

on each disputed study with reference to the study criteria and any applicable Commission policies and practices. We think this provides ample opportunity for development of the record and consideration of study requests related to recommendations.

141. Interior contends that the National Park Service should be eligible for formal dispute resolution with respect to study recommendations that relate to potential project impacts on a unit of the National Park System or other areas of special management concern, such as National Recreation Areas. Interior offers no basis for distinguishing these studies related to FPA Section 10(a) recommendations from those of other entities, and we *see* none.

142. GLIFWC, Menominee, and Nez Perce suggest that the Commission's trust responsibility requires Indian tribes to be eligible for formal dispute resolution with respect to studies related to impacts to reservation lands within the project boundary and ceded lands on which tribes have treaty reserved rights. We do not agree. The study plan development and formal dispute resolution components of the integrated process are not required by any treaty or statute, and are being created solely to provide a means of creating an evidentiary record to support, to the extent reasonably possible, the actions of agencies or Indian tribes with decisional authority.

143. Finally, NHA and PG&E request that the regulations make more clear that the formal process is available only to agencies or Indian tribes with respect to their study requests related directly to exercise of their mandatory conditioning authority, and not for study requests relating to matters wherein these entities may only make recommendations, such as FPA Section 10(j) fish and wildlife agency recommendations. We have clarified the regulatory text in this regard.¹³⁰

3. Advisory Panel

a. Need for Panel

144. Several commenters object to, or express concerns about, the efficacy of, the Advisory Panel. Some licensee commenters assert that the existing dispute resolution provisions work well enough.¹³¹ They assert generally that

allowing the disputing agency to be represented on the panel violates fundamental fairness, accepted notions of due process, and the Administrative Procedure Act (APA).¹³²

145. Some commenters also fear that the panel proposal is not practical, citing the lack of monetary compensation for the third-party panelist's time and effort; and the short time frames, particularly in light of the panelists' lack of familiarity with the project and background of the issues.¹³³ They recommend instead a technical conference, narrowly focused on the specific dispute, with input from the potential applicant and any other interested participant, and that the record of the technical conference be filed with Director to inform his decision on the dispute. The Skokomish Tribe fears that the panel process will be unwieldy, take longer than the existing process, and increase costs. VANR recommends that eligible study disputes be resolved by the Director using the existing process and, if the panel is used at all, it be only as a forum for appeals from the Director's decision. Duke recommends instead a modified version of the existing dispute resolution process; written submissions followed by a technical conference including Commission staff, or a panel including a representative of the applicant. PFBC recommends that the formal process be used only after the disputants have first attempted to resolve the matter using the ALP dispute resolution process.

146. These alternative recommendations generally have the virtue of being less complicated than the Advisory Panel proposal. They lack however the presence of a third party technical expert and panelists from Commission staff and the disputing agency who have no prior connection to the proceeding, and must work cooperatively with the third party expert and one another. We have also provided for a technical conference, discussed below, at which the potential applicant may directly address the Advisory Panel. For these reasons, we will adopt the Advisory Panel proposal.

b. Panel Membership

147. Many comments were received on the membership of the Advisory Panel. Various licensee commenters contend that the Advisory Panel is unfair because it includes a panelist from the disputing agency, but not the potential applicant.¹³⁴ They assert that

requiring the agency representative to be someone not previously involved with the proceeding,¹³⁵ or even from another agency, will not obviate an institutional bias that resource agency staff have in favor of other resource agency staff.¹³⁶ Others contend that the panel would be more fair without a disputing agency representative because the disputing agency is a party to the dispute, while the Commission is the decisional authority.¹³⁷ Troutman expresses skepticism that resource agencies will be able to find qualified representatives who have not been involved in the proceeding and suggests that agency representatives will be unwilling to act independently of higher level agency officials who support the agency's position in the dispute.

148. Suggested remedies for this alleged bias include having two Commission staff members not previously associated with the proceeding and one third party expert,¹³⁸ replacing the disputing agency on the panel with a licensee representative,¹³⁹ adding a licensee representative to the panel,¹⁴⁰ and replacing the third party expert with a third member designated by the potential applicant.¹⁴¹

149. We do not agree that the proposal for panel membership is unfair to potential applicants. Again we remind industry commenters that the purpose of the Advisory Panel is to help resolve a dispute between the Commission staff and an agency or Indian tribe with mandatory conditioning authority concerning the adequacy of the record to support agency decision-making. Potential applicants will have ample opportunity through their written submission and participation in the technical conference to make their case to the Advisory Panel and the Office Director. A potential applicant that believes the Advisory Panel recommendation and study plan determination are not based on substantial evidence or are otherwise improper may file a request for rehearing.

150. EEI states that the agency representatives are not bound by the

Advisory Panel abdicates the Commission's responsibility to decide the issues before it. The Advisory Panel has no decisional authority; it is limited to making recommendations concerning the consistency of the study request with the study criteria.

¹³⁵ This is required by 18 CFR 5.14(d).

¹³⁶ WPSC, WPSR.

¹³⁷ Duke, Progress, Troutman.

¹³⁸ Duke, Progress, Troutman.

¹³⁹ WPSR.

¹⁴⁰ Xcel.

¹⁴¹ Snohomish.

¹³⁰ See 18 CFR 5.14(a). EPA requests that we modify the regulation text to make eligible any agency that has water quality certification authority, so as to permit EPA to file notices of dispute in instances where it, rather than the state, is responsible for issuing water quality certification. We agree to this modification, and modified the regulatory text accordingly.

¹³¹ EEI, Idaho Power, Alabama Power, Xcel, NEU.

¹³² 5 U.S.C. 551–559.

¹³³ Suloway, NPS, Long View, VANR.

¹³⁴ Duke, Long View, Xcel, Snohomish. These entities reiterate assertions previously made that the