

182. The majority of commenters on this issue, and the Process Group, support the use of a single panel to deal with related resource issues in the same proceeding, subject to various caveats. They indicate that it may be necessary to reduce costs, avoid delay, and prevent sequential disputes over the same study. For instance, one panel would consider all issues relating to fishery studies in a single proceeding or, perhaps, in a multi-project proceeding.¹⁵⁹ A few commenters suggest that one panel ought to suffice for all disputes in a proceeding, without regard to resource differences.¹⁶⁰ In this regard, Troutman likens the role of the panelists to that of judges in a court, and states that expertise is less important than a good record.

183. The most frequent caveat of those who agree that a single panel may consider more than one dispute is that the panelists have appropriate expertise.¹⁶¹ Interior adds that the decision to have one panel for multiple disputes needs to be made on a case-by-case basis, and that it needs to be clear at the outset what issues the panel will consider so that disputing agencies can appoint an appropriate representative and identify appropriate technical experts. We agree.

184. California would have the panel chair determine which disputes the panel will hear. In light of the goal of expeditious resolution, we think it falls to the Commission staff, under the direction of the Director of Energy Projects, to quickly assess the disputes and determine how many panels are needed and which issues each will consider.

185. Oregon requests clarification as to whether there will be standing panels for various resources that are likely to be the subject of many study requests at many projects, such as anadromous fisheries, or project-specific panels. Oregon does not appear to support this, but rather to recommend project-specific panels in order to help ensure that appropriate technical expertise is brought to bear. We agree.¹⁶²

186. GLIFWC indicates that if a panel is to consider issues pertaining to different resources, it should be

supplemented with a technical expert for each resource. We do not envision that the same panel would consider issues relating to, for instance, the need for a requested turbine entrainment study and the need for additional or modified recreational use surveys. The same panel might however consider disputes concerning studies requested on turbine entrainment and bypass reach flows for fishery habitat purposes. It would be a matter for the Commission staff and agency or tribal panel members to determine which persons on the list of potential technical experts are qualified and able to serve with respect to the subject of the dispute(s).

8. Panel Recommendation

187. The proposed rule provides for the Advisory Panel to make a finding "as to whether the criteria * * * are met or not, and why."¹⁶³ PG&E and GLIFWC state that the Advisory Panel should be required to determine whether each of the study criteria has been met. This is a reasonable recommendation, and we are modifying the regulation text accordingly. We make however two observations. First, not all the criteria necessarily apply to all the requesters. For instance, a requester may not be an agency or Indian tribe with established resource management goals for the relevant resource (Criterion 2). There is moreover no bright line by which to determine if some of the criteria have been met.

188. PG&E also suggests that the Advisory Panel should address, in addition to the study criteria, "any other relevant consideration."¹⁶⁴ SCE recommends that panel's recommendation be explicitly limited to whether the criteria have been satisfied. We agree with SCE. The study criteria were carefully developed with the intention that every participant in a dispute resolution proceeding would understand the criteria by which study requests should be formulated and would be judged. PG&E's recommendation would introduce substantial uncertainty into the process.

189. NEU states that if all three panelists do not support a recommendation, the disagreeing panel member should be required to provide a statement of the reason for their disagreement, in order to ensure a more complete record. We think this decision is best left to individual panelists. We could not, in any case, require compliance with such a provision.

9. Director's Determination

190. The Director's determination is to be made "with reference to the study criteria * * * and any applicable law or Commission policies and practices."¹⁶⁵ Several commenters think the Director has too much discretion regarding whether or not to accept a panel's recommendation.¹⁶⁶ NOAA Fisheries, Interior, and MPRB would have the Director bound by a majority vote of the panel. GLIFWC indicates that a requirement for deference to panel recommendations should be written into the rules. The commenters identify no deficiency with these requirements or other specific concern, but evince only a desire to make the panel recommendation binding. The Commission cannot delegate its decisional authority to the Advisory Panel. We have however modified the regulations to clarify that the Director will take into account the technical expertise of the panel, and will explain why any panel recommendation was rejected if that occurs.

191. Some licensee commenters suggest that a potential applicant should be permitted to file a response to the panel recommendation before the Director's determination is made.¹⁶⁷ We think that the study plan development process, plus the right in formal dispute resolution to make a written submission to the Advisory Panel and to participate in the technical conference provide sufficient opportunities for potential applicants to plead the merits of their study proposals.

192. Interior recommends that the Director be required to obtain Commission approval before issuing a decision that does not adopt the Advisory Panel's recommendation. We see no reason why such a decision needs to be elevated to the full Commission.

193. Interior also states that it does not know which technical experts the Director may consult before the decision is issued, which could result in the Director's objectivity being compromised. The regulations provide that all communications to or from the Commission staff, which includes the Director, related to the merits of the potential application shall be placed into the record.¹⁶⁸

194. Finally, several states request that we reaffirm that the Commission's dispute resolution process does not bind state water quality certification agencies

¹⁵⁹ HRC, NYSDEC, NCWRC, PPMC, NEU, SCE, Alabama Power, GLIFWC, IDFG, Troutman, Interior, California.

¹⁶⁰ B&B, Troutman, Alabama Power.

¹⁶¹ Interior, IDFG, NYSDEC, NCWRC.

¹⁶² We note however that the concept of standing panels is worth considering, as it may be more administratively efficient. As experience is gained with the integrated process we will further consider this idea and, if experience indicates that it would be beneficial, will consult with stakeholders concerning whether modifications to the rule are necessary.

¹⁶³ Proposed 18 CFR 5.13(j).

¹⁶⁴ PG&E, p. 24.

¹⁶⁵ See proposed 18 CFR 5.13(k).

¹⁶⁶ NOAA Fisheries, Interior, MPRB, GLIFWC, FWS.

¹⁶⁷ CWRC, NEU, SCE.

¹⁶⁸ 18 CFR 5.8(b)(3)(v).