

comments before an application is filed. It adds that Interior's Bureau of Land Management and the U.S. Forest Service do not require pre-filing consultation.

384. We think leaving pre-filing consultation to the discretion of potential applicants is unlikely to result in any gains in the timeliness or efficiency of the licensing process, and reject the qualifying criteria proposed by SCE. A NEPA document issued many years before a new license application is filed is likely to be of very little value. Nor is a proposal to maintain the *status quo* as an operating regime necessarily a guarantee that a new license application will not raise substantial issues. Changes are likely to have occurred over the term of the license with respect to recreational use of the reservoir and shoreline, threatened and endangered species listings, water quality standards, resource agency management goals, standards for protection of cultural and historical resources, and others. That SCE has established relations with certain agencies has no bearing on this issue of general applicability.

385. SCE adds that if the PAD is required it should be scaled back for applications using the traditional process because it is too burdensome for small projects and the required amount of information is not needed at the beginning because NEPA scoping will follow filing of the application. SCE overlooks two important facts. First, the PAD is one of the tools used to inform the opinions of the participants and the Commission concerning whether to approve use of the traditional process. Second, the PAD is only required to include existing relevant information that can be obtained with the exercise of due diligence. An existing licensee already has a substantially similar obligation to produce information under the traditional process regulations.<sup>364</sup>

#### 4. Streamlined Process for Small Projects

386. The NOPR declined to adopt a proposal by NHA under which applicants could file a request for waiver of all or part of the pre-filing consultation requirements. We did so largely because the existing regulations already provide for consensual waiver by agencies and Indian tribes and owing to concerns about NHA's proposed criteria.<sup>365</sup> Nonetheless, in recognition of the important place of small hydropower in the nation's energy infrastructure and in the hope of

eliminating potentially unnecessary costs of relicensing, we requested comments on other approaches to streamlining the licensing process for small projects that would not compromise the interests of other stakeholders.<sup>366</sup>

387. NHA responds that we should not have rejected its proposal because no other agency requires pre-filing consultation, it is not required by NEPA, and it is less important for licenses issued after enactment of the Electric Consumers Protection Act<sup>367</sup> because such licenses were the subject of a recent NEPA document and are likely to include many environmental protection measures. NHA adds that it does not seek an exemption from NEPA, or to preclude analysis based on new issues such as threatened or endangered species listings, but only wants recognition that some impacts will already have been adequately addressed. NHA also stresses that the existence of the PAD would enable interested entities to comment prior to the license application even if there is no formal opportunity to comment.

388. We remain unpersuaded. That other agencies may not require pre-filing consultation, or that it is not required by NEPA, has no bearing on whether it makes sense for license applications. The FPA licensing scheme is unique, and commenters were nearly unanimous that the key to timely and efficient processing of applications is combining pre-filing consultation with NEPA scoping. NHA may be correct that post-ECPA licenses are likely to contain a greater level of resource protection than pre-ECPA licenses. However, as noted in our response to SCE's proposal in the preceding section, many factors are likely to change over the term of any license, regardless of when it was issued.<sup>368</sup>

389. NEU recommends that projects under 5 MW with minor licenses should have the right to elect the traditional process without Commission approval, and to file the initial consultation document currently required by the regulations instead of the PAD. We think the approval requirement has been framed so that licensees of small projects will have a reasonable opportunity to make their case for using the traditional process and, as noted, we

have made the PAD less burdensome for all potential applicants.

390. Agencies and NGOs continue to recommend that no special allowances be made for projects of any size unless there has been consultation with agencies, Indian tribes, and the public. They reiterate that size is no indicator of environmental impacts, case-by-case consideration of the issues is not unduly burdensome, and that if there really are few issues or little controversy, then the study design can reflect that.<sup>369</sup>

391. Notwithstanding our rejection of NHA's and NEU's recommendations, we think there are likely to be instances where relicensing of a small project will be uncontroversial, and for which study requirements should be modest. For such cases, waiver of part or all of pre-filing consultation may not prejudice the timely and thorough consideration of a relicensing application. We are therefore modifying Section 16.8(e) of the regulations that requires the consent of a resource agency or Indian tribe in order to waive pre-filing consultation with respect to that entity. We will now permit non-consensual requests for waivers, but will require any such request to be preceded by discussions with these other entities and for the request to include documentation of the discussions and a response to any objections to the waiver request. We will also provide an opportunity for responses to the waiver request.<sup>370</sup>

#### 5. Draft Applicant-Prepared Environmental Analyses

392. Under the current rules, a license applicant may include a draft EA with its application if it uses the ALP (applicant-prepared EA, or APEA). The NOPR declined to adopt recommendations that we permit license applicants to include a draft EA or draft EIS with their application even if they use the existing traditional process. We stated that the limits on pre-filing public participation and the history of post-application continuation of pre-filing study disputes would likely make such documents no more useful, or even less useful, than the existing Exhibit E. We did however note that by proposing full public participation in pre-filing consultation and adding mandatory, binding study dispute resolution, the problem of an incomplete record when the application is filed should be alleviated. We requested comments on whether, in light of these proposed changes, we

<sup>366</sup> 68 FR at p. 14012; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,736.

<sup>367</sup> Public Law 99-495, 100 Stat. 1243 (Oct. 16, 1986) (codified at 16 U.S.C. 791a *et seq.*).

<sup>368</sup> We note in this regard that the minimum term for a new license is 30 years, and the first relicenses of projects with post-ECPA licenses are still approximately 15 years away.

<sup>369</sup> S-P, MPRB, NCWRC, Interior, Georgia DNR, Wisconsin DNR, Oregon, California, HRC, NYSDEC.

<sup>370</sup> 18 CFR 16.8(e).

<sup>364</sup> See 18 CFR 16.7(d) and 16.8(b).

<sup>365</sup> 68 FR at p. 14012; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,735-736.