

environmental assessment in some cases. VANR believes this increases the likelihood of process delay in the form of requests for rehearing. A single environmental assessment is issued only when the Commission is able to make a finding of no significant impacts, which is generally in cases where there is little or no controversy. The parties are in any event afforded an opportunity to comment before the order acting on the license application is issued. The integrated process makes no change in this practice.²⁸⁵

3. Endangered Species Act Consultation

310. NOAA Fisheries and Interior state that the integrated process regulations should clearly identify points at which ESA consultation occurs, such as initiation of formal and informal consultation.²⁸⁶ NOAA Fisheries also recommends language to encourage either the potential applicant or the Commission staff to initiate informal or formal consultation when the process begins.

311. The part 5 regulations are replete with references to ESA consultation. The section on the NOI states that the NOI may include a request by the potential applicant to be the Commission's designated non-Federal representative for this purpose.²⁸⁷ The notice of commencement of proceeding will contain, if appropriate, a request by the Commission to initiate informal consultation and, if applicable, designate a non-Federal representative.²⁸⁸ The PAD must include existing information on threatened and endangered species.²⁸⁹ One of the specified topics for the scoping meeting is a schedule for ESA consultation in the process plan and schedule.²⁹⁰ Study requests following this meeting should include requests related to threatened and endangered species.²⁹¹ The application contents include a discussion of the status of ESA consultation.²⁹² The tendering notice will update the processing schedule, if required, including ESA consultation.²⁹³

312. In addition, although it is not reflected in the regulations, our well-established practice is to issue a

biological assessment with the draft NEPA document, and the joint agency ESA regulations²⁹⁴ are clear concerning how and when Interior and Commerce are to respond to that document. In sum, we think the regulations we are adopting provide sufficient clarity concerning the interaction between the licensing process and ESA consultation.

313. Interior, citing the Interagency Task Force report on ESA consultation,²⁹⁵ also implies that information gathering and studies for ESA purposes should be conducted independent of the rules for information gathering and studies in the licensing process. Interior offers no reason why this should be so, and it would be inconsistent with the entire thrust of the integrated process, which is to maximize coordination of Federal, state, and tribal processes.

314. Finally, Washington DNR states a license or license amendment might be inconsistent with an existing Habitat Conservation Plan (HCP) approved by the USFWS and NOAA Fisheries for various species in Washington State and, if that were the case, the HCP would have to be amended.²⁹⁶ Washington DNR indicates that the Commission should require the licensee in such circumstances to reimburse Washington State for any costs associated with the HCP amendment. Decisions concerning funding of state agencies are however a legislative responsibility.

4. Fish and Wildlife Agency Recommendations

315. The NOPR proposed to modify our regulations which set forth procedures for consideration under FPA Section 10(j)²⁹⁷ of recommendations made by Federal and state fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.²⁹⁸ The proposed modifications would, with one minor exception, not change the existing procedures, but would simply restate the existing practices with more

clear reference to the statutory standards. The only change in procedure would be that Federal and state fish and wildlife agencies would no longer receive separate notice by letter of the preliminary consistency determination that is made in the Commission's draft NEPA document (or single environmental assessment). In the future, service of the draft NEPA document would serve as notice.

316. Oregon objects to the proposal to give notice of preliminary consistency determination in the draft NEPA document. Oregon suggests that notice by letter is necessary to ensure that state agencies do not miss the opportunity for 10(j) negotiations.²⁹⁹ This should not be a matter of concern. We are not aware of any case in which a Federal or state fish and wildlife agency has failed to receive the Commission's draft or final NEPA document.

317. Interior proposes that the regulations include criteria for the acceptance of 10(j) recommendations, based on a "team" approach in which the Commission staff and fish and wildlife agencies would confer before issuance of any preliminary consistency determination. However, at the point where the draft NEPA document or single environmental assessment is ready to be issued there has already been substantial consultation on these matters. Interior's proposal would also, for all practical purposes, be a pre-draft NEPA document 10(j) negotiation procedure. It would be inconsistent with our goal of expeditious resolution of licensing applications to provide an additional, duplicative process step.³⁰⁰

318. Snohomish states that the regulations should specify the step in the integrated process at which the 10(j) process begins. The regulations state that the process begins when federal and state agencies submit their 10(j) recommendations in response to the REA notice.³⁰¹

319. California asserts that it cannot reasonably be asked to make final 10(j)

²⁹⁴ 50 CFR part 402.

²⁹⁵ This report provides guidance for integrating and coordinating the procedural steps of the licensing and ESA Section 7 consultation processes. The intent of the agreement report is to incorporate ESA issues into pre-filing consultation on study needs, the filing of a draft biological assessment with the license application when possible, and integrating ESA issues with the NEPA document and 10(j) negotiations, so that all processes are on the same track. The ITF's guidance documents are posted on the Commission's Web site at <http://www.ferc.gov> on the hydro page.

²⁹⁶ The PAD is required to describe any applicable HCPs, so that any potential conflicts with a license or amendment proposal are brought to light early.

²⁹⁷ 16 U.S.C. 803(j).

²⁹⁸ 16 U.S.C. 661 *et seq.*

²⁸⁵ See 18 CFR 5.24(d).

²⁸⁶ Washington and Washington DNR state that ESA consultation should begin with the NOI and be completed before the application is accepted for filing.

²⁸⁷ 18 CFR 5.5(e).

²⁸⁸ 18 CFR 5.8(b)(2).

²⁸⁹ 18 CFR 5.6(d)(3)(v).

²⁹⁰ 18 CFR 5.8(b)(3)(viii).

²⁹¹ 18 CFR 5.9(a).

²⁹² 18 CFR 5.18(b)(3)(ii).

²⁹³ 18 CFR 5.19(b).

²⁹⁹ Oregon also urges us to defer to state agency recommendations instead of requesting additional support for recommendations that the Commission staff believes are not adequately supported on the record. Such deference would be inconsistent with the Commission's obligation to independently analyze all public interest issues. Our approach to consideration of 10(j) recommendations is moreover long-established and judicially approved. See *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990); accord, *American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999).

³⁰⁰ Implementation of section 10(j) has been discussed by the Interagency Task Force on hydropower, which consists of staff from the Commission and other Federal agencies. Additional discussions may be conducted in the future, if necessary.

³⁰¹ 18 CFR 5.26(a).