

to study requests having nothing to do with project impacts.⁹⁴

98. CHRC counters that a study might be required to establish the existence of a nexus. Taken to its extreme, CHRC's position would have us approving study proposals that amount to mere speculation. We think a common sense approach to demonstrating a nexus between project operations and resource impacts, informed by the professional judgment of qualified agency, Commission, and tribal staff, should ensure that this criterion is reasonably applied.

99. Oregon approaches the nexus issue from a different perspective; that is, if a nexus is demonstrated between project operations and resource impacts (e.g., fish entrainment mortality), then related study requests must be approved. We do not agree. As stated above, the criteria are to be considered as a whole, in light of the circumstances of the individual proceeding, and any applicable Commission policies and practices.

100. NHA and PG&E also request that we add an additional criterion requiring requesters to describe how the information would be used in the proceeding in relation to resource management measures. This proposed criterion appears to be intended to elicit an explanation how the information could be used to develop protection, mitigation, or enhancement measures by the Commission or agencies with conditioning authority. The Studies Group discussed this matter and recommended that the following phrase be added to the end of Criterion (5): "and how study results would inform the development of license conditions." We agree that this is an important aspect of study requests and are adopting the proposed modification.

e. Criterion (7)

*(7) Describe considerations of cost and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.*⁹⁵

101. This proposed criterion received the most comments. Several state agencies state that resource agencies should not be required to provide detailed cost estimates of proposed studies because specific knowledge concerning study costs lies with

applicants or their contractors. They contend that potential applicants should have the burden of addressing cost and practicality. They also add that this may be a difficult matter on which to reach a merits conclusion, because the value of the information developed is not always known until after a study is completed.⁹⁶

102. NYSDEC states that the criterion should be modified to require a requester to address the proposed study's scope and level of effort. We conclude the proposed modification is not necessary because there is a built-in incentive for requesters to do so. It is implicit that cost and practicality can be addressed only to the extent the study request includes a description of the scope and level of effort. The less specificity a requester provides, the more difficult it will be to apply the criterion in its favor.

103. Finally, various Indian tribes and agencies state that where protection of tribal trust resources is at issue, the Commission's trust responsibility prohibits it from considering factors of cost and practicality, or that such factors are entitled to minimal weight. They state that the only applicable considerations are consistency with treaties, statutes, and case law defining obligations to protect the trust resources. Some add that the FPA requires the Commission to protect non-developmental resources, so matters of study cost and practicality are entitled under that Act to minimum weight.⁹⁷ As we stated in the NOPR, our responsibility to balance all aspects of the public interest with respect to any project proposal necessarily encompasses the exercise of independent judgment concerning the relative cost and value of obtaining information.⁹⁸

104. The NOPR also discussed certain additional criteria proposed by NHA and SCE,⁹⁹ and requested comments on whether their proposed criterion (3) ("The cost of the study must be justified relative to the value of the incremental information provided") or the Commission's proposed Criterion (7)

more appropriately deals with the issue of study costs.¹⁰⁰

105. Industry commenters preferred the NHA/SCE language because it requires a conclusion concerning whether the cost of the study is justified by the expected value of the information.¹⁰¹ Agency and NGO commenters aver that the NHA/SCE language is more theoretical than practical and likely to cause more disputes than it prevents because the full value of a study cannot be known until it is completed. They add that any criterion that purports to measure study results against dollars is an apples to oranges comparison and prejudices everyone's interests but the applicant's. They therefore favor the Commission's Criterion (7).¹⁰² Interior and MPRB state that scientific standards should be paramount. Interior adds that cost and practicality can be assessed by the proposed Advisory Panel, if the study request goes to dispute resolution.

106. California recommends that if Criterion (7) is not adopted, a better alternative than the NHA/SCE language would be to follow California's requirement that the burden of studies, including their costs, must bear a reasonable relationship to the need for the study and the benefits to be obtained therefrom. PG&E and NHA in their comments also attempt to find some middle ground by recommending that NHA/SCE criterion (3) be revised to require the requester to "Assess the relative value of the anticipated incremental information compared to the effort, including time and cost, required to obtain it." There is clearly no agreement between the industry on the one hand, and agencies, Indian tribes, and NGOs on the other hand about how to consider cost and practicality.

107. The Studies Group considered this question at length and agreed that this criterion is not concerned solely with cost, but also generally with the level of effort the potential applicant should have to make to gather information or conduct studies with respect to an issue. They proposed to insert the words "and/or level of effort" after the word "cost" to reflect that agreement. After considering all the comments, we conclude Criterion (7), modified as recommended by the Studies Group, provides an appropriate basis for consideration of cost and

⁹⁴ Geosyntec appears to state that a requester should only have to show a nexus between the study request and an issue, rather than a nexus between a study request and the project. We think this is a distinction without a difference, because the impacts of the project on resources creates the issues, which in turn are the basis for study requests.

⁹⁵ See proposed 18 CFR 5.10.

⁹⁶ Georgia DNR, Minnesota DNR, NCWRC, PFBC, MPRB. MPRB would eliminate this criterion altogether on the ground that once a need for information is established, cost is irrelevant. We rejected such assertions in the NOPR. 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

⁹⁷ Menominee, Wisconsin DNR, MPRB, Interior, Skokomish.

⁹⁸ 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,705.

⁹⁹ 68 FR at pp. 13995–996; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

¹⁰⁰ 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.

¹⁰¹ NHA, Normandeau, WPPD, SCE, PFMC, EEI, NEU, Duke, PG&E, CSWC.

¹⁰² California, Oregon, HRC, NCWRC, Interior, MPRB.