dispute concerns requests that directly implicate their exercise of that conditioning authority.<sup>111</sup> If more than one agency or tribe filed a notice of dispute with respect to the preliminary determination's decision on a study request, the disputing agencies or tribes would select one representative to the panel, to ensure that balance is maintained.

86. This proposed process distinguishes between agencies and tribes with conditioning authority, to extent they are exercising that authority, and participants whose role is to make recommendations pursuant to FPA sections 10(a) and 10(j), NHPA section 106, or other applicable statutes. Agencies or tribes exercising mandatory conditioning authority have a duty to make reasoned decisions based on substantial evidence, and their decisions are subject to judicial review. Agencies, tribes, or members of the public that make recommendations to the Commission bear no such responsibility. The proposed integrated

process ensures information and study requests of the latter entities receive appropriate consideration, in the context of early NEPA scoping and a process for developing the study plan provides all parties with opportunities to participate in study plan development meetings and file comments.

87. We recognize that the applicant, by virtue of the fact that it must conduct any studies required by the Commission and implement the license, has a special interest in the outcome of any dispute resolution process involving the Commission and agencies or Tribes with mandatory conditioning authority. For that reason, the dispute resolution process we are proposing provides an opportunity for the applicant to submit to the panel information and arguments with respect to a dispute.

88. The advisory panel procedure does not delegate any of the Commission's decisional authority, because the panel is advisory only. Nor do we think it is necessarily too costly or unwieldy if properly managed. All costs of panel members representing the Commission staff and the agency or tribe which served the notice of dispute would be borne by the Commission, agency, or tribe, respectively. The third panel member will serve without compensation, except for certain allowable travel expenses to be borne by the Commission.<sup>112</sup>

89. We agree with GLIFWC that consistency of analysis is desirable in a dispute resolution process, but anticipate that project-specific facts will play a large role in the recommendations of the panels. We are not moreover able to provide any assurance that third party panelists, who volunteer their services, would be willing to appear on multiple panels during any given period of time. Finally, the recommendations of each panel and the Director's decision will be matters of public record, and may inform the thinking of future panels applying the same criteria to issues concerning the same resource.

90. NYSDEC and AMC state that to ensure the neutrality of the third panel member, that person should be from academia and not tied to any licensee's financial interests, or should be some other wholly independent party. We believe that neutrality will be sufficiently ensured by the fact that the third panelist must be agreed upon by

the panelists representing the Commission staff and the disputing agency or tribe. The Commission requests comments on the proposed study dispute resolution process, and in particular on the efficacy of the advisory panel.

91. California and others<sup>113</sup> recommend that disputes be resolved by persons local to the project region, on the ground that local officials have a better understanding of the issues and states cannot afford to send staff to Washington, DC. This is a matter best decided in the context of each proceeding.

#### e. Other Recommended Uses for Dispute Resolution

92. Menominee recommends that the study dispute resolution concept be extended to other elements of the licensing process, such as disagreements on draft license articles (which we propose to include with draft NEPA documents),<sup>114</sup> and whether the Commission is in compliance with NEPA. Dispute resolution with the Commission staff is not appropriate for such matters, which are solely within the Commission's authority, and to which rehearing and the opportunity for judicial review apply. Dispute resolution procedures may however be appropriate in the context of settlement negotiations among parties where a settlement agreement could include recommendations to the Commission concerning the content of license articles.

93. Some industry commenters suggest that disputes over material issues of fact related to issuance of mandatory conditions should be the subject of "mini-hearings" upon the applicant's request. They contend this would improve the overall record of the proceeding for judicial review, and that the prospect of a fact-finding hearing would make agencies with conditioning authority more likely to settle cases and less likely to impose unreasonable conditions.<sup>115</sup> We do not propose to change our general practice of resolving most hydroelectric licensing matters by means of notice and comment procedures. We agree, however, that there may be merit in using evidentiary hearings before administrative law judges in licensing proceedings, and will give due consideration to any requests for such hearings.<sup>116</sup>

<sup>112</sup> The allowable travel expenses are defined at 31 CFR part 301. In brief, travel allowances are the same as those of a salaried employee traveling on behalf of the Commission. The Commission has procedures and guidance in place for such situations.

<sup>113</sup> Oregon, CRITFC.

<sup>114</sup> See Section III.D.4.d.

<sup>115</sup> EEI, NHA, Idaho Power, DM&GLH, APT, Duke.

<sup>116</sup> Proposed 18 CFR 5.27(e) explicitly provides for this.

<sup>111</sup> See proposed 18 CFR 5.12.