

consultation and to do so according to mutually agreeable rules.²⁶⁰

2. Mandatory, Binding Study Dispute Resolution

203. As discussed above, lack of effective study dispute resolution has been identified as one of the principal reasons for license applications that are incomplete or require significant additional information. The most commonly identified reasons for failing to use the existing study dispute resolution process are that it is not required to be used and that the result is advisory only.

204. We therefore propose to require consulted entities in the traditional process who oppose a potential applicant's information-gathering and study proposals to file a request for dispute resolution during pre-filing consultation. Consulted entities that do not request dispute resolution would thereafter be precluded from contesting the potential applicant's study plan or results with respect to the issue in question. We also propose to make the outcome of dispute resolution binding on all participants. In other words, the Director's order resolving the dispute will, if information or a study is determined to be necessary, direct the potential applicant to gather the information or conduct the study. Consulted entities would not be permitted to revisit the dispute after the application is filed.

205. Dispute resolution requests would occur during first stage consultation following the applicant's response to study requests by agencies, Indian tribes, or the public. Any additional study requests during the second stage of consultation would be subject to the same dispute resolution requirements.²⁶¹

206. Consistent with our proposals to provide for full public participation in pre-filing consultation, require all potential license applicants to prepare the Pre-Application Document, and make study dispute resolution mandatory and binding, we also propose to eliminate from the traditional process for license applications the provision for participants to file requests for additional scientific studies not later than 60 days after the application is filed, and for the license applicant to respond. Resource agencies, tribes, and the public will have had two opportunities to request studies during pre-filing consultation and study

disputes should be resolved, so there should be no need for an additional post-application opportunity to do so.²⁶²

207. The ALP process includes a provision for dispute resolution which is similar to the existing procedures for the traditional process and which, like those procedures, is advisory.²⁶³ We propose to leave the existing ALP dispute resolution procedures in place, because mandatory, binding dispute resolution appears to be incompatible with the collaborative nature of the ALP. We request however comments on whether there may be circumstances under which binding study dispute resolution could be conducted in a manner that safeguards the collaborative process.

3. Recommendations Not Adopted

a. Waiver of Pre-Filing Consultation

208. Some industry commenters favor special provisions for non-controversial projects, which may include many small projects.²⁶⁴ They state that small projects probably have few impacts that warrant serious study,²⁶⁵ and that the cost of licensing is already disproportionately high for small projects.²⁶⁶ PREPA recommends that projects be categorized by size and that small projects be the subject of a separate fast track process with short time frames and one year of studies, if any are needed.

209. In this connection, NHA and EEI recommend that applicants be permitted to request waiver of all or part of the pre-filing consultation requirements. Under this proposal, an applicant would, prior to the NOI deadline, distribute an information package to resource agencies, tribes, and other interested entities. This would be followed by a public meeting at which the Commission staff would explain the process options, and the Commission staff and applicant would seek input on an appropriate process. Following the meeting, and presumably before the NOI deadline, the applicant would choose a post-application NEPA process for the project. This would be accompanied by a request for waiver of all or part of the pre-filing consultation requirements.²⁶⁷

²⁶² See proposed changes to 18 CFR 4.32(b)(7).

²⁶³ 18 CFR 4.34(i)(6)(vii). Any party may request dispute resolution, but only after making reasonable efforts to resolve the matter informally.

²⁶⁴ NHA, EEI, Spaulding.

²⁶⁵ PREPA.

²⁶⁶ Spaulding.

²⁶⁷ NHA suggests that appropriate criteria for granting such waivers would include where: (1) The project has previously undergone NEPA review, as far back as 1969, which predates the Clean Water Act; (2) no new ground-disturbing facilities would

The waiver request would be subject to public notice and comment. The applicant would still be required to meet the applicable filing requirements. Further public participation would be deferred until after the application is filed, as part of the Commission's NEPA process.²⁶⁸

210. NYSDEC and New York Rivers oppose any special provisions for small projects or those an applicant may regard as non-controversial. They state that project size is no determinant of environmental impacts or the scope of issues.²⁶⁹ NYSDEC suggests that a single, flexible licensing process can accommodate small projects with few issues, but that the determination of issues and information needs can only be developed through NEPA scoping.

211. We are not inclined to adopt this aspect of NHA's proposal. For those applicants who use the traditional process, existing § 4.38(e)(1) already excuses applicants from complying with the pre-filing consultation requirements to the extent that a resource agency or Indian tribe is willing to waive consultation in writing. If a proposed project indeed engenders little controversy, then such waivers, in whole or part, may be obtainable in any event, or the burden of pre-filing information-gathering and studies should be modest. We also think it would be asking too much of stakeholders to comment on a waiver request following as little discussion as a single public meeting based on an information package that will necessarily be very slim with respect to project operations under a future new license. Finally, NHA's proposed criteria are not appropriate. Any information used in a NEPA analysis more than several years old is likely to be outdated with respect to current environmental conditions, and the document is likely to lack much information that is now routinely required. Nonetheless, the Commission recognizes the important place in the nation's energy infrastructure of small hydropower projects and is concerned about the potential imposition of unnecessary relicensing costs on these projects. We therefore request comments on other approaches to streamlining the licensing process for small projects without compromising the interests of other stakeholders.

be constructed; or (3) the project operation would be the same as under the existing license.

²⁶⁸ NHA, EEI.

²⁶⁹ NYSDEC, New York Rivers.

²⁶⁰ See 18 CFR 4.38(i).

²⁶¹ See proposed changes to 18 CFR 4.38 (b)(5), (c)(1), and (c)(2); and 16.38 (b)(5), (c)(1), and (c)(2).