

1. Traditional Process—Public Participation

374. In the NOPR we proposed to modify the traditional process pre-filing consultation regulations to require potential applicants to make reasonable efforts to bring into pre-filing consultation as early as possible NGOs and other members of the public, and for these entities to be involved in the development of the potential applicant's study plans.³⁵⁷

375. Non-industry commenters favor this proposal. NHA and SCE oppose it. NHA states that it could significantly increase the cost and time of the process. It recommends that we maintain the existing provisions for public participation, except that the public would be encouraged to provide the potential applicant with comments on its proposal following the public meeting required during stage one consultation,³⁵⁸ and the potential applicant and agencies would be required to respond contemporaneously to those comments. NHA indicates that the availability of the PAD on the Commission's Web site should enable the public to effectively participate in the public meeting, and the potential applicant could decide what level of pre-filing public participation was appropriate for the project. SCE also cites increased costs and burdens and states that the public is already adequately represented by the Commission and resource agencies.³⁵⁹

376. We are strongly inclined to adopt the rule as proposed. Under NHA's proposal, the potential applicant would not be required to distribute the PAD to members of the public likely to be interested in any license application proceeding or include the public in the joint meeting with agencies and Indian tribes. There would also be no requirement for the public to provide comments and study requests following the joint meeting, and they would not be eligible to participate in the joint meeting following comments on the draft license application.³⁶⁰ This would exacerbate the contribution that lack of public input during pre-filing

consultation now makes to licensing delays. The proposal in the NOPR to include the public in all aspects of pre-filing consultation substantially resolves this problem for the traditional process.

2. Traditional Process—Mandatory, Binding Dispute Resolution

377. The principal reasons the existing study dispute resolution process is not used are that it is not required to be used and the result is advisory only.³⁶¹ We proposed to require consulted entities in the traditional process who oppose a potential applicant's information-gathering and study proposals to file a request for dispute resolution during pre-filing consultation. Consulted entities that do not request dispute resolution would thereafter be precluded from contesting the potential applicant's study plan or results with respect to the issue in question.

378. We also proposed to make the outcome of dispute resolution binding on all participants; that is, the Director's order resolving the dispute would, if information or a study is determined to be necessary, direct the potential applicant to gather the information or conduct the study. Consulted entities would not be permitted to revisit the dispute after the application is filed. We further proposed to eliminate from the traditional process the opportunity to request additional scientific studies after the license application is filed.³⁶²

379. NHA and EEI support the proposed change.³⁶³ NHA would also modify the proposed rule by requiring study requesters to address the study criteria applicable to the integrated process, and by requiring the Director to address those criteria in his decision.

380. Agency and NGO commenters were less enthusiastic. HRC and Interior contend the proposed change could make the problem of post-application study disputes worse and, along with TU urge that if pre-filing binding dispute resolution is adopted, it be the same as formal dispute resolution in the integrated process. Interior argues that study disputes cannot be resolved without the aid of a panel of technical experts and the views of Commission staff, so the goal of developing a record during pre-filing consultation that will

support the actions of all agencies with decisional authority would be thwarted. NYSDEC appears to support mandatory, binding dispute resolution, but opposes elimination of post-application study requests. HRC, echoing the concerns of commenters on binding dispute resolution in the integrated process, adds that if the traditional process dispute resolution is to be mandatory and binding, then the Commission must permit rehearing of the Director's decisions. Finally, Interior and NOAA Fisheries state that the Commission does not have authority to issue a binding pre-filing dispute resolution in the traditional process because in that process no formal proceeding commences until the application is filed. We think Interior and NOAA Fisheries are correct and will therefore not adopt this proposal.

381. Finally, NOAA Fisheries recommends that we modify the traditional process by requiring applicants to submit for Commission approval a study plan under conditions similar to development of the study plan in the integrated process. Since we are not adopting mandatory, binding dispute resolution in the traditional process, a Commission-approved study plan would serve no purpose, and would blur the distinction between the integrated and traditional process.

3. Traditional Process—Other Recommendations

382. Interior recommends that we make no changes in the traditional process until the integrated process has become established and shown to be effective because it opposes mandatory, binding dispute resolution in the traditional process. As just discussed, we are not adopting that proposal. Because Interior does not specifically oppose increased public participation, we presume it has no objection to that aspect of the proposed rule.

383. SCE states that the best way to streamline the process would be to eliminate pre-filing consultation altogether for any project that has previously been issued a license in which a NEPA document was prepared, or for small projects where no operational or ground-disturbing changes are contemplated. Under SCE's scenario, the pre-NOI notice to the applicant would be published in a local newspaper. The potential applicant would file the NOI and an abbreviated version of the PAD, then file an application based on whatever pre-filing consultation it decides is needed. In support, SCE states that it already has relationships with the resource agencies and that anyone is welcome to make

³⁵⁷ 68 FR at p. 14011; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,734.

³⁵⁸ See 18 CFR 4.38(b)(3) and 16.8(b)(3).

³⁵⁹ Acres does not oppose the proposal, but states that the Commission should help individual members of the public organize themselves so that public participation is efficient and structured. Participation by individuals may be inconvenient for applicants in certain respects, but individuals are capable of determining for themselves whether joint action is consistent with their individual interests.

³⁶⁰ See proposed 18 CFR 4.38(b) (1)(3)(4) and (5); 4.38(c)(2) and (6); 4.38(d)(2); analogous sections of proposed 18 CFR part 16, and proposed 18 CFR 5.4.

³⁶¹ 68 FR at p. 13996; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,707.

³⁶² See proposed changes to 18 CFR 4.38(b)(5), (c)(1), and (c)(2); and 16.38(b)(5), (c)(1), and (c)(2) and related NOPR discussion, 68 FR at p. 13996; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,734–735.

³⁶³ SCE supports mandatory pre-filing dispute resolution, but states that it should be the same for all processes and should be available only to agencies with mandatory conditioning authority.