

panel. We are moreover confident that no single panelist will be able to dictate the recommendation to the other panelists. The panel chair should have the leeway to make this assignment in consultation with the other panelists.

171. California contends that it is important for the Advisory Panel to convene in the vicinity of the project (and perhaps to visit the project) in order for the panel to better understand the disputed issues and so that state agencies and local entities with limited budgets are more likely to be able to appear before the panel. Whether it is necessary for the panel to meet in the project vicinity or visit the project is a matter best determined in light of the facts and circumstances of each case.

5. Timing Issues

172. Some commenters state that some or all of the time frames for the formal dispute resolution process are insufficient.¹⁵³ OWRC is particularly concerned that if more than one agency brings the same dispute, insufficient time is allowed for the agencies to agree on who should represent both of them. We disagree. This is a matter that agencies should be able to quickly settle over the telephone.

173. HRC suggests that the response times can be alleviated and the panel's deliberations better focused if the notice of dispute and potential applicant's responsive comments, if any, are required to include proposed findings and recommendations. The agency or Indian tribe's notice of dispute is already required to address the study criteria, which we expect would encompass its proposed findings and recommendations, but only from its own perspective. Any response from the potential applicant is likely to similarly address the criteria from its perspective. The task of the Advisory Panel will be to discuss and attempt to resolve differences between the submissions. The addition of the technical conference is also likely to result in clarifications to the written submissions that will influence the opinions of individual panelists. Thus, the proposed findings and recommendations are largely included in the record. Although we are not inclined to require the disputing agency or Indian tribe, or the potential applicant, to separately state its proposed findings and recommendations, they are encouraged to do so if they think it will benefit the record.

174. The NOPR proposes to require a notice of study dispute resolution to be filed within 20 days of the study plan

determination.¹⁵⁴ NYSDEC and Interior state that this is not sufficient time to assemble the supporting evidence. NYSDEC would give the disputing agency at least the 25 days afforded to the potential applicant to submit responsive comments.¹⁵⁵ Interior recommends 30–60 days. Twenty days is not a great deal of time, but a disputing agency will have written out the support for its notice of dispute when it makes its study request prior to the study plan determination.

175. IDEQ recommends a 90-day period for the participants to informally resolve remaining differences after the study plan determination before a notice of dispute must be filed. We decline to adopt this recommendation. As discussed below, we have modified the rules to provide a 90-day period before comments are filed on the potential applicant's draft study plan for this purpose.¹⁵⁶ Participants in the formal dispute resolution process may also try to resolve differences during that process as a result of reviewing one another's written submissions, or following the technical conference.

6. Third Party Technical Expert

176. The principal concern raised about the third party technical expert is whether qualified persons will be willing to serve. Some commenters think the absence of compensation for professional time beyond reimbursement of expenses will make recruiting difficult.¹⁵⁷ Washington states that this is inequitable, but does not explain why, in light of the fact that panelists would be volunteers. Others suggest that unpaid panelists won't invest the necessary time and effort to result in a well-reasoned recommendation. They also think that a compensated third party expert is more likely to be truly neutral. These commenters recommend that third party experts be paid for their services as part of the cost of the hydropower program.¹⁵⁸ SCE recommends that the Commission and the disputing agency share the cost to compensate the third party expert.

177. We believe potential third party technical experts may be motivated to

volunteer their services for reasons other than financial gain. One reason would be that service on the panel would enhance that person's professional standing as a technical expert, or in the area of alternative dispute resolution. It would also be an opportunity to provide a public service.

178. IDFG is concerned that there may not be a sufficient number of qualified people in the pool for certain issues due to lack of familiarity with local resources or limited field level experience with the resources. We think the Commission staff and disputing agency panelists will be competent to determine who among the pool of experts is qualified to serve.

179. The other principal concern of commenters is how to ensure that third party experts are truly neutral. Minnesota DNR indicates that technical experts employed by consulting firms are biased in favor of the industry and recommends using only experts from academia who have no recent ties to the industry. EEI, on the other hand, would have us prohibit the use of academics, on the ground that they are biased in favor of expansive and expensive studies. We decline to make any such blanket characterizations about large and very diverse classes of persons. This is the kind of concern that is best dealt with by the Commission staff and agency representatives to the panel in the context of a specific proceeding.

7. Multiple Panels and Multi-Issue Panels

180. A few commenters favor the use of multiple panels. NOAA Fisheries, for instance, states that there should be a separate panel for each issue relating to each study dispute; *e.g.*, if NOAA Fisheries and the U.S. Fish and Wildlife Service each had different issues with respect to the same study, they would file separate notices and there would be separate panels.

181. We hope that the formal dispute resolution process will rarely be invoked, but must take care to structure it so as to ensure that when it is, it can accomplish its purpose of timely bringing finality to study disputes. The regime favored by NOAA Fisheries is simply not practical. A contentious case with multiple study requests and disputes could paralyze the dispute resolution process for months. The more resources, studies, and agencies involved in a proceeding, and the more integrated processes being undertaken in the same general time frame, the more panels would be required, and the more difficult it would be to timely recruit panel members.

¹⁵⁴ Proposed 18 CFR 5.13(a).

¹⁵⁵ The 25-day period for potential applicants to respond to the notice was not selected to give the potential applicant an advantage, but to provide time following convening of the panel for the service addresses of the panelists to be posted on the Commission's Web site in order that the potential applicant will be able to serve the panel members. See proposed 18 CFR 5.13(h).

¹⁵⁶ 18 CFR 5.12 and Section III.T.

¹⁵⁷ Wisconsin DNR, Washington, HRC, Idaho Power, EEI, NEU, SCE.

¹⁵⁸ HRC, Washington.

¹⁵³ OWRC, California, NYSDEC, IDEQ, HRC.