

opportunity to participate in formal dispute resolution before any dispute pertaining to implementation of NHPA Section 106 is resolved. Subsection 800.4(a) provides for the action agency to determine whether the action could result in changes to any historic properties located in the area of potential effects. If so, the agency is to review existing information on potentially affected historic properties, request the views of the SHPO or THPO on further action to identify historic properties that may be affected, and seek relevant information from local governments, Indian tribes and others. Based on its assessment, the action agency is to determine the need for further actions, such as field surveys, to identify historic properties. Subsection 800.4(b) requires the action agency to make a good faith effort to identify potentially affected historic properties and to evaluate their eligibility for the National Register in consultation with the SHPO or THPO.

161. The integrated process is fully consistent with this requirement. The study plan and schedule development process discussed above contemplates the active participation of the SHPO or THPO, local governments, Indian tribes, and any interested agency or member of the public in determining what information needs to be gathered or studies conducted with respect to historic properties. Because these entities do not have mandatory conditioning authority, they would not be eligible to initiate the formal dispute resolution process. They would however have the benefit of informal dispute resolution and be eligible to participate in the technical conference.

162. We emphasize in this connection that the study plan development process merely determines, in consultation with the participants in the Section 106 process, which information gathering and studies the potential applicant should undertake. It assists the Commission in obtaining the information needed to identify what historic properties may be present. It makes no determination whether any aspect of the potential license application or reasonable alternatives would have an adverse effect on historic properties. That determination is made later in the context of the environmental document and other elements of the Section 106 process; specifically, the Commission must, when applying the criteria of effect and, if necessary, consult with the SHPO/THPO on ways to avoid or mitigate these effects, usually by entering into a PA.

d. Technical Conference

163. NHA recommended inclusion of an "Advisory Technical Conference (ATC)," which would convene just prior to the meeting of the Advisory Panel. The ATC would include representatives of the Commission staff, the agency or Indian tribe with the dispute, the potential applicant, and a neutral expert or experts. It is not clear from NHA's submission how the Advisory Panel would interact with the conferees. Commission staff with appropriate expertise would moderate the ATC,¹⁵¹ and the Commission staff would be responsible for maintaining a conference record.

164. Prior to the ATC, the potential applicant and the resource agency that filed the dispute would file information and arguments. During the ATC, the agency or Indian tribe would summarize its arguments based on the study criteria, the potential applicant would respond, and the conferees would then discuss the issue in dispute relative to the study criteria. NHA would, to the extent feasible, have all studies in dispute addressed at one ATC. Following the ATC, the Advisory Panel would meet without the applicant, then make its recommendation to the Director, who would also have available the record of the ATC, including the opinions of the third party technical experts.

165. The Studies Group agreed that it would assist the formal dispute resolution process to add a technical conference, to be presided over by the Advisory Panel. This meeting would be held after the written submissions to the Advisory Panel by the disputing agency and the potential applicant are made by disputing agencies and the Commission staff, and just prior to the deliberative meeting(s) of the Advisory Panel. The meeting would be open to all parties, but the topics would be restricted to the specific studies in dispute and the applicability to them of the study criteria. The Advisory Panel would determine how it wished to receive information, but we anticipate that a question and answer format would work well.

166. The NHA proposal has merit in the sense that it would bring in additional technical expertise, but it also would entail additional steps requiring more time, additional Commission resources to provide a moderator and to keep a record, and would add to the overall burden by creating additional written record

¹⁵¹ It is not clear if NHA intends for the Commission staff moderator to be someone other than the Commission staff panel member.

material of questionable incremental utility. NHA's proposal also does not provide an avenue for other participants with an interest in the outcome of the dispute to participate in the process.

167. We conclude that a technical conference based on the Studies Group's recommendation would benefit the process. The opportunity for the members of the Advisory Panel to hear directly from and be able to question the disputing agency or Indian tribe, the potential applicant, or other participants who have an interest in the outcome of the dispute should enable them to clear up any questions about the written submissions and quickly focus on the most important elements of the dispute. This should, in turn, assist the Advisory Panel to develop its recommendation in a timely fashion.¹⁵²

e. Activities of the Advisory Panel

168. Various comments were received about the role of the Advisory Panel and how it should go about its work. EEI urges us to require the Advisory Panel to specifically address the potential applicant's submissions. An explicit direction in this regard is unnecessary; particularly in light of our decision to include the technical conference.

169. Troutman and Oregon request generally more definition of how the Advisory Panel will do its work, including with whom it will communicate, and how. The technical conference proposal and clarification that strict application of the prohibition on *ex parte* communications will apply should address these commenters' concerns. Also, as discussed above, we have determined that the Commission staff panel member should chair the panel. These provisions provide sufficient guidance to panelists and assurance to others that the panel will make its recommendations through procedures that are fair and reasonable.

170. EEI believes the disputing agency representative should be barred from writing the Advisory Panel's report on the ground that this person is likely to be biased in favor the disputing agency's position and, by having control over the drafting, will wield undue influence. We reject this suggestion. First, we trust that the panelists will apply their expertise in a professional manner consistent with the purpose of the

¹⁵² See 18 CFR 5.14(j). EEI recommended that we consider turning over disputes to the Commission's Dispute Resolution Service (DRS). The DRS is not an appropriate alternative to the formal dispute resolution process because the DRS is not a decision-making body and cannot ensure a resolution of the dispute through voluntary mediation. The DRS' role as a mediator or facilitator is more appropriate at other points in the process.