

these standards in the light of case-specific facts.

d. Comments on Study Reports

130. We also requested comments on whether parties should be required to file written comments on the potential applicant's initial and updated study reports prior to the required meeting to discuss the report(s).¹²⁰ Most commenters oppose such a requirement. Long View, Oregon, and ADK say that the written comments are likely to reflect misunderstandings or misinterpretations and the best place to clear such things up is in a face-to-face meeting. These parties suggest that written comments be filed after the meeting. California, PFBC, ADK, Georgia DNR also think it would be unproductive and would allow anyone who cannot attend the meeting to file their comments in lieu thereof. On the other hand, HRC, PFMC, and NEU think such a requirement would encourage effective preparation by the potential applicant for the meeting. Interior and Skokomish think pre-meeting comments should be optional.

131. In light of these comments, we will not impose such a requirement. Instead, we will leave it to the parties to determine individually whether they think the time and effort to file comments before the meeting will be beneficial in the circumstances of the proceeding.

132. Finally, S-P seeks assurance that the study development process will include consultation on means of keeping confidential sensitive Indian cultural practices. Our regulations and practices ensure that Indian tribes' confidentiality concerns will be appropriately addressed.¹²¹

G. Study Dispute Resolution Process

133. The NOPR proposed to establish a dispute resolution process that serves two purposes. In the informal stage, the applicant files a draft study plan for comment; the participants (including Commission staff) meet to discuss the draft plan and attempt to informally resolve differences. The Commission then approves a study plan with any needed modifications after considering the applicant's proposed plan and the participants' comments (study plan order).¹²²

134. In the formal dispute resolution process, resource agencies with mandatory conditioning authority under FPA sections 4(e) and 18, and states or Indian tribes with water quality certification authority under Clean Water Act section 401, would be able to file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under the aforementioned sections of the FPA or CWA. An Advisory Panel considers the dispute and makes recommendations to the Director of Energy Projects, who resolves the dispute.

135. We also proposed that the applicant, by virtue of the fact that it must conduct any studies required by the Commission and implement the license, has a special interest in the outcome of study dispute resolution, and should be afforded the opportunity to submit to the panel information and arguments with respect to a dispute.¹²³

136. The NOPR requested comments on what modifications, if any, should be made to the proposed study dispute resolution process and, in particular, the proposed advisory panel.¹²⁴ Responses were received on nearly every aspect of the proposed process. Most commenters supported the proposed study dispute resolution process, but nearly all requested clarifications or modifications to cure perceived deficiencies. A few commenters opposed the panel and made alternative recommendations. All of these comments are considered in this section.

1. Informal Dispute Resolution

137. NHA and WPPD recommend that a peer review process be added for study disagreements prior to issuance of the study plan determination, to provide unbiased expert opinion on establishment of study request goals and objectives, technical design in relation to goals and objectives and the state of the art, and the anticipated utility of the study results to meeting the study goals and objectives. If the disagreement was not resolved as a result of consultation with the peer reviewers, the peer reviewers' comments would become part of the record, which would be available to the panel in formal dispute resolution, if any.

138. We will not adopt this recommendation. A peer review process would add additional time and expense to the process, and would largely

replicate the formal dispute resolution process, which would be inconsistent with our goal of having a study plan development process that ensures, as best the Commission can, that the participants come together for the purpose of resolving study disagreements themselves.

2. Formal Dispute Resolution—Subject Matter and Eligibility

139. Many commenters recommend that the formal process be made available to any participant for study requests regarding any matter.¹²⁵ California states that the formal process should be available for all study disputes raised by agencies and Indian tribes. Some agencies suggest that the fact that they have a statutorily established role in licensing process, such as making fish and wildlife agency recommendation pursuant to FPA Section 10(j), establishes an obligation on the part of the Commission to ensure that the record contains information to support their recommendations.¹²⁶ Others suggest that eligibility for informal dispute resolution only undermines state agency management of state fish and wildlife resources.¹²⁷

140. The NOPR explained that agencies and Indian tribes with mandatory conditioning authority, to extent they are exercising that authority, are differently situated than participants whose role is to make recommendations pursuant to FPA sections 10(a) and 10(j), National Historic Preservation Act (NHPA) Section 106,¹²⁸ or other applicable statutes. The former have a duty to make reasoned decisions based on substantial evidence, and their decisions are subject to judicial review. Those making recommendations have no such responsibility.¹²⁹ None of the proponents of broadening eligibility for the formal process addresses this fundamental distinction. They also gloss over the fact that the study plan determination is the culmination of the study plan development process in which potential applicants, study requesters, and the Commission staff consult intensively on what information gathering and studies are needed, study requests and responses thereto are accompanied by discussion of the study criteria, and the study plan determination must explain its decision

¹²⁰ 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,732–733.

¹²¹ See discussion of this issue in the NOPR; 68 FR at p. 14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

¹²² This was referred to in the NOPR as the "Preliminary Determination." We have change the name to Study Plan Order to recognize that it is not preliminary with respect to study requests that do

not directly involve the exercise by agencies or Indian tribes of mandatory conditioning authority.

¹²³ Proposed 18 CFR 5.1213(i).

¹²⁴ 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,711.

¹²⁵ Interior, ODFW, Duke, Nez Perce, S-P, AW/ FLOW, AMC, MDEP, Washington, AmRivers, ADK, RAW, EPA, MPRB, PFBC, CRITFC, SC League, MPRB, WGA, Skagit.

¹²⁶ Interior, IDFG, Oregon, Washington.

¹²⁷ Oregon, IDPR, PFMC, WGA, California, IDFG.

¹²⁸ 16 U.S.C. 470f.

¹²⁹ See 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,710.