

in the sense that participation by a such agencies in the Commission's processes does not affect whatever independent authority it has to require a potential license applicant to produce data or information in the context of the water quality certification application.¹⁶⁹ Alaska states that this holds for state CZMA processes as well. We affirm our prior statement.¹⁷⁰

10. Study Plan Implementation

195. Several commenters¹⁷¹ state that a dispute resolution panel should be convened to resolve any disagreements over the interpretation of study results, whether study plans need to be modified, and whether any additional studies are needed. They contend that such disagreements are no less important than disputes over what the study plan requirements should be in the first instance. Interior and RAW add that disagreements concerning a matter which was previously the subject of a panel recommendation should be considered by the same panel.

196. Our decision to limit formal study dispute resolution to development of the study plan does not imply that any subsequent decisions with respect to studies are less important. Rather, it reflects the fact that convening an Advisory Panel at every point in the overall process where there are likely to be disagreements would severely hamper the timely conclusion of the proceeding. Subsequent resolution of disagreements over study results, modifications to the approved plan, and additional study needs are also not likely to result in substantial changes to the overall study plan. Interior's and RAW's recommendation to reconvene an Advisory Panel for later disagreements pertaining to matters previously considered by that panel is impractical. There is no assurance that the same panelists would be available in a timely manner, or at all, and it would likely hamper the recruitment of third party technical experts if by committing to serve on one panel they were also committing to serve on an undetermined number of future panels at undetermined times.

H. Compliance With Study Plan

197. As proposed, the study plan order would require the potential

applicant to proceed with the approved study plan. The Director's order in formal dispute resolution could amend the study plan order and, if so, would require the potential applicant to carry out the study plan as modified.¹⁷²

198. SCE and others¹⁷³ request that we clarify in the rules whether the proposed study plan order (if no dispute resolution is initiated) and the proposed Director's order following formal dispute resolution are final orders to which rehearing applies. SCE seeks certainty on this point so that it may know whether a potential license applicant is subject to the compliance provisions of FPA Section 31. Duke and SCE request that we make these orders non-binding so that potential applicants are not forced to file requests for rehearing or judicial review to protect themselves against the possibility of sanctions under Section 31¹⁷⁴ or, at least, that we permit the plan and schedule to be modified based on unforeseen circumstances. PG&E suggests that the rules state that an application lacking the required information "may" be found deficient, rather than "will" be found deficient, since an existing licensee might want to avoid doing pre-filing studies to prevent potential competitors from copying the results. WUWC similarly requests that we make clear that any failure to comply with a study plan determination will not result in civil penalties, but will be treated as a deficiency in the application.

199. California, Interior, and AmRivers request that the rule be amended to ensure that there are consequences for the potential applicant if study requirements, objectives, and expectations are not met. Menominee requests that applicants be required to develop a "Quality Assurance Project Plan" prior to implementation of the study plan.

200. Orders regarding studies plans will be binding on potential license applicants, and we expect that they will comply with them. Failure to do so will put potential applicants at risk of having

their applications, when filed, found to be deficient or rejected. The question of whether such orders are subject to rehearing and appellate review may have differing answers, based on the facts of individual cases. In addition, review of study plan orders could significantly lengthen the licensing process, and thus is to be avoided to the extent possible.

201. More to the point, it is crucial to the success of the integrated process that issues regarding development of the record be identified and resolved at an early stage in the licensing proceeding. To this end, the process has been designed to give all participants the opportunity to examine existing information, make proposals regarding necessary studies, work with other participants to achieve consensus regarding information-gathering and, on matters that cannot otherwise be resolved, to obtain the opinion of a three-person panel of experts and a determination from the Director based on the record compiled by the participants. It is our hope and expectation that this consensus-building process will succeed, as has the collaborative alternative licensing process, in keeping disputes regarding studies to an absolute minimum, such that all participants can meet their information needs with the study plan as approved by the Director, without the need for further proceedings.

202. Some licensee commenters¹⁷⁵ state that it is unfair that an existing licensee which is a potential applicant could be sanctioned under Section 31 for failing to comply with study plan determinations, while non-licensee potential competitors for the same project license could not.¹⁷⁶ PG&E and others fear that non-licensee potential competitors might fail to comply with the study orders, then submit an application that relies on the studies undertaken by the existing licensee. They recommend that the Commission address this imbalance by specifying that the penalty for failure to comply with the study plan determinations will be the same for licensee and non-licensee potential applicants; that is, the application will be found deficient.¹⁷⁷ Alternatively, SCE states that a non-licensee potential competitor should also be required to have a formal study plan and schedule, and that its

¹⁷² Proposed 18 CFR 5.13(k).

¹⁷³ Long View and PG&E recommend that the Director's decision in formal study dispute resolution be appealable to the Commission or an administrative law judge. PG&E would extend this right to agencies, tribes, and the potential applicant, but states that it should be limited to alleged errors of fact. Long View would allow an appeal in "extraordinary circumstances," which it indicates would include a study recommendation that significantly increases the cost of the study plan over the applicant's budget.

¹⁷⁴ Duke adds that if rehearing is requested, the Commission would have to suspend the study requirements in dispute pending rehearing or judicial review in order to preserve the potential applicant's rights.

¹⁶⁹ Washington, Massachusetts DER, Georgia DNR, NYSDEC, California, WGA.

¹⁷⁰ California requested that this statement be included in the regulations. We think it is unnecessary to do so, as the authority of states and Indian tribes in this connection is not affected by anything in our regulations.

¹⁷¹ HRC, AmRivers, Wisconsin DNR, Interior, and RAW.

¹⁷⁵ Duke, PG&E, NHA, SCE.

¹⁷⁶ SCE evidently has in mind *Wolverine Power Co. v. FERC*, 963 F.2d 446 (D.C. Cir. 1992), which holds that the civil penalty provisions of FPA section 31 apply only to licensees, permittees, and exemptees, not to unlicensed project operators.

¹⁷⁷ They refer to 18 CFR 4.38(b)(6)(I) and 16.8(b)(6)(I).