

recommendations without the benefit of the Commission's NEPA analysis. It recommends that we provide for preliminary 10(j) recommendations, which would be due 60 days after the REA notice, and final recommendations, which would accompany the agency's comments on the draft NEPA document. The 10(j) process however already includes a response by Commission staff to the 10(j) recommendations (the preliminary consistency determination), which initiates an opportunity for agencies to file responsive comments, including modifications to their 10(j) recommendations.³⁰² That is not changed. We see no need to burden the process with a second opportunity to modify these recommendations.

320. The NOPR proposes that modified mandatory terms and conditions be filed 60 days following the deadline date for comments on the draft NEPA document or environmental assessment. Washington suggests that the time frames for the 10(j) process should be on the same track as the track for mandatory conditions because there may be related issues. It states, for example, that a modified fishway prescription might be inconsistent with an earlier-filed 10(j) recommendation. The 10(j) recommendations and the Commission's preliminary consistency determination are in the public record and served on all parties to the proceeding. If a Federal or state agency or Indian tribe with mandatory conditioning authority elects to impose a condition inconsistent with a state agency's 10(j) recommendation, the mandatory condition would prevail.

321. NOAA Fisheries states that the Commission's determinations that 10(j) recommendations are inconsistent with the FPA often rest on the conclusion that a recommended measure is too costly relative to the expected environmental benefits. NOAA Fisheries states that these determinations appear to be arbitrary because there is no standard formula for determining the cost of 10(j) recommendations. It asks that we establish a standard methodology for these determinations and include it in the regulations. NOAA Fisheries' concerns in this regard were addressed above.³⁰³

322. In a related vein, Interior recommends that the regulations specify in detail procedures for determining

pursuant to the comprehensive development standard of FPA Section 10(a) whether to accept the recommendations of parties to licensing proceedings, including 10(j) recommendations. The procedures for processing all aspects of a license application are set forth in the integrated process rules or in parts 4 and 16, as applicable. To the extent Interior may be requesting the establishment of a formula for determining the public interest, public interest determinations are made with reference to a myriad of statutory and regulatory provisions and case-specific factual circumstances and cannot be reduced to a formula.

323. HRC does not request the establishment of a formula for acceptance or rejection of 10(j) recommendations, but does request that our consistency determinations provide a more specific explanation of how cost figures into each decision. The Commission is committed to providing a full explanation of how all relevant considerations are factored into its decisions.³⁰⁴

324. Georgia DNR requests that we include in the integrated process formal guidelines to address state-listed threatened and endangered species. We do not believe there is a need for any additional guidelines concerning state-listed species, as consideration of them is already built into the integrated process. State fish and wildlife agencies should participate in development of the study plan and schedule, including NEPA scoping, then make recommendations concerning protection of state-listed species pursuant to FPA Section 10(j) in response to the REA notice.

P. Time Frame for Integrated Process

325. The NOPR included a detailed, sequential description of the process steps in the proposed integrated process, including time frames for each of the process steps.³⁰⁵ We requested comments on which process steps might need to be adjusted, and which time frames, if any, should be specified in the

regulations for purposes of guiding development of a process plan and schedule (including studies), and which may not be appropriate for specification in the regulations, but should be developed entirely in the context of case-specific facts.³⁰⁶ Many comments were filed on the proposed time frames. In this section we consider comments on the overall process.³⁰⁷ Comments on the time frames for specific steps are discussed with the relevant subject matter.

326. Many commenters state that the overall process time frame of 5.5 years is unrealistic.³⁰⁸ They cite the complex, multi-party, multi-jurisdictional nature of the proceeding; study requirements that often require more than one or two years of data;³⁰⁹ the likelihood of one or more occurrences that could impair the timely development of the evidentiary record, such as droughts; weather conditions such as heavy snowpack that can cause lengthy delays in the initiation of field work or may force the revision of planned studies; newly listed threatened and endangered species; the possibility that potential applicants may not adequately fulfill the study plan; the likelihood that some applications will be considered in the context of multi-project environmental analyses covering projects in the same river basis with different expiration dates;³¹⁰ and potential difficulties melding the integrated process with the processes of Indian tribal governments, particularly those with modest resources.³¹¹

327. California and others state that strict adherence to a 5.5-year time frame emphasizes speed at the expense of sound science and quality decision-making, will stifle meaningful public and agency participation, and will cause the process to break down, resulting in needless rehearings and appeals.

³⁰⁶ 68 FR at p. 14011; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,733.

³⁰⁷ The Commission received several hundred specific recommendations regarding modifications to the regulation text. These recommendations may be discussed in the preamble in the context of a significant issue, but many recommendations are redundant of the recommendations of other commenters, or are technical corrections, or while meritorious and incorporated into revised regulatory text, do not require discussion in the preamble.

³⁰⁸ California, SCE, Oregon, PFMC, MPRB, PFMC, VANR, Oregon, GLIFWC, NHA, WPPD, S-P, CRITFC, Noe, Wisconsin DNR, Long View, PG&E, Snohomish, Xcel, Washington, ADK, IDEQ, Minnesota DNR, Interior, HRC, Menominee.

³⁰⁹ California, Oregon, NOAA Fisheries, Interior, PFMC, and CRITFC point to such examples as mortality studies of anadromous fish, which require multiple release groups over as much as five years to obtain data from just one brood year.

³¹⁰ California.

³¹¹ S-P, Menominee, GLIFWC, CRITFC.

³⁰² Although the process has always been conducted in a manner that contemplates modifications to 10(j) recommendations, the regulations may not be entirely clear in this respect. We have therefore clarified the regulation text. See 18 CFR 5.25(c).

³⁰³ Section III.O.2.

³⁰⁴ HRC suggests that not making formal dispute resolution available for study disputes related to possible 10(a) and 10(j) recommendations increases the risk of disputes over the recommendations themselves. It urges us to increase the use of neutrals to resolve such disputes. We have not traditionally used neutrals in disputes between Commission staff and the parties to proceedings following the issuance of draft NEPA documents, but we are not categorically opposed to HRC's suggestion. As experience is developed with the formal pre-filing study dispute resolution process, it may make sense to further consider whether neutral technical experts could play a useful role in this area as well.

³⁰⁵ NOPR Section III.E.2 and Appendix C.