

2. Consultation and Coordination With States

94. The current regulations require prospective license applicants to include state fish and wildlife agencies and water quality certification agencies in pre-filing consultation,¹¹⁷ and for license applicants to include with their application proof that they have received, applied for, or received waiver of water quality certification.¹¹⁸ Notwithstanding, the Section 603 Report identified lack of timely state water quality certification as one of the principal causes of delay in licensing.¹¹⁹

95. The causes for this appear to vary from state to state. States, including those which participated in the December 2001 regional workshops, indicate that they have very limited resources to devote to such applications; that disputes over the scope of studies required for a complete certification application are not resolved before the license application is filed; or that their water quality certification process is designed to use the Commission's final NEPA document to the extent possible as the basis for acting on the water quality certification application.¹²⁰

96. Not surprisingly, then, there was broad agreement in the regional workshops with states and among the commenters that early collaboration or coordination by all parties with state agencies that issue water quality and CZMA consistency certification is essential to any effort to improve the timeliness of licensing.¹²¹ Many commenters recommend that these state agency processes be fully integrated with the Commission's processes from the beginning of pre-filing consultation through license issuance. This could include joint Federal/state environmental issues scoping and preparation of environmental documents as cooperating agencies.¹²² CRITFC states coordination of Federal and state regulatory agency action would also be enhanced by river basin-wide analyses that take into account all

relevant state and tribal water quality standards and tribal water rights.

97. The proposed integrated licensing process is designed to maximize coordination with state processes under the CWA and CZMA, and to aid the ability of state agencies to timely provide recommendations pursuant to FPA sections 10(a)(1) and 10(j). State agencies would be consulted with respect to development of the applicant's Commission-approved study plan; invited to participate in an initial public meeting for the purpose, among others, of coordinating all regulatory processes to the extent possible; and could participate in the Commission's NEPA scoping activities. They would also be eligible for dispute resolution with respect to information and study requests pertaining to the exercise of their water quality conditioning authority.

98. There are limits to what the Commission can do to coordinate its activities with state processes. Some states for instance indicate that the problem of incomplete water quality certification applications when the license application is filed would be eliminated if the Commission would treat states as "full partners" in the licensing process, which appears to entail, among other things, complete deference to state agency study requests.¹²³ The Commission may in fact require an applicant to complete all of the information-gathering or studies requested by a state agency, but must exercise its independent judgement with respect to each study request in light of the comprehensive development standard of FPA section 10(a)(1), the Commission's policies, and any other applicable law. Several states moreover commented that they cannot be bound by the result of any Commission decisions on information and study needs insofar as their independent water quality certification authority is concerned, and if they are not satisfied with the information resulting from the Commission-approved study plan or dispute resolution process, they will deny water quality certification or use their other authorities to require the information they believe is needed.¹²⁴ Finally, some states oppose participation as cooperating agencies for NEPA document preparation, on the ground that would conflict with their own policies or procedures.¹²⁵

99. EEI, NHA, and Idaho Power recommend that the Commission

consider developing state-specific agreements comparable to programmatic agreements with State Historic Preservation Officers (SHPO), which might address such matters as coordination of schedules and key information needs of the states.¹²⁶ As previously noted,¹²⁷ the Commission has already begun consultations with the states to determine whether such memoranda or other actions to enhance coordination, apart from the proposed rule, may be useful. Our staff is also engaged in more focused discussions with some states where numerous relicense applications are expected to be filed over the next decade.

100. Some states¹²⁸ indicate that their ability to timely issue water quality and coastal zone management plan consistency certifications would be greatly enhanced if the Commission directly funded their participation in the licensing process or used its authorities to require license applicants to fund their participation. The Commission does not have authority to directly fund state agencies. Licensee funding of Federal and State agencies is governed by FPA section 10(e)(1), which requires the Commission to collect in annual charges from licensees the Commission's administrative costs and * * * any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this part * * *.

101. This clause was added by section 1701(a) of the National Energy Policy Act of 1992 (EPAct).¹²⁹ Section 1701(a)(2) of EPAct also added the following proviso:

Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such reviews and shall remain available until expended;

102. The Commission has construed this provision to require an annual appropriation for this purpose by

¹²⁶ EEI, NHA, Idaho Power. EEI states that any drafts of any such agreements should be submitted to licensees for comment.

¹²⁷ See Section II.B., *supra*.

¹²⁸ Washington, Oregon, Michigan DNR. California recommends that the Commission reimburse intervenors for attorneys' fees and travel expenses.

¹²⁹ Pub. L. 102-486, 106 Stat. 2776-3133 (Oct. 24, 1992).

¹¹⁷ 18 CFR 4.38(a)(1) and (a)(2); and 16.8(a)(1) and (a)(2).

¹¹⁸ 18 CFR 4.38(f)(7); 16.8(f)(7).

¹¹⁹ See Section 603 Report, pp. 38-43.

¹²⁰ WDOE, Oregon, SCDWQ, Michigan DNR, California, Wisconsin DNR. EPA states that the limited resources of some states relative to their Clean Water Act responsibilities could make it difficult for the state agency to stay involved over the term of a multi-year license proceeding.

¹²¹ Washington, California, SCE, Salish-Kootenai, NHA, HLRTF, Oregon, Interior, PG&E, PCWA, Idaho Power, PacifiCorp, SCDWQ, APT, Michigan DNR, HRC, Wisconsin DNR, EEI, NYSDEC, Maryland DNR, NMFS.

¹²² NRG, Washington, Idaho Power, PacifiCorp, SCE, Oregon, Michigan DNR, HRC, KCCNY, CDWR, HRC, Idaho Power, PacifiCorp, NHDES, PG&E.

¹²³ California, NYSDEC, VANR, Wisconsin DNR.

¹²⁴ California, Oregon, Michigan DNR, Wisconsin DNR, WDOE.

¹²⁵ See Section III.D.4.b.