

California recommends that we assume a process requiring at least 6.5 years. Interior agrees and, if we adopt the 5.5-year process, change all of the 15–30 day time frames to 45–90 days. California also recommends that we modify the rule to provide for negotiated schedules.

328. We are aware that there may be instances in which factors such as those cited above or others, such as lack of water quality certification, will prevent a license application from being developed and processed within the 5.5-year time frame, and that there will continue to be cases where annual licenses are issued. That said, we continue to think the best approach the Commission can take is to design a process that, to the greatest extent possible under the existing statutory scheme, addresses the causes of delay and disputes over the sufficiency of the record. The proposed integrated process was designed to do so. We are confident that the integrated process, with modifications based on the post-NOPR comments and consultation activities, offers the best means of meeting our goals.

Q. Settlement Agreements

1. Time Outs

329. Many commenters urge us to reconsider our decision not to include specific provisions in the regulations for a “time out” period during which processing of a license application could be suspended while settlement discussions take place.³¹² Oregon suggests a period of 12–18 months would be appropriate. HRC similarly suggests that the processing schedule could be developed to include time for settlement discussions, with the schedule for the Commission’s NEPA document adjusted upon the request of the parties to ensure that any settlement agreement which may be filed is one of the action alternatives.

330. These commenters do not disagree that the integrated process should help to foster settlements by ensuring early issue identification and production of information. They contend however that the labor intensive nature of the integrated process and settlement discussions, and the tight time frames in the integrated

process, will prevent participants from participating simultaneously in both activities. They add that settlement agreements enhance the strength and durability of the license, help to avoid conflicting Federal and state license conditions, and minimize litigation.

331. They also challenge our statement that the pressure a firm processing schedule places on the parties is an incentive to reach settlement. They argue that time outs increase the likelihood of settlements because it often takes significant time for all parties to fully understand the implications of various potential provisions, which is needed for complete buy-in to an agreement. They add that enforcement of strict deadlines, such as for responses to REA notices, will force parties to take adversarial positions.³¹³ We continue to adhere to our conclusion in this regard, which is based on our experience.

332. In response to the concerns expressed in the NOPR about maintaining timeliness, the commenters indicate that reaching settlement is more important than strict adherence to a schedule, and that the Commission can place reasonable limits on the amount of time that processing will be suspended while the parties negotiate and require periodic status reports. These comments essentially restate comments made prior to the NOPR.

333. We are not inclined to grant requests for regulatory language that guarantees time outs or implies that they should be routinely granted. We think however there is benefit to codifying the considerations that should be addressed by parties who seek suspension of the procedural schedule to pursue settlement agreements. The provisions we are adopting in this connection make clear that a lack of progress toward the timely filing of a settlement agreement may cause the Commission to terminate any suspension of the procedural schedule that it has granted.³¹⁴

³¹² Interior states in this connection that it cannot engage in settlement negotiations that compromise its authorities, presumably by causing it to lose its conditioning authority by failing to meet deadlines in the licensing process. It states that if it agrees to participate in settlement discussions, the Commission must agree to accept as mandatory conditions any resulting settlement provisions, or to accept as timely filed any conditions that Interior may file if settlement negotiations fail. We cannot strike such a bargain, which would compromise the Commission’s control of its own processes. Interior must weigh the risks of participation in settlement negotiations in each case.

³¹⁴ 18 CFR 5.29(g).

2. Other Matters Pertaining to Settlements

334. The NOPR responded to many commenters who requested guidance in the regulations on what kinds of settlement provisions are or are not acceptable, including adaptive management programs, mitigation measures in lieu of additional studies, mitigation measures outside of existing project boundaries, and confidentiality agreements. In declining to adopt this recommendation, we explained our policies and practices in this regard, with citations to relevant orders. We further explained that it is inappropriate to put general guidance in the regulations because each settlement agreement measure must be evaluated individually in light of the entire record and factors identified in the FPA and other relevant legislation.³¹⁵

335. Several commenters renew their requests for guidance. Some essentially repeat their earlier submissions. Others state that the Commission’s response in the NOPR, while helpful, is insufficient. Interior and Oregon, for example, request that we provide additional guidance by compiling case studies and examples of successful agreements.³¹⁶ Regarding the second point, Interior and Oregon appear to be asking for guidance on the substantive content of settlement agreements. The best general guidance we can give is that we strive to approve and give effect to all uncontested settlement agreements to the maximum feasible extent, within the bounds of the law and consistent with the public interest. Instances where the Commission has rejected a substantive provision of a hydroelectric licensing settlement that is lawful and within our jurisdiction to enforce are quite rare. If there is any question concerning whether a potential settlement provision has been previously rejected by the Commission or is likely to be rejected, we encourage the parties to confer with the Commission staff.

336. HRC acknowledges that decisions on settlement agreements are based on the law and the record of individual cases, but requests periodically updated guidance on the boundaries of the law concerning what is acceptable, formatted similarly to the Council on Environmental Quality’s “Forty Most Asked Questions Concerning CEQ’s NEPA

³¹² OWRC, Long View, Reliant, Oregon, CRITFC, Xcel, NHA, VANR, IDFC, GKRSE, Interior, Process Group. NYSDEC states that explicit provisions for time outs are not needed, but that the Commission should grant reasonable requests for suspensions that will help advance settlement talks. Georgia DNR supports a brief suspension of the schedule only where the Commission determines it is ultimately likely to expedite the licensing process. Only Alabama Power opposes a time out provision.

³¹⁵ 68 FR at p. 14008; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727–728.

³¹⁶ Interior makes the same request with respect to scientific studies and adaptive management plans.