

training in service as third-party neutrals, and judges have served in that capacity in a number of hydroelectric proceedings. In addition, the Commission has provided various training programs in facilitation, mediation, and dispute resolution to its staff. In just the past few years, over 100 members of the Commission staff have completed training courses in various forms of ADR, and many staff members have put their skills to work in assisting collaborative licensing processes and settlement negotiations as mediators or facilitators.

166. Finally, NMFS states that the Commission should establish schedules for acting on settlement agreements. As noted above, we are already providing schedules for license application proceedings.

c. Guidance on the Content of Settlement Agreements

167. Several commenters stated that the Commission's rules should provide guidance concerning the Commission's policies on what kinds of settlement provisions are or are not acceptable,²¹² or that the Commission should have a policy of deferring to settlement agreements in the absence of illegality.²¹³ Specific subjects on which commenters seek guidance include support for adaptive management programs for licenses,²¹⁴ mitigation measures in lieu of additional studies,²¹⁵ mitigation measures that occur outside of existing project boundaries or are beyond the Commission's authority to require,²¹⁶ and confidentiality agreements.²¹⁷

168. The Commission strongly supports the efforts of parties appearing before it to settle their differences and propose to the Commission agreements to resolve pending proceedings in the public interest.²¹⁸ We make every effort to fully accept uncontested settlement

agreements that are consistent with the public interest. Where settlements are contested, the Commission has an additional duty to protect the interests of non-settling parties and must ensure that agreements are fair and reasonable. Our conclusions concerning the compatibility of a settlement agreement with the public interest are informed by the comprehensive development standard of FPA section 10(a)(1) and the policies and practices we have adopted pursuant to that standard. This is not the same as the absence of illegality, and our responsibility to review the merits of each settlement agreement in this context is statutory and cannot be delegated to the settling parties.

169. Our practice is to incorporate into the license those provisions of an approved settlement agreement that are within the Commission's authority to enforce or, albeit not enforceable by the Commission, are required to be included because they are contained in a water quality certification issued pursuant to Clean Water Act Section 401 or mandatory terms and conditions issued pursuant to FPA Sections 4(e) or 18.²¹⁹

170. We do not propose to include in the regulations statements endorsing in general terms any potential components of a settlement agreement, such as adaptive management plans, mitigation measures in lieu of studies, or mitigation measures that may occur outside of an existing project boundary. The Commission has approved all of these things in the context of specific settlement agreements, but only after considering the entire record of the proceeding and conducting the analyses required by applicable portions of the FPA, NEPA, ESA, NHPA, and any other applicable statutes.

E. Description of Integrated Licensing Process

1. Applicability

a. New and Original Licenses

171. The September 12, 2002 Notice solicited comments on whether there are issues unique to the processing of original license applications or new

license applications that need to be addressed in an integrated licensing process. Most commenters suggested that studies associated with original licensing may require more time than studies for new licenses, owing to a lack of existing data and uncertainty with regard to the specific project proposal during pre-filing consultation. They recommend that an integrated licensing process, if it applies to original licenses, should be flexible in order to accommodate these considerations.²²⁰

172. The proposed integrated process would apply to original licenses as well as new licenses.²²¹ As detailed below, a potential applicant for an original license would be required to file an NOI. Although there is no statutory limit on the time between filing of the NOI and filing of an original license application, the time periods in the proposed rule between NOI and license application are roughly coincident with the three year period for which preliminary permits are issued. This should bring some additional pressure to bear on permit holders to timely develop their project proposals, which responds to the concerns of states such as Oregon that believe too much of their time is spent responding to ill-formed and highly speculative proposals under preliminary permits.²²² A few commenters suggest that it might be desirable to merge the integrated process and preliminary permit regulations,²²³ but we see no reason the proposed rules cannot co-exist with the existing preliminary permit regulations. We would however modify our practice by including in each order issuing a preliminary permit language directing the permit holder to the requirements of new part 5. The Commission requests comments on whether the proposed

²¹² APT, HRC, Interior, AMC, PG&E, Wisconsin DNR.

²¹³ Washington, Interior, NYSDEC, NMFS. DM&GLH states that when a settlement agreement is accompanied by an applicant-prepared EA (APEA), the Commission should adopt the APEA, rather than prepare a separate NEPA document. While an APEA prepared in connection with a settlement agreement is certain to be helpful to the Commission's analysis, the Commission cannot delegate its NEPA responsibilities to applicants or settling parties.

²¹⁴ RAW, NYSDEC, Oregon, Michigan DNR.

²¹⁵ Xcel, Southern, NHA.

²¹⁶ Oregon, Michigan DNR.

²¹⁷ SCE, NHA.

²¹⁸ 18 CFR 385.602 (g)(3). See also City of Seattle, WA, 71 FERC ¶ 61,159 (1995), *order on reh'g*, 75 FERC ¶ 61,319 (1996); Consumers Power Company, 68 FERC ¶ 61,1077 (1994); P.U.D. No. 2 of Grant County, WA, 45 FERC ¶ 61,401 (1988); Long Lake Energy Corp., 34 FERC ¶ 61,225 (1986).

²¹⁹ In *Erie Boulevard Hydropower LP*, 88 FERC ¶ 61,176 (1999), we identified the types of settlement provisions that are beyond our authority to enforce because they apply to non-jurisdictional entities. These typically include provisions which govern relations among parties to the settlement agreement, such as dispute resolution, and the procedural practices of such groups. See also *Avista Corporation*, 90 FERC ¶ 61,167 (2000) and 93 FERC ¶ 61,116 at p. 61,329. Until recently, the Commission declined, as a matter of policy, to enforce such provisions against licensees. That policy was reversed in *Erie Boulevard Hydropower, LP and Hudson River-Black River Regulating District*, 100 FERC ¶ 61,321, at p. 62,502 (2002).

²²⁰ HRC, Michigan DNR, NMFS. HRC also notes that a license application for a new project might also involve regulatory requirements not applicable to a new license application, such as a dredge and fill permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 344. Only ADK specifically recommends that the integrated licensing process apply to original licenses.

²²¹ The proposed rule would not apply to applications for non-power licenses, because they are an interim measure until a separate state, municipal, interstate, or Federal agency assumes regulatory supervision over the lands and facilities involved when a licensee proposes to cease power generation. They are, in essence, a form of license surrender.

²²² Where a potential applicant is genuinely interested in submitting a license application, but circumstances are such that additional time is needed to develop the specific licensing proposal, it may be appropriate to grant a waiver or extension of the pertinent 18 CFR part 5 regulations.

²²³ NHA, Interior.