

commitment of the potential applicant to the success of the process, and the cooperation of stakeholders can be achieved without Commission approval.<sup>31</sup>

36. Several of these commenters suggest that if the integrated process is to be made the default, that it be done only after a 5–6 year test period, during which there would be a presumption that the applicant's choice is appropriate. If the potential applicant chooses the traditional process, proponents of the integrated process would have the burden of showing that the integrated process would be significantly better or significantly disadvantage non-applicant stakeholders. If, at the end of this period, the integrated process appeared successful, it would be made the default process, with any modifications needed in light of experience.<sup>32</sup> In this regard, AEP and GKRSE state that the goal should be to use the process that is likely to yield the best results, procedurally, economically and environmentally, and that if the integrated process appears to satisfy this goal, potential applicants and stakeholders will use it.

37. A few industry commenters assert that the traditional process, either in its current form or with the proposed modifications, should be the default because it has been tested by years of experience and is satisfactory in most cases.<sup>33</sup> They add that it works best for small projects, which are a substantial portion of licensed projects.<sup>34</sup>

38. Several non-industry commenters favor making the integrated process the default with the potential applicant's choice requiring Commission approval.<sup>35</sup> The Minnesota DNR, while not apparently objecting to the integrated process as the default, states that there should also be a means for other entities to oppose an applicant's election to use the default process.

39. We continue to think the integrated process should be the default because it addresses as fully as we can within the confines of the statutory scheme the problems that participants in licensing from every perspective have identified with the traditional process. It merges pre-filing consultation and the NEPA process, brings finality to pre-filing study disputes, and maximizes the opportunity for the Federal and state agencies to coordinate their respective processes.

40. The best means of gaining acceptance for the integrated process however is to demonstrate that it works. We agree with commenters that some period of transition is appropriate. Accordingly, we have decided that the integrated process should become the default process on July 23, 2005. During this two year period, potential license applicants will be able to select the integrated process or the traditional process as it currently exists, or request authorization to use the ALP. At the end of the two-year period, the integrated process will become the default process, and potential applicants will have to obtain approval to use the traditional process.

41. We disagree with those who believe we should defer to the potential applicant's process choice on the ground that it has the most relevant knowledge. The comprehensive development standard of the FPA requires us to consider all issues pertaining to the public interest and establishes important roles and responsibilities for other federal and state agencies. We also have a trust responsibility to Indian tribes. The appropriate process must be selected with the interests of these entities and other members of the public, not simply those of the potential applicant, in mind.

## 2. Standard for Approval of Traditional Process

42. The NOPR proposed to grant requests to use the traditional process upon a showing of "good cause."<sup>36</sup> Several commenters state that this standard should be replaced by

specified criteria, or at least that certain factors should be considered before the Director acts on a request to use the traditional process.<sup>37</sup> Alabama Power and WUWC, however, state that "good cause" is sufficient if construed liberally and with deference to the potential applicant.

43. The recommended criteria predictably differ depending on whether they come from industry commenters or others. Industry commenters suggest that the traditional process should be readily approved for small projects with relatively few issues. This, they suggest, includes some or all of: a project operated in run-of-river mode; no substantial changes are proposed in operations or structures; there are no anadromous fish; generating capacity is modest; or the existing project boundary includes little or no land above the high water mark.<sup>38</sup> Other recommended criteria for approving the traditional process include where the potential applicant and stakeholders are too polarized to work well together;<sup>39</sup> if, all things considered, it appears likely that the licensing process can be completed before the license expires;<sup>40</sup> and the potential applicant thinks the integrated process would be too costly.<sup>41</sup>

44. Non-licensees contend that the bar for approval of the traditional process should be set high. Criteria for approval recommended by these commenters include: (1) A consensus favoring the traditional process;<sup>42</sup> (2) lack of opposition from any Federal or state agency;<sup>43</sup> (3) the public or resources affected by the project will benefit from using the traditional process compared to the integrated process;<sup>44</sup> (4) the traditional process will maximize coordination of all pertinent regulatory processes and more timely resolve potential disputes;<sup>45</sup> (5) it will be the most efficient process with the highest level of resource protection;<sup>46</sup> (6) the project does not have significant environmental impacts;<sup>47</sup> or (7) the

<sup>31</sup> NHA, EEL, SCE, Long View, PG&E, B&B, M&H.

<sup>32</sup> NHA, Long View, PG&E, B&B.

<sup>33</sup> Xcel, WPSR, Alabama Power. Other industry commenters, while not recommending the traditional process as a default, also assert that it generally works well. GKRSC, AEP, CHI, Long View, Consumers, WPSC.

<sup>34</sup> Approximately half of Commission-licensed projects are 5 MW or less.

<sup>35</sup> RAW, ADK, CHRC, Whitewater, SC League, IRU, California, AmRivers. PFMC recommends that approval of the applicant's process proposal should remain with the full Commission, rather than be delegated to the Director of the Office of Energy Projects. California states that an applicant may show good cause to use the traditional process, yet other reasons may exist to deny the request, so the regulation should read "may" approve, instead of "shall." Any good cause determination will take account of any objections raised by commenters.

<sup>36</sup> Proposed 18 CFR 5.2(f)(5). The criteria for approval of the ALP would not change. Proposed 18 CFR 5.2(f)(5) states that requests to use the traditional process or ALP will be granted "for good cause shown." NHA asserts that the good cause standard is something new and unnecessary as applied to the ALP. While the regulatory text of 18 CFR part 4, from which the requirements for support of a request to use the ALP were transposed, do not explicitly state that a good cause standard applies, it should be obvious that good cause is the minimum standard for Commission approval of any authorization not subject to a more specific standard. We are merely making explicit what is plainly implicit.

<sup>37</sup> Interior, PG&E, NF Rancheria, NPS, Washington, AmRivers, Wisconsin DNR, CHRC, Whitewater, NOAA Fisheries, HRC, SC League, TU, VANR, PFMC, AW/FLOW.

<sup>38</sup> GKRSC, AEP, CHI, Long View, Consumers, WPSC.

<sup>39</sup> NHA, Idaho Power, EEL, WUWC, SCE.

<sup>40</sup> Consumers.

<sup>41</sup> M&H.

<sup>42</sup> CHRC, Interior, Whitewater, NOAA Fisheries, AmRivers.

<sup>43</sup> HRC. HRC, consistent with its recommendation for one flexible process, would also apply these criteria to requests to use the ALP.

<sup>44</sup> SC League, Wisconsin DNR.

<sup>45</sup> TU, VANR.

<sup>46</sup> PFMC, HRC.

<sup>47</sup> NOAA Fisheries. California agrees that the bar for using the traditional process should be very