

practicality in weighing the merits of any study request.<sup>103</sup>

#### f. Proposed Additional Criteria

108. Various industry commenters recommend that we add a criterion requiring a requester to discuss whether or a not a resource problem has been identified that relates to the request.<sup>104</sup> This proposed criterion is too subjective. A principal feature of hydroelectric licensing in recent decades has been disagreements between license applicants and others concerning the extent to which proposed or existing projects have negative effects on natural and other resources. Whether an identified impact is or is not a problem, and the extent of the problem, are often matters of perspective. Moreover, the finding of a "problem" is not a required predicate for Commission action under the comprehensive development standard of FPA Section 10(a)(1). Rather, that standard contemplates license conditions for the "protection, mitigation, and *enhancement*" of fish and wildlife \* \* \*, and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other resources." [emphasis supplied]<sup>105</sup>

109. Normandeau suggests that we consider adding a criterion that requires a requester to address the effect the information gathering or study would have on timely completion of the overall process. Criterion (6) requires each proposed study to include a schedule, including appropriate field season(s) and the study duration, so all parties should be able to assess the potential effect of the request on the timeliness of the proceeding. The appropriate length of a proposed study will, of course, be a matter best determined in the context of the specific case.

110. Menominee recommends that we add a criterion to recognize study requests made in connection with the Federal government's trust responsibility to protect the resources of Indian tribes. This does not appear to be necessary because the relationship between a study request and the trust responsibility can be addressed in Criteria (2) or (6).

111. The study criteria, modified in accordance with the foregoing discussion and as set forth in the regulations we are adopting, are set forth here:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribe with jurisdiction over the resource to be studied;

(3) If the requester is a not resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and

(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

#### 3. Progress and Study Reports and Additional Study Requests

##### a. Progress Reports and Initial and Updated Study Reports

112. The proposed rule would have required the potential applicant to file an initial status report with study results and analyses following the first season of studies, or at another appropriate time following the date of the study plan order. The report would be followed by a meeting with parties and Commission staff. The potential applicant would file a meeting summary and, if necessary, a request to modify the study plan and schedule. The request to modify the plan, if any, would be deemed approved unless any party filed a notice of disagreement. Disagreements would be resolved based on written submissions to the Director. Any request for new information or studies following the initial status report would have to address the study criteria and show good cause why the request should be approved.<sup>106</sup>

113. An updated status report would follow after a second season of studies

or at another appropriate time. It would be subject to the same review, comment, and disagreement resolution procedures, except that any request for new information or studies must address the study criteria and show extraordinary circumstances why the request should be approved.<sup>107</sup>

114. SCE states that this is unduly burdensome for all participants. It questions the practicality of one report at a specified time because of the likelihood of multiple studies conducted on different schedules, and states that preliminary results could lead participants to false conclusions. SCE also objects to sending study results to entities that have not previously requested to be involved in the issue under study. SCE and NHA would instead require the potential applicant to distribute a status report explaining actions taken to date, any unexpected findings, and a schedule for completing the studies.

115. SCE adds that the meeting following the initial status report would be unworkable because of the large numbers of studies required to be reported in detail, and because most participants will be interested in a limited number of studies. SCE would have the potential applicant determine the need for study review meetings based on comments received on the abbreviated status report, unless a majority of participants requested a meeting with respect to a particular study. NHA would also make the meeting optional for the potential applicant. If participants wanted a meeting not proposed by the potential applicant, they would so request in their comments on the initial status report, and the Commission staff would decide if it is needed.

116. Long View shares NHA's and SCE's concerns about the status reports and meetings. It would modify the rule to allow potential applicants to issue study-specific status reports and hold study-specific meetings at appropriate times with appropriate people.

117. NYSDEC would modify the rule to state that the potential applicant's meeting summary must include a brief statement that the meeting summary is deemed to be approved unless a party files a notice of disagreement.

118. These and other concerns about the status report proposal were considered at length by the Studies Group, including the fundamental issue of whether it makes more sense to have one status report and meeting, or to issue separate reports for each study or group of related studies at different

<sup>103</sup> See 18 CFR 5.9(b)(7).

<sup>104</sup> PG&E, SCE, NHA, WPPD, EEI. Other additional criteria were suggested, which were considered above in the context of modifications to the existing proposed criteria.

<sup>105</sup> 16 U.S.C. 803(a)(1).

<sup>106</sup> Proposed 18 CFR 5.14 (Conduct of studies).

<sup>107</sup> *Id.*