

consideration to such requests.¹⁸⁹ We also included a provision in the proposed rules providing for such hearings.¹⁹⁰

212. In the Final Rule, we retain the proposed language on this issue. Resolving factual disputes before an ALJ is a time-tested means of decision making; factual records developed in such hearings are useful to courts which may be called upon to review the final decision on the license.

K. Draft License Application Replaced

213. The integrated process was proposed to include the filing for comment of a draft license application containing, insofar as possible, the same contents as a final license application.¹⁹¹ Exhibit E, the environmental report, would be significantly different from the traditional Exhibit E because it would be prepared following the guidelines for preparation of an applicant-prepared environmental analysis.¹⁹² Any entity requesting additional information or studies in its comments on the draft application would be required to show extraordinary circumstances, and to address in its request certain criteria, as applicable to the facts of that case.¹⁹³

1. Need for Draft Application

214. We requested comments on whether, in lieu of filing a draft license application for comment, it would be a better use of the participants' time to continue informally working on the resolution of any outstanding issues, or whether other considerations weigh for or against a draft license application.¹⁹⁴

215. Several industry commenters state that the potential applicant should decide if a draft license application is needed, because many potential applicants feel the time and effort devoted to it would be better spent on other matters such as settlement discussions and completing study requirements.¹⁹⁵ They state that the draft application requirement is burdensome and redundant because of the cost of creating, reproducing and distributing the document to many stakeholders, and then quickly revising and again reproducing and distributing a final application. Some state that other

Federal agencies, such as the U.S. Army Corps of Engineers, do not require draft applications, and that it causes no problems.

216. These commenters contend that the other participants do not need to see the potential applicant's proposed resource protection, mitigation, and enhancement (PM&E) measures until the application is filed, and that they should have a good general idea of what the potential applicant is likely to propose from the PAD, NEPA scoping, and study plan requirements. NHA would have the potential applicant consult with the parties with the objective of an agreement on whether a draft application should be circulated.¹⁹⁶ NHA and Long View also suggest that the draft license application may be eliminated for relatively simple cases, such as small projects that operate run-of-river or have no anadromous fish issues.

217. Resource agencies and NGOs urge us to retain the draft license application. They state that it is the first time the potential applicant's whole proposal, including PM&E measures, is consolidated and revealed to agencies, which helps them to understand the entire effect of the project and to prepare for filing of the application in final. Some indicate that the draft application is necessary to ensure that potential applicants consider all participants' comments. Others state that it is an important last pre-filing chance to influence the potential applicant's proposed PM&E measures, and to identify areas where additional information may be needed, including for water quality certification purposes. Some also suggest that the draft license application fosters settlement negotiations. Finally, some commenters indicate that the time required to review a draft license application will not prevent parties from continuing to work on outstanding issues, such as settlements or the completion of studies.¹⁹⁷

218. Agency and NGO commenters also suggest that the cost of a draft application should be modest because it is circulated so close to the filing deadline that the draft must very closely resemble the final application, and some favor permitting control of costs by e-

filing.¹⁹⁸ AMC would retain the draft application if there are no settlement negotiations taking place when it would otherwise be due. Interior suggests that the burden entailed by a draft license application could be minimized by permitting the potential application to incorporate by reference information from the PAD or study results that have not changed.

219. As indicated above, much of the disagreement about whether to require a draft license application turns on the contrast between the industry view that it is burdensome and of questionable utility, and the agency and NGO view that it is helpful to the participants. Our task then is to devise a document that reduces the burden imposed on the potential applicant but retains the features of the draft license application that the agencies and NGOs find useful. To that end, we must consider the commenters' views on the appropriate contents of a draft license application.

2. Contents of Draft Application

220. The NOPR requested comments on whether a draft application, if required to be filed, should track the contents of the final license application, or whether it would be preferable to require it only to include a revised Exhibit E or other materials.¹⁹⁹

221. NHA and others²⁰⁰ state that if a draft application is required it should be limited to a description and analysis of the potential applicant's proposal, plus Exhibit E or an abbreviated version thereof. They state that most recipients are only interested in those parts of the draft application and rarely comment on any other part of it.²⁰¹ They add that any other information in the record will already have been filed with the Commission and served on the parties, and may be incorporated in a draft application or comments by reference.²⁰² They conclude that the comments are seldom useful because of

¹⁸⁹ Oregon, HRC, PFMC, NCWRC, ADK, California, Interior, VANR, GLIFWC, Skokomish.

¹⁹⁹ 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732.

²⁰⁰ Oregon, HRC, PFMC, NCWRC, ADK, California, Interior, VANR, GLIFWC, Skokomish, Long View, Acres.

²⁰¹ Long View, Acres. Acres indicates that Exhibits A (project description) and B (description of proposed project operation and alternatives considered) may also be appropriate if the potential applicant for a new license is proposing material changes in project operation.

²⁰² Longview, Acres. These commenters state that the contents of Exhibits A, B, C (proposed construction schedule), and G (project map) would already have been circulated in the PAD or a PAD supplement, or already provided for in the study plan and schedule. They recommend reference to the Commission's EA Handbook as the guidance for preparing Exhibit E.

¹⁸⁹ 68 FR at p. 13998; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,711.

¹⁹⁰ See proposed 18 CFR 5.28(e). The provision is now at 18 CFR 5.29(e).

¹⁹¹ Proposed 18 CFR 5.15 (Draft license application).

¹⁹² Proposed 18 CFR 5.17 (Application content).

¹⁹³ Proposed 18 CFR 5.15.

¹⁹⁴ 68 FR at p. 14010; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,732.

¹⁹⁵ NHA, Suloway, Long View, SCE, Snohomish.

¹⁹⁶ PFBC, viewing the matter from the opposite side of the coin, would eliminate the draft license application only if most or all parties agree.

¹⁹⁷ MDEP, FWS, ADK, Wisconsin DNR, IDFG, VANR, NEU, Oregon, HRC, PFMC, NCWRC, California, Interior, GLIFWC, Skokomish, Skagit. One industry commenter, PG&E recommends against eliminating the draft application, at least Exhibit E. PG&E states that the comment deadline on the draft application tends to focus participants on the matters most important to them.