

times. The Studies Group concluded that it would be best for the participants to negotiate the timing of periodic progress reports on studies,¹⁰⁸ including the manner and extent to which information will be shared, which may include meetings, and sufficient time for technical review of the analysis and results, when the study plan and schedule is developed. The progress reports would have to describe the study progress and data collected to date in a manner that enables participants to determine if the study plan is being followed, and to describe any proposed changes. Documentation of study results would be provided to participants upon request. An annual study report would be issued, but would be in the form of a summary of the overall progress of study plan implementation and would serve as a trigger point for requests, if any, to modify existing studies or conduct additional studies.

119. These modifications should make it easier for individual participants to focus on issues of concern to them, should result in early identification of any implementation issues, and should ease the distribution and consultation burden on the potential applicant. Accordingly, this is a reasonable approach to the matter of study plan implementation and is reflected in the final rules.¹⁰⁹

120. Finally, the Studies Group and Minnesota DNR recommend that parties have 30 days to respond to the initial and updated study reports, instead of the 15 days proposed. We have so provided.¹¹⁰

b. Modified Study Requests

121. NHA also addressed the standard for requesting modifications to the approved study plan in response to the initial study report. NHA would require a requester to address each of the study criteria and subject the request to the same good cause standard as a request for new information or new studies. We think such a requirement is unnecessary. Requests for modifications to an ongoing study are likely to be focused on specific concerns about how the study was conducted, or straight forward matters such as whether to extend the study for an additional field season because of drought conditions. A participant with such concerns should not have to reestablish the need for the

study in the first instance. Rather, it should only be required to show good cause for the proposed modification.

122. We also think good cause standard should apply to proposals to modify ongoing studies following the updated study report. The proposed regulation text was not clear on the distinction between the standards applicable to requests for modifications to existing studies versus requests for new information gathering or studies. We have modified the regulation text to make the applicable standards clear.¹¹¹

c. New Study Requests

123. We requested comments on whether participants should be permitted to make new information-gathering or study requests (as opposed to requests for modification of, or disputes concerning the implementation of, existing studies) following the updated study report.¹¹²

124. NHA and Long View would like the rules to provide more certainty regarding the potential applicant's study obligations. They propose that after the updated study report participants would be permitted to make recommendations regarding the implementation of previously approved studies, but not permitted to make new information gathering or study requests. They state that participants should know when the initial study report is made whether any new studies are needed, and allowing new study requests after the updated study report would make participants less likely to focus their efforts on developing study requests at the beginning of the process.

125. Other licensees share the desire for certainty, but support the "extraordinary circumstances" standard as an alternative to a prohibition on new study requests.¹¹³ SCE would permit a new study request only if: first year studies reveal unexpected results that require further review not possible under the current study plan; a change in applicable law that requires another goal to be considered; or there is a valid dispute regarding implementation of the plan.

126. Agencies and NGOs support the opportunity to request new studies at this point.¹¹⁴ Interior and MPRB state that many unanticipated events could cause a change in circumstances or that study results could show that more information is needed. Oregon and PFBC similarly state that studies may

reveal specific sources of project impacts, and that follow-up studies may be needed to determine if negative impacts can be corrected without extensive mitigation.

127. Some agencies and NGOs accept the premise that the standard for new study requests should increase as the proceeding progresses, and do not oppose an extraordinary circumstances standard at this point.¹¹⁵ Examples of extraordinary circumstances proffered by these entities include:

- A finding late in the study of a listed species in the area affected by the project;¹¹⁶
- Initial studies uncover information that must be considered to ensure agency mandates and important management objectives are met.¹¹⁷
- A nexus between project impacts and the study request is shown;
- A good reason is offered why the study was not previously requested;
- Circumstances have changed;
- Study results indicate a new study is necessary; or
- There are changes in laws, regulations, or environment.¹¹⁸

128. After considering the comments, we have decided to adopt the proposed rule in this regard. We appreciate the desire of potential applicants for certainty when the study plan is approved, but until the study plan is completed, it appears premature to prohibit any additional study requests. An extraordinary circumstances standard, conscientiously applied, is sufficiently strict to provide ample incentive for participants to make their study requests early on, during development of the study plan. We will not attempt to further specify in the rules what constitutes extraordinary circumstances. This is the kind of decision that needs to be made in the context of a specific proceeding.¹¹⁹

129. Finally, HRC, apparently fearing that the "good cause" standard will be too restrictive, requests clarification of that term. Troutman, apparently fearing that "good cause" and "extraordinary circumstances," will be interpreted too broadly, requests clarification of both terms. We think it inadvisable to attempt more specificity at this point. The only practical approach is to apply

¹⁰⁸ For clarification, here and in the regulations we are referring to the potential applicant's comprehensive annual report as the "study report," and to other periodic reports on studies as "progress reports."

¹⁰⁹ 18 CFR 5.11 and 5.15.

¹¹⁰ 18 CFR 5.15.

¹¹¹ See 18 CFR 5.15.

¹¹² 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,731.

¹¹³ PG&E, Springer, NEU, Idaho Power, EEL.

¹¹⁴ California, Oregon, PFMC, Menominee, Interior, MPRB, Skagit.

¹¹⁵ California, HRC, NYSDEC, NCWRC.

¹¹⁶ NCWRC, PFBC, Georgia DNR.

¹¹⁷ NCWRC, PFBC, Georgia DNR.

¹¹⁸ The last five examples were provided by NYSDEC. Minnesota DNR states that study requests should not be foreclosed simply because they may not have been identified early in the consultation process, and MPRB contends that the proposed limitations should be relaxed to ensure that project proposals are fully understood.

¹¹⁹ New study requests made at later points in the process are considered in Section III.L.2 below.