

concludes that either the license application or REA notice deadline should generally be late enough to ensure that its processes can be concluded before an existing license expires.

260. Oregon and HRC similarly recommend that the deadline date should be established by agreement between the participants and the state on a project-by-project basis. They state that the best time to file the water quality certification application is when the studies are sufficiently complete to provide reasonable assurance of a supportable decision, so long as there is sufficient remaining time to complete the Commission's NEPA analysis and other steps and issue a new license before an existing license expires. Other factors Oregon would take into account include whether the state has public participation and SEPA requirements that rely on the federal environmental analysis.

261. We cannot accept an open-ended deadline date to be negotiated in each proceeding. That would introduce an enormous element of uncertainty into the process and subordinate the Commission's license process to the convenience of the parties or the processes of the water quality certification agency. Neither can we accept a deadline of 60 days following issuance of the draft NEPA document. First, this would be well over three years after the Commission-approved study plan is finalized. Second, in some states the potential license applicant may learn from pre-filing consultation with the certifying agency or tribe all of the data it will be required to produce, but in others this is not determined until an application has been filed. The draft NEPA document is issued at a point approximately 14 months prior to expiration of an existing license. Even if the state promptly determines what additional information is required, it is highly unlikely that the data could be gathered and a certification issued within the remaining time before license expiration. If the state does not act promptly, as much as a year could be lost from the remaining time.

262. California does not explain how the Commission's draft NEPA document could serve that state's public notice and comment requirements when there is no application pending for water quality certification. Absent that application, there would be no reason to think the state would consider the evidentiary record complete, or that the alternatives considered in the Commission's NEPA document would resemble the contents of a water quality certification. In this connection, New

York states that it requires water quality certification applicants to submit studies or data based on pre-project conditions. Maine states that its water quality certification agency will not participate in the Commission's study dispute resolution process because of state sovereignty concerns and because an unfavorable decision in the Commission's process would make it more difficult to require the requested data through its own processes.

263. California indicates that the Commission need not establish a water quality application deadline because states have an incentive to informally consult with the potential applicant before the water quality application is filed to ensure that they have the data necessary to issue water quality certification before the existing license expires and thereby ensure that the environmental improvements included in the certification will timely go into effect. That incentive exists now, yet the single most common cause of new licenses not being issued prior to expiration of the existing license is the absence of water quality certification.

264. In sum, the latest date we can accept for filing of the water quality certification application is 60 days following the REA notice for all processes. This provides two to two and one-half years following issuance of the Commission-approved study plan for the potential applicant and the state agency or Indian tribe to determine what, if any, additional information will be required for a complete water quality certification application, and for the applicant to collect the data and file an application before the Commission issues its REA notice.²⁴¹ If an application is filed at that point and the state has not yet determined what additional information it will require, it is highly unlikely that the certification will be issued before an existing license expires.

265. Since 1991, our policy has been to deem a water quality certification agency to have waived certification if it has not denied or granted a request for certification within one year after the request is filed. A few commenters recommend that we change the policy so that the statutory one-year period for action established by CWA Section 401 is deemed to begin when the state deems the application to be complete.²⁴² We decline to do so. This was our practice prior to 1991, but it

²⁴¹ As discussed above in this section, this is a minimum time that assumes the certification agency has not previously made its information requirements known to the potential applicant.

²⁴² VANR, PFBC, IDEQ, EPA.

was found to be unduly burdensome because it put the Commission in the frequently difficult posture of trying to ascertain and construe the requirements of many and divergent state statutes and regulations. The existing rule, in contrast, is clear and simple.²⁴³

3. Coastal Zone Management Act

266. Alaska seeks assurance that our consideration of coordination and consultation with states includes CZMA issues. Coordination with state agencies that issue consistency certifications under the states' approved Coastal Zone Management Plans should begin with development of the process plan and schedule, in the same manner as coordination with the water quality certification process. We have added state agencies with CZMA authorities to the list of agencies with which a potential applicant must consult,²⁴⁴ and strongly encourage such agencies to participate in the pre-filing consultation process.

N. Tribal Issues

267. In the NOPR we proposed to establish the position of Tribal Liaison as a single, dedicated point of contact and a resource to which Native Americans can turn for assistance in dealing with the Commission regardless of the proceeding or issue. We also proposed to contact Indian tribes likely to be interested in a relicense proceeding in a time frame consistent with the advance notification to initiate discussions concerning consultation procedures.²⁴⁵

1. Consultation Policy

268. Indian tribes offered many comments on the Commission's trust responsibility as it relates to treaty rights, legislation, and executive orders. Several tribes state that as sovereign entities, they have government-to-government consultation rights which differ from those applicable to agencies and the general public, because they must be determined by mutual agreement between the Commission and individual tribes in a case-specific and issue-specific context.²⁴⁶

²⁴³ See Order No. 533, Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters, 55 FR 23108 (May 20, 1991); FERC Stats. & Regs. Regulations Preambles 1991-1996 ¶ 32,921 at p. 30,135 (May 8, 1991).

²⁴⁴ 18 CFR 5.1(d).

²⁴⁵ 68 FR at p. 14002; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,717.

²⁴⁶ S-B, S-P, CRITFC, NW Indians, Nez Perce, Umatilla, GLIFWC, NF Rancheria.