

Congress in the budgets of the applicable agencies or the Commission.¹³⁰ Congress has not made such appropriations for the states.¹³¹

a. Timing of Water Quality Certification Application

103. Some commenters suggest that the timing of the water quality certification application should be governed by events other than the filing of the license application. Although the specific time frames that they recommend for filing are divergent, the common theme appears to be that the water quality certification application should be filed when the record with respect to water quality issues is complete.¹³² California recommends that the certification application be filed after the Commission's draft NEPA document is issued. New York Rivers and Oregon suggest that regardless of when the certification application is filed, the Commission should not begin counting the one-year period for state action until the state deems the application to be complete.¹³³

104. The current rule requiring a license applicant to apply for water quality certification by the time the license application is filed rests on the assumption that water quality data issues will have been resolved during pre-filing consultation. The integrated licensing process we are proposing provides greater opportunity for that to occur. The applicant and water quality certification agencies will know well before the application is filed what related data the Commission will require to be filed with it. Thus, states should be in a position to inform license applicants if additional information will be required by the state for water quality

certification purposes before the application is filed, and applicants should be prepared to begin obtaining any such information and assembling a water quality certification application before the license application is filed.

105. For those applications developed using the traditional process, we propose to modify the rules to require the applicant to show that it has applied for, received, or received waiver of water quality certification no later than the date for responses to the Commission's REA notice. The later date may be appropriate for the traditional process because there is no Commission-approved pre-filing study plan, and therefore less reason to assume that water quality information and study issues will have been resolved when the application is filed. Similar considerations may apply to the ALP, where the parties have much flexibility with respect to the timing of the development of the record. On the other hand, and as discussed below, we are proposing to incorporate full public participation and mandatory, binding dispute resolution into the traditional process, which should result in pre-filing resolution of water quality data issues far more often than is currently the case. The Commission therefore requests comments on whether the deadline date for filing the water quality certification application should remain when the license application is filed for both the traditional process and ALP.

3. Consultation With Indian Tribes

106. The September 12, 2002 Notice asked how a new licensing process can better accommodate the authorities, roles, and concerns of Indian tribes. The principal concerns expressed by tribes are that tribal sovereignty and authorities need to be recognized in the process, that the Commission have government-to-government relations with the tribes, and that the tribes be consulted and their issues identified very early in the process.¹³⁴

107. A few tribes suggest that the existence of a government-to-government relationship means that only the Commission should consult with the tribes, and that the tribes should not have to deal directly with license applicants.¹³⁵ Most tribes, however, recognize the crucial role of the license applicant in consultation and development of studies and the license application, and accordingly offer recommendations intended to

improve coordination and development of information with the applicant as well as the Commission. A few licensees suggest that if consultations between the tribes and license applicants become unproductive, or at the tribe's request, all consultation with the tribe should be through the Commission.¹³⁶

108. Several tribes state that there is a lack of understanding by the Commission of its roles and responsibilities as a trustee for tribes, and of individual tribal concerns, and a lack of understanding by tribes of the Commission's processes. They also state that our regulations are not clear with respect to the rights, roles, and responsibilities of Indian tribes.¹³⁷ Several suggest that the Commission establish either an office of tribal affairs or otherwise dedicate a specific person or persons as a tribal liaison.¹³⁸

109. The relationship between the United States and Indian tribes is defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum,¹³⁹ departments and agencies of the Executive Branch have been directed to consult with Federally recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes, in a manner that recognizes the status of the tribes as governmental sovereigns.

110. As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on license applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the Commission's rules and the nature of its licensing process place some limitations on the nature and type of consultation

¹³⁰ See Testimony of Commission Chair Elizabeth Moler before the Subcommittee on Energy and Water Development of the House Committee on Appropriations (April 21, 1993); Letter from Chair Elizabeth Moler to Hon. John Dingell of August 2, 1994.

Certain Federal agencies have for a number of years submitted "reasonable and necessary costs" to the Commission for inclusion in annual charges. Some licensees have challenged the eligibility of these costs for recovery in annual charges and the Commission's policies concerning the evidentiary showing necessary for the costs to be recovered. These matters are currently in litigation. *City of Tacoma, et al. v. FERC*, DC Cir. 01-1375 (filed August 28, 2001).

¹³¹ Although the Commission's existing authority in this regard is constrained, we are well aware of the funding challenges faced by many states and are interested in pursuing with them in other contexts how the Commission might be able to assist them in meeting this challenge.

¹³² NHA, Idaho Power, NYSDEC, SCE (when the REA notice is issued); CDWR (one year prior to scheduled license issuance); HRC, NCWRC (following issuance of a draft or final NEPA document).

¹³³ NYRU, Oregon.

¹³⁴ Menominee, GLIFWC, CRITFC, Salish-Kootenai, St. Regis Mohawks, PRT, HETF; CTUIR; St. Regis Mohawks, NF Rancheria, Catawba, APT, KT, Nez Perce.

¹³⁵ Choctaw, PRT, Shoshone.

¹³⁶ PacifiCorp, NHA.

¹³⁷ E.g., Nez Perce.

¹³⁸ CRITFC, Salish-Kootenai, NF Rancheria, Menominee, KT, GLIFWC, BRB-LST, Quinalt, CTUIR, Shoshone.

¹³⁹ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (issued November 6, 2000); Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (issued May 14, 1998); Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments (issued April 29, 1994), reprinted at 59 Fed. Reg. 22,951; Executive Order 12875, Enhancing the Intergovernmental Partnership (issued October 26, 1993).