

3. NHPA Section 106

289. In response to licensee requests, the NOPR clarified how the Commission meets its responsibilities to Indian tribes under NHPA Section 106.²⁶⁶ The Advisory Council states that this discussion is accurate. NHA however states that while the Historic Resources Management Plan (HPMP) guidance document issued jointly by the Commission and the Advisory Council²⁶⁷ is useful, the documentation requirements for license applications are inconsistently applied. It states that some staff require a draft Programmatic Agreement (PA) when the application is filed, others want the HPMP to be complete before the application and prior to the PA, and in other cases these documents are allowed to be completed after the license is issued. NHA states that the proposed integrated process regulations are clear that a draft HPMP needs to be filed with the application when the potential applicant has been designated as the Commission's non-Federal representative, but that the traditional process and ALP regulations need to provide the same clarity.

290. NHA and others²⁶⁸ also request that we explain how the Section 106 consultation process relates to the overall licensing process. Section 106 consultation begins at the same time as the licensing process; that is, when the NOI and PAD are filed and distributed. 18 CFR § 5.8(b)(2) provides for the license applicant to request to initiate consultation at the beginning of the pre-filing consultation or, if it is not designated as the Commission's representative for this purpose, for the Commission to initiate consultation.²⁶⁹ The Commission-approved study plan and schedule provided for in 18 CFR 5.11 through § 5.13 should include studies pertaining to issues raised pursuant to Section 106. The PA must be completed prior to license issuance, but the HPMP can be prepared prior to or following issuance of the license.

291. They also request that the Commission undertake in such circumstances to do any necessary studies itself. The fact that a potential applicant does not become the Commission's non-Federal representative, for whatever reason, does not relieve it, as the project

proponent, of the responsibility to undertake the information gathering or studies the Commission determines are necessary to provide the evidentiary record to support a reasoned decision.

4. Other Matters

292. The Tribal Group recommended that the regulations require each potential applicant to designate one person as its point of contact for Indian tribes. We think this is a matter best worked out via consultation between potential applicants and individual tribes.

293. Finally, Washington, Maidu, and Skagit indicate that participation in licensing is costly and that the Commission should work with states and tribes to identify and develop sources for funding of tribal participation that will foster consistent, active participation and rapid turnaround times by tribes. CRITFC recommends that the Commission require applicants to fund liaisons under the control and direction of tribes. NW Indians add that even if the Commission cannot require applicants to fund tribal participation, it should encourage them to do so.

294. The Commission is aware that participation in licensing proceedings can entail significant expense. Federal funding for Indian tribes is however the responsibility of other Federal agencies. We note however that some applicants have found such funding to be beneficial in specific circumstances, and we encourage applicants to consider whether it may be beneficial in the context of their potential applications.

O. Environmental Document Preparation

1. Cooperating Agencies Policy

295. The NOPR proposed to modify, as to federal agencies, the Commission's policy that an agency which has served as a cooperator in the preparation of a NEPA document may not thereafter intervene in the same proceeding, and to make conforming revisions to our *ex parte* rule. The rationale for the existing policy is that cooperating agency staff will necessarily engage in off-the-record communications with the Commission staff concerning the merits of issues in the proceeding, so that, if the agency is allowed to become an intervenor, it will then have access to information that is not available to other parties, in violation of the prohibition in the APA and our rule against on *ex parte* communications.²⁷⁰

296. In the NOPR, we concluded that the likely benefits of better coordination between federal agencies in the exercise of their responsibilities, a more complete record, and reduced duplication of effort outweighed the potential for prejudice to other parties that would not have access to some information and decisional communications between the Commission and the cooperating agency. To minimize the potential for prejudice to other parties, we proposed to require that any cooperating agency that provides the Commission with study results or other information also serve such materials on parties to the proceeding.

297. State agencies and NGOs generally support this proposal, and request that we also reverse the policy for state agencies, including water quality certification agencies.²⁷¹ SCE also supports the proposed change, provided that cooperating agencies are precluded from challenging the content and completeness of a jointly-prepared environmental document.

298. NHA does not take a position on the proposed policy change, but suggests that any change in policy occur after the transition period, so as not to disrupt ongoing proceedings. PG&E and Duke assert that if the policy change is to apply to gas certification proceedings as well, the Commission should first provide public notice and an opportunity for comment.

299. Several commenters strongly oppose the proposed change in policy.²⁷² They assert that the changed policy would make cooperating agencies who also intervene "super parties" with

²⁶⁶ 68 FR at pp. 14001-003; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,716-718.

²⁶⁷ This document provides guidance to applicants and licensees for preparing their historic resource management plans. It is available on the Commission's Web site at <http://www.ferc.gov/hydro/docs/hpmp.pdf>.

²⁶⁸ E.g., Spiegel.

²⁶⁹ The Advisory Council and NHA requested this provision.

²⁷⁰ See, e.g., Rainsong Company, 79 FERC ¶ 61,338 at 62,457 n.18 (1997).

²⁷¹ Washington, Georgia DNR, Wisconsin DNR, Washington DNR, California, CSWRCB, Interior, NOAA, HRC. California asserts that the prohibition on *ex parte* communications would not be an issue with respect to states if the Commission were to change its practice of preparing NEPA documents that include, in addition to an environmental impact analysis, analysis and recommendations to the Commission concerning which of the reasonable alternatives considered is the preferred alternative. California would have us put all such analysis in a separate document. California further suggests that the *ex parte* issue could be obviated if the Commission staff who process the application and prepare the NEPA document were separate from the decisional staff that advised the Commission. We will not adopt California's suggestions because preparing two environmental documents in each case and requiring that two separate sets of Commission staff be assigned to every proceeding would likely add expense and delay to proceedings, and would place an undue burden on our resources. Moreover, given that decisions about the scope and conduct of the environmental analysis may have a significant bearing on the ultimate outcome of a proceeding, we are unsure that California's proposals would obviate concerns about fairness and *ex parte* requirements.

²⁷² See, e.g., Alabama, Duke, EEL, Idaho, Spiegel.