

higher level of effort than the existing public information and ICD requirements,⁶⁰ and suggest that the incremental burden on applicants is unnecessary.⁶¹ Several commenters also indicate that much or all of the historical information currently required to be made available to the public is never requested and represents a needless burden and expense.⁶²

55. Consumers recommends that we allow any applicant that uses the traditional process to meet only the existing public information and ICD requirements instead of filing the PAD. NEU makes the same recommendation for existing projects of 5 MW or less. Consumers also recommends that information requirements be made flexible to accommodate different types of projects; for instance, some data that is useful for unconstructed projects greater than 5 MW may not be needed to evaluate a smaller existing project. MWH and WPSR similarly indicate the PAD requirements should be reduced for small projects because of the asserted connection between small projects with minor impacts.

56. Various industry commenters also seek affirmation or clarification of our intention that only existing information relevant to project impacts is required, and that the scope of and level of effort to obtain existing data should be commensurate with project impacts.⁶³

57. Resource agencies and NGOs support the PAD and state that a high quality PAD is essential to the success of the integrated process in light of the short time frames contemplated in the NOPR, and that an applicant's failure in this connection would interfere with the ability of other parties to timely and effectively participate in licensing.⁶⁴

58. California agencies and a few other commenters believe that the PAD contents should not be limited to existing information, but should include all information needed to evaluate potential effects of project operations, and that the applicant should be required to conduct whatever studies or information searches are necessary to fill in any gaps in the existing information before the PAD is filed. They assert generally that NEPA scoping

cannot be done unless there already exists a complete baseline of existing environmental data, and suggest that existing licensees should have acquired such data during the term of the existing license.⁶⁵

59. HRC similarly states that the PAD should include a systematic discussion of the project's resource impacts, so that post-NOI information gathering and studies are minimal, even if that requires potential applicants to conduct environmental monitoring or original studies not required under the existing license.

60. Agency and NGO commenters generally recognize however that complete information on all resource impacts attributable to a project is unlikely to be available when the NOI is issued and the PAD is filed. These commenters recommend that potential applicants be subject to a due diligence standard with respect to obtaining existing information; that is, make a good faith effort to determine what relevant information is available and to obtain it.⁶⁶

61. We agree that a due diligence standard will apply to the development of the PAD. The regulations we are adopting provide some guidance on what constitutes due diligence, but we are not able to provide a detailed definition. Rather, the determination of whether due diligence is exercised will have to be made on case-by-case basis.

2. PAD Contents, Format, and Distribution

a. Contents

62. There is a considerable gap between the industry and other commenters on the range and level of detail that should be required in the PAD. PG&E and Georgia Power for instance, suggest that instead of specific requirements, the content requirements should be stated as broad subject matter categories, with information required to the extent reasonably known, available, and applicable. Troutman similarly recommends that specific requirements in the regulations be replaced by a policy statement or guidance document from which applicants would determine what information is relevant and appropriate.

63. In contrast, agencies and NGOs generally prefer explicit and detailed requirements. For example, Wisconsin DNR and VANR recommend that the PAD include the original license order and all amendment orders and management plans; any document that

explains the existing license requirements; a layman's summary of all of the license and management plan requirements; and a list of every entity consulted by the potential applicant prior to filing the NOI and the issues those entities raised. Another recommendation is that the PAD include study plans for restoration of essential fish habitat; data needed for water quality certification; information on cumulative environmental impacts throughout the river basin; and studies of fish passage conditions and plans for improvements thereto, including restoration of historic fish habitat. CHRC states that flow data should be provided on the finest available scale, even to daily or hourly flow for the entire historical record.

64. HRC suggests that licensee compliance with the requirements can best be ensured by having the Commission evaluate whether the PAD meets certain standards for completeness and committing to taking measures to enforce compliance with the standards beyond finding that an application is deficient. These might include requiring the applicant to file a revised PAD before the proceeding continues, and interim environmental measures in annual licenses, or civil penalties.

65. Because these disagreements relate to how the document is formatted and distributed, we will defer their resolution to the conclusion of the following section concerning those matters.

b. Distribution

66. Several industry commenters made recommendations with respect to the format and distribution requirements for the PAD.⁶⁷ NHA proposes that the PAD be reformatted, some of the content requirements be deferred to the license application, and the distribution requirements modified. The PAD itself would contain basic information about the licensee, project description and existing and proposed operations, a general description of the river basin, including pertinent information about land use, other dams, and management plans, a discussion of environmental impacts based on existing information, a list of issues in the form of a scoping document, and a plan and schedule for pre-application activities.⁶⁸ Exhibits showing project structures and features, historical information on amendments,

⁶⁰ The initial consultation document is required by 18 CFR 4.38(b) and 16.8(b)(1). The public information requirement for existing licensees seeking a new license is at 18 CFR 16.7(d).

⁶¹ SCE, Alabama Power, NEU, Xcel, Consumers, Oroville.

⁶² PG&E, SCE, Consumers.

⁶³ Consumers, Long View, MWH, WPSR, EEI, NHA, Xcel, NEU, SCE, CHI.

⁶⁴ VANR, WUWC, Interior, California, CHRC, Whitewater, SC League, IRU, NYSDEC, CSWRCB, Long View, HRC, AmRivers, SC League, Oregon, AMC.

⁶⁵ CDWR, Cal A-G, CSWRCB, AMC.

⁶⁶ CDFG, HRC. At least one licensee, PG&E, agrees that a due diligence standard is reasonable.

⁶⁷ Duke, PG&E, Troutman, WPPD, Xcel, CHI, Sullivan, NHA, SCE.

⁶⁸ See proposed 18 CFR 5.4(c)(2)(A)-(B), (D)-(G), (I) and (P).