

182. No later than 50 days following the notice of dispute, the panel would make a written recommendation to the Director of Energy Projects. The panel would recommend that the Director require the applicant to conduct the requested information-gathering or study if the panel finds that the request satisfies the criteria set forth in the regulations. The Director would issue a decision within 70 days of the notice of dispute, either accepting the panel's recommendation or reaching a different conclusion that explains why the information and arguments before the panel do not support the panel's recommendation or explains why the recommendation is inappropriate as a result of pertinent laws, regulations, or Commission policies. The Director's decision would constitute an amendment to the approved study plan, and would be accompanied by an order directing the applicant to carry out the study plan as amended.²³⁶

b. Conduct of Studies

183. The proposed rule requires the applicant during the period of information-gathering and study to file status reports including study results and analyses to date. The first such report would be filed after the first season of studies or other appropriate time following the date of the preliminary determination. The status report would also include any proposals to modify the study plan and schedule in light of the results to date. The initial status report would be followed by a meeting with parties and Commission staff. Following the meeting, the Applicant would file a meeting summary and, if necessary, a request to modify the study plan. The Applicant's meeting summary and request to modify the plan, if any, would be deemed approved unless any party filed a notice of disagreement. The procedure for resolving these disagreements would not include a panel, but would rest on written submissions to the Director. Following responses to any notice of dispute, the Director would issue an order resolving the dispute.²³⁷

184. An updated status report would follow the first status report after the second season of studies, if any, or other appropriate time in light of the circumstances of the cases. It would be subject to the same review, comment, and dispute resolution procedures, except that any party requesting additional information or studies at this late point in the information gathering

process would be required to show exceptional circumstances warranting acceptance of the request.²³⁸ The Commission requests comments on whether participants should be permitted to make new information-gathering or study requests (as opposed to making requests for modification of ongoing studies, or to raise disputes concerning the implementation of, existing studies), following the updated status report.

185. The Commission also requests comments on whether there should be a requirement for parties to file written comments on the potential applicant's status reports prior to the required meeting, or whether the familiarity of the parties with the facts of the proceeding may make written comments at this juncture superfluous.

c. Draft Application to License Order

186. Following the updated status report, the Applicant would file the draft license application for comment by the parties and Commission staff. The draft application would be required to contain, insofar as possible, the same contents as a final license application.²³⁹ Also, the form of Exhibit E, the environmental report, would be significantly different from the traditional Exhibit E because it would be prepared following the guidelines for preparation of an applicant-prepared environmental analysis.²⁴⁰

187. The Commission requests comments on whether the draft license application contents should be required to track the contents of the final application, or whether it would be preferable to require only the proposed revised Exhibit E, or any other materials, to be included. One drafting group also considered whether a draft license application should be filed at all, but reached no conclusions. The Commission also requests comments on whether, in lieu of filing a draft license application for comment, it would be a better use of the participants' time to continue informally working on the resolution of any outstanding issues, or whether other considerations weigh for or against a draft license application.

188. The participants and Commission staff would file comments

on the draft license application, including recommendations concerning whether an environmental assessment is acceptable or an environmental impact statement is needed. Any commenter requesting additional information or studies in its comments would be required to show exceptional circumstances, and to address in its request certain criteria, as applicable to the facts of that case.²⁴¹

189. We expect that in most cases the updated status report will indicate that all of the information required by the approved study plan, or all of the information required to support the filing of FPA Section 10(j) recommendations or mandatory terms and conditions or fishways, has been collected and distributed to the relevant agencies. In such circumstances, it may be appropriate for the parties to file preliminary 10(j) recommendations, terms and conditions, or fishway prescriptions, and for the Commission staff to make a preliminary response, including initial 10(j) consistency findings, to those filings. Were this to happen, it follows that the parties could appropriately be asked to file modified (*i.e.*, final) recommendations or terms and conditions in response to the Commission's notice of ready for environmental analysis, rather than following issuance of a draft environmental assessment or environmental impact statement, or an environmental assessment not preceded by a draft, as provided for in the proposed rule. If so, a step could be eliminated at the end of the process, and Commission action on the application could be rendered more timely.

190. The Commission requests comments on whether the Commission should in each case make a determination following the updated studies status report of whether the record is sufficiently complete to require filing of preliminary recommendations and terms and conditions with comments on the draft license application, filing of final terms and conditions in response to the REA notice, and elimination of an opportunity to file further revised recommendations or terms and conditions following the draft NEPA document, or environmental assessment, as applicable.

191. The Commission further solicits comment on how to ensure that resource agencies have an adequate opportunity to consider public comment on their proposed terms and conditions if such an approach were adopted, and how such an approach could be

²³⁸ *Id.*

²³⁹ Proposed 18 CFR 5.15 (Draft license application). In contrast, the existing regulations require the draft license application to include only responses to agency and tribal comments and study requests, the results of information-gathering and studies, and proposed environmental protection measures. See 18 CFR 4.38(c)(4).

²⁴⁰ Proposed 18 CFR 5.17 (Application content). By contrast, see *e.g.*, the existing Exhibit E requirements of part 4, subpart F (Major Project—Existing Dam), 18 CFR 4.51(f).

²³⁶ Proposed 18 CFR 5.13 (Study dispute resolution process).

²³⁷ Proposed 18 CFR 5.14 (Conduct of studies).

²⁴¹ Proposed 18 CFR 5.15.