

authority must support their conditions with reasoned decisions based on facts in the public record. A cooperating agency that supplies the Commission with study results or other information presumably does so because it believes the material adds value to the decisional record and deliberations. No cooperating agency should therefore object to a requirement that all study results and other information provided to the Commission also be served on parties to the proceeding. Deliberative communications however involve the interpretation and application of study results and other information. It is appropriate for such communications among cooperating agencies to remain off-the-record in order to foster the free and timely exchange of ideas. As long as the analyses upon which the Commission and a cooperating agency ultimately rely are set forth in their respective NEPA or decisional documents, they will be subject to challenge in comments on draft NEPA documents, on rehearing of decisional orders, and on judicial review. Under these circumstances, no other party should be prejudiced.

134. We therefore propose to modify our policy by permitting Federal cooperating agencies to intervene, subject to a requirement that all studies and other information provided by a cooperating agency to the Commission be promptly submitted to the Secretary and placed in the decisional record. Decisional communications such as working drafts of NEPA documents and associated communications would continue to be exempt from disclosure. Accordingly, we also propose to modify the text of the ex parte regulations to this effect.¹⁷³ The exception to the APA's prohibition on ex parte communications for Federal agency communications does not extend to states or Indian tribes. Our policy will therefore remain in place with respect to these entities.

b. NRG Cooperating Agency Proposal

135. NRG proposes that the Commission and Federal or state resource agencies that regularly participate in the Commission's licensing processes develop a general Memorandum of Understanding (MOU) that would establish a procedural framework in which the resource agencies would be cooperating agencies in the preparation of a non-decisional NEPA document; that is, one which would analyze resource impacts of the applicant's proposal and reasonable alternatives, but would not include any

recommendations on license articles or terms and conditions. The MOU would cover procedures for cooperation, dispute resolution, and decision-making. Each MOU would be supplemented by a project-specific Memorandum of Agreement.¹⁷⁴

136. The Commission supports in general the use of cooperating agency NEPA documents as a means of increasing efficiency. We are not however prepared to structure the integrated licensing process proposal based on the assumption that there will be a cooperating agency relationship in all or most cases. Many considerations go into an agency's decision to seek or not to seek such status. These include staff availability, the nature and extent of the agency's responsibilities with respect to licensing, and the policies and practices of the potential cooperating agencies.¹⁷⁵ Moreover, where the Commission and resource agencies have found it to their mutual benefit to be cooperating agencies, project-specific agreements have generally been timely concluded so that the processing milestones were not prejudiced. Nevertheless, the Commission acknowledges that there may be benefits to having general MOUs with resource agencies to address coordination issues that cut across projects, and we will continue to explore that approach outside the context of this rulemaking.

c. Non-Decisional NEPA Documents

137. Under NRG's proposal for non-decisional NEPA documents, the Commission and cooperating agencies would separately publish records of decision explaining the basis for their respective decisions, based on the record in the joint NEPA document and other relevant materials in their public record. NRG believes there would be little controversy with regard to the scientific analyses, which would eliminate the need for the Commission and cooperating agencies to conduct separate NEPA reviews. It suggests that this might reduce the average time of license proceedings.

138. NRG's proposal enjoys some support from across the spectrum of

interests.¹⁷⁶ HRC states that having a non-decisional NEPA document will help to ensure transparent decision-making, and that non-decisional documents are needed to ensure that license articles and terms and conditions are not negotiated between agencies without public input. It is not however universally embraced. EPA, citing the regulations of the Council on Environmental Quality,¹⁷⁷ and NMFS support a decisional NEPA document with a Commission-preferred alternative. ADK suggests that using two documents for what is now encompassed in one document might lead to inefficient sequential processing.

139. The Commission does not propose to adopt a practice of issuing non-decisional NEPA documents as proposed by NRG. Although we propose to change our existing policy with respect to intervenor status for cooperating agencies, there is no assurance that cooperating agency agreements will become the norm, as discussed above. We are moreover less optimistic than NRG concerning the likelihood of conflicts over scientific analyses. The ubiquity of study disputes and conflicts over interpretation of study results, quite apart from decisions over how they might translate into PM&E measures, leads us to believe that the resource impact analysis sections of NEPA documents will continue to be controversial.

140. The Commission does however propose to modify the structure of its NEPA documents to better separate resource impact analysis from decisional analysis. In the future, all of our NEPA documents will confine decisional analyses pursuant to FPA sections 10(a) and 10(j) to clearly delineated sections at the close of the document. In this way, any other Federal or state agency or Tribe with mandatory conditioning authority will, whether or not it is a cooperating agency, be able to use those parts of the resource impact analysis not in dispute in whatever documents it prepares pursuant to its legislative mandates.

d. Draft License Articles

141. Federal agencies and some commenters recommend that the Commission issue draft license articles for comment in connection with draft NEPA documents. They believe this will result in better license orders and license articles, and that issuance of draft articles would help to foster settlement agreements.¹⁷⁸

¹⁷⁴ See NRG proposal summary, September 12, 2002 Notice, Attachment B, p. 9. NHA supports the NRG proposal in this regard. CRITFC and Nez Perce support joint-agency NEPA documents in concept, but are concerned that the NRG's proposal might exclude the tribes, or somehow impose inappropriate limitations on appeal rights.

¹⁷⁵ Michigan DNR and WDOE object to the inclusion of state agencies as cooperating agencies, on the ground that would subject the state agency to schedules established by the Commission, which they aver would conflict with other Federal or state laws and regulations.

¹⁷⁶ HRC, AmRivers, SCE, CRITFC.

¹⁷⁷ See 40 CFR 1500, *et seq.*

¹⁷⁸ HRC, Menominee, BRB-LST.

¹⁷³ Proposed new 18 CFR 385.2201(g)(2).