

Commission's *ex parte* rules and suggest that they will consult in private with the agency staff who filed the dispute. The Process Group considered this issue and agreed that as a condition of serving on a panel, all panelists would have to agree to be strictly bound by the Commission's prohibition on *ex parte* communications. This is unnecessary however, as the regulations state that all communications to and from the Commission staff concerning the merits of the potential application shall be filed with the Commission.¹⁴²

151. The few agency commenters on panel membership state that fairness and balance require the disputing agency to be on the panel because that is the only way to ensure that its position on biological and technical issues is properly represented.¹⁴³ Their principal concern is that the panel members have appropriate technical expertise relative to the specific issues in dispute.¹⁴⁴ NOAA Fisheries, for instance, contends that the expertise must be very specific to the issues; for instance, a study dispute involving gas bubble disease in fish would require experts on that topic, not merely general expertise in fisheries or other related specialized knowledge. Wisconsin DNR similarly argues that regional-specific expertise is needed; for instance, an expert in west coast anadromous fish would be unsuitable for a dispute concerning the study of resident, freshwater fish in Wisconsin.

152. We think it would be a sterile exercise to try to craft regulatory language that more precisely defines the type or degree of expertise that may be necessary for the myriad of potential dispute resolution issues. The most practical approach is to leave the selection of an appropriate third party expert from the list of technical experts to the agency or tribe and Commission staff panel members in light of the facts of the case.

153. Interior requests that the requirement that the Commission and disputing agency panel members be "not otherwise involved in the proceeding"¹⁴⁵ be modified to bar only persons not "directly" involved. In this way, Interior would make eligible a supervisor in the same office as the agency staff who invoked the formal dispute resolution process. California would exclude only those who have not been "actively involved in the proceeding as an advocate or negotiator

for the agency or tribe's position."¹⁴⁶ This, too, would allow supervisory employees with direct responsibility for the agency's participation in the case to serve as a panel member. We decline to add this qualification because it would blur the line between those who are eligible to serve and those who are not, and would undercut the appearance, and probably the reality, that the panel is composed of technical experts using their independent judgment. The best way to ensure acceptance of the Advisory Panel approach is to ensure that the panel members are working on a clean slate with respect to the specific proceeding.

154. Oregon and IDPR state that the Advisory Panel should not be limited to three members because every agency that objects to the study plan determination on a particular study needs to have its own representative. We have limited the panel to three for two reasons. First, we seek to minimize the possibility of deadlock. Second, the larger the panel is, the greater are the logistical challenges associated with the panel convening, meeting, and making a recommendation. To these we add the concern that the panel not appear to be weighted in favor of disputing agencies. We see moreover no reason why two Federal agencies with disputes concerning the same or similar study requests cannot be represented by one individual with the requisite expertise.

155. The NOPR proposed that if there is no timely agreement on a third party expert, the two existing panel members carry out the panel's functions.¹⁴⁷ Mr. Groznik recommends that in such a case the Director should be required to appoint a third party expert. Interior contends that three panel members are needed to ensure that there is either a majority or unanimous recommendation. Oregon states that the panel should not be allowed to proceed in the absence of a technically-qualified third party, principally to ensure that there is appropriate technical expertise on the panel.

156. We expect instances where a third panel member cannot timely be selected by the Commission staff and disputing agency representatives to be rare. We recognize however the importance of the third panel member in providing assurance that the impartiality of the panel's recommendations. We have therefore amended the rule to provide that in such an event, an appropriate third panel member will be selected at

random from the list of experts maintained by the Commission.¹⁴⁸

157. Washington thinks a state agency expert should be able to serve on the Advisory Panel. We agree. A Federal agency or Indian tribe that initiates a dispute resolution could request a state agency expert to represent it on the Advisory Panel. Likewise, for instance, a state water quality certification agency could certainly appoint as its representative a member from its own ranks, or from another state or Federal agency, or Indian tribe. There is also no reason a qualified state agency employee could not serve as a third party expert if that person was selected by the other panel members and the state's regulations and policies permit that person to engage in such activities. We think this flexibility should make it easier to quickly assemble panels with the right expertise.

158. The Studies Group agreed that it would be appropriate for the Commission staff representative to initially organize the Advisory Panel and serve as chair. We think this makes sense because the notice of dispute will first be filed with the Commission, which will maintain the list of eligible technical experts, and some individual needs to be responsible to ensure that the process starts quickly and stays on track. We have so provided in the regulation text.¹⁴⁹

c. Non-Member Participation

159. Some commenters contend that parties other than the potential applicant should be allowed to respond to the notice of dispute, even if they cannot initiate a dispute resolution, because they may have an interest in the outcome of the process not represented by the disputing agency or the potential applicant.¹⁵⁰ To do otherwise, suggests HRC, violates fundamental due process. SCE asserts that a potential applicant should be permitted to meet face-to-face with the Advisory Panel instead of being limited to written submissions. We believe the concerns of these parties are addressed by our decision in the following section to include the technical advisory meeting in the formal dispute resolution process.

160. The Advisory Council, citing 36 CFR 800.4, seeks assurance that State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officers (THPO), and Indian tribes have an

¹⁴⁸ 18 CFR 5.14(d).

¹⁴⁹ See 18 CFR 5.14(d)(1). To further assist the rapid formation of the panel, the disputing agency is required to identify its panel member in its notice of dispute. 18 CFR 5.14(b).

¹⁵⁰ HRC, CHRC, Whitewater, Advisory Council, TU.

¹⁴² 18 CFR 5.8(b)(3)(v).

¹⁴³ Catawba, SC League, Wisconsin DNR.

¹⁴⁴ Interior, Oregon, NOAA Fisheries.

¹⁴⁵ 18 CFR 5.14(d).

¹⁴⁶ California, p. 13.

¹⁴⁷ Proposed 18 CFR 5.13(d).