

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: :

PROPOSED RULEMAKING FOR :

HYDROELECTRIC LICENSING :

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Commission Meeting Room
Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C.

Thursday, April 10, 2003

The above-entitled matter came on for workshop, pursuant to notice, at 9:10 a.m., Chairman Pat Wood III, presiding.

APPEARANCES:

- COMMISSIONERS PRESENT:
- CHAIRMAN PAT WOOD, III, Presiding
- COMMISSIONER WILLIAM L. MASSEY
- COMMISSIONER NORA MEAD BROWNELL

P R O C E E D I N G S

(9:10 a.m.)

MR. ROBINSON: My name is Mark Robinson. I'm the Director of the Office of Energy Projects, and you all have answered one question for me. I was wondering, after three days of conference on hydro, which I know many of you attended, how many people would have the stamina to come in and continue this. And I'm pleased that we have a crowd of this size. That's the good news.

There's also another sort of observation from this that is good news. We've been at this now for, what now, nine months? I don't know how long it's been in that one-year period that we all committed to up front, and people are still hanging with us, and that's good news, too.

The progress that's been made so far, I think has been spectacular. Our Commission, I don't think, could be more pleased than what we accomplished in getting that NOPR out.

But as we committed up front, this NOPR is absolutely and unequivocally a draft document. We are still working on it. We want the final rule to be better.

Certain aspects of it, I don't think you're going to see a whole lot of concept changes like the ILP is where we put the eggs in the basket, and we're really trying to make that work right. That was a big decision for us.

But there is still a lot to be done and a lot of issues to be resolved that we have been working on with our regional meetings, and now we're going to really try to focus in and then following this with our drafting sessions, come the end of the month. That's where we'll really try to bring this altogether in some ultimate form.

So, I welcome you. I thank you all for coming. We need your input; we want to make this rule the best thing that we could possibly put out of the Commission, even in a one-year period. It always kind of amazes me when you say you're going to spend a year doing something, and there is still some thought of, well, it's not -- you know, we need more time.

A year is a good hunk of time. We've made good use of it. You all made sure that we've used it wisely, and I think over the next April, May, June, the next three months or so, we will really put a fine edge on this rule, and come out with something that we can all be proud of.

So, again, I want to thank you for coming this morning. I appreciate your sticking with us and giving us your thoughts and your time, and with that, I'll turn it over to John and Ann and John and Tim and everybody else that's been working so hard on this. Thank you all for coming.

MR. KATZ: Thank you. My name is John Katz. I'm

going to be your moderator today.

Commission Staff has been, as you know, holding these workshops around the country. Our goal with regard to this particular workshop is to discuss key issues which have been identified at the regional workshops held across the country and to identify additional thoughts that folks have about the proposed rule, and to develop recommended solutions for any issues that are raised at this session.

I want to identify briefly, some of the folks who are sitting up here, who you may be talking with, although, judging from this crowd, most of you are very well familiar with us and us with you.

To my left is John Clements of the Office of General Counsel, who has basically been the primary draftsman and laboring oar for the rule. Next to him is Ann Miles, whose title, if I get it right, is Acting Director, Division of Hydropower, Environmental and Engineering in the Office of Energy Projects.

To my right is Tim Welch, who has been a lead OEP staffer throughout this process. As we go through the day, the session is going to be recorded by the Court Reporter, who's sitting to my right, so when you speak, please identify yourself and give your organizational affiliation so that you can be clearly identified for the record.

Also, please do not start speaking until our

assistant, the lovely and talented Ken Hogan, who is in the back, comes to you with a microphone, because otherwise, folks in the room might not be able to hear you and it will be much more difficult for the Court Reporter to get down what you have to say.

If you have any questions, there are FERC staff here at the table, and throughout and outside. Please feel free to talk to us and get any help you need.

With that, I'm going to turn it over to Tim Welch, who is going to give an overview of our proposed rule.

MR. WELCH: Thanks, John. As John said, I'm going to spend the next 15 minutes or so, sort of taking you briefly through the rule, and talking a little bit about our process.

Before I start, I want to point out your yellow programs here and the things that I'm going to be talking about. The talk I'm about to give is Enclosure B, which is a separate handout, right, that was just inserted in there. And those will be my slides. There is some room in here for you to take notes and that kind of thing.

The other thing I would point is our process itself is on the inside cover, so you can kind of follow along when I go through that. And then on the back of the program is the integrated process itself, and you can follow

along.

If you look in the lower left-hand corner for each of the steps, it refers you to the section in the proposed rule with the language that sort of is behind it all.

Very briefly, in terms of our process, you all know that we issued the Notice of Proposed Rulemaking on February 20th. The comment period for that NOPR closes April 21st, which is a week from Monday.

Once again, you don't have to wait until Monday to get your comments in, you know, we'll take them anytime. I'm sure all of you have them like ready now.

In March and April, we've spent on these regional workshops. This is the last of the six regional workshops. We've been in Portland and Milwaukee and Sacramento, and Charlotte and Manchester, New Hampshire.

Our next big step is to hold our stakeholder drafting sessions, beginning the last week in April and the beginning of May. And they are very similar to the ones that we did prior to the NOPR.

This is being referred to -- this a four-day session, as opposed to the two-day session before. This is being referred to as hydro hell week, so we cordially invite you to come and spend four days with us where we're inviting stakeholders from the industry, NGOs, tribes, resource

agencies, to come together and actually, you know, really hammer out some of the details of some of the concepts.

(Slide.)

MR. WELCH: Registration for that will be online and that will open on April 18th. Next week, be watching our website where we're going to post our agenda, and on that agenda will be the different drafting groups and the subject matter. And we're in the process of working all that out right now.

So, once the stakeholder drafting sessions are over and we have the written comments and we have all the transcripts from our regional meetings, we will once again convene with our sister resource agencies and actually begin drafting the specific language for the final rule.

And we have already started meeting with them a little bit in March and April, and primarily in May we'll be having some pretty intensive meetings. And then as most of you know, our target for completing the final rule and presenting it to the Commission for a vote is July of 2003.

Now, what's in the proposed rule? During the pre-NOPR workshops, you know, as Mark said, one thing we heard was integrate, integrate, integrate, so, low and behold, what you find here is an integrated licensing process.

And so the proposed rule does two things: First

of all, as I said, it creates a new integrated licensing process, and it also proposes some changes to the traditional process.

(Slide.)

MR. WELCH: Now, the integrated process, we sort of broke it down into three areas here. The first year will be spent developing a process plan, and I will tell you a little bit more about what that is later, and a study plan.

Now, once that's all completed, we're looking a period of approximately two years for completing the studies and developing the application.

Once the information is complete, we will begin application processing, and that will take approximately one and a half years. Now, as far as the changes to the traditional process, what we did was, we tried to take some of what we felt were the superior aspects of the integrated process and we're proposing to apply them to the traditional process in Parts 4 and 16 of the regulations.

And those two things are: Increased public participation, or requiring applicants not only to consult with resource agencies and tribes, but members of the public as well; and also more early study dispute resolution. We think those two items will vastly improve the traditional process.

So, the integrated process, we believe both

improves the efficiency of the process, the timeliness of the process, and we believe that we're going to come out with a much better product.

As far as the improvements and efficiencies, probably the cornerstone of the integrated process is the fact that now application preparation will be conducted in conjunction with FERC NEPA scoping. Now, contrast that to the traditional process where NEPA scoping begins after the application is already developed.

We thought it made a lot more sense to do that in the beginning of the process while the agencies are involved and the applicants are scoping the issues themselves.

So we will have our NEPA scoping at the same time. The other important part of the licensing process that improves the efficiency is coordinating with other agencies' processes. And most notably, I'm thinking of the 401 Water Quality Certification process.

(Slide.)

MR. WELCH: Once again, we want things to work in parallel, rather than sequentially, so we put in some steps to help integrate those processes much more efficiently. And, of course, increased public participation, getting the public involved very early in the process, so we can identify everyone's issues right from the very start.

(Slide.)

MR. WELCH: Now, timeliness: The integrated process, we believe, improves the timeliness, primarily for early FERC staff assistance in preparing the application. Again, contrast this with the traditional process where FERC Staff typically do not get involved until after the application has already been developed.

And one of the things that FERC will be doing will be helping to develop this process plan, working with the applicant and other agencies to once again coordinate the processes and develop a plan and a schedule for getting the license information together and getting the application together so we can process it in a very timely manner.

Also, we're looking at early study plan development and informal and formal dispute resolution early in the process, once again contrasting with the traditional process where study disputes often have to wait until after the application is filed, sometimes causing major delay.

(Slide.)

Now, we have a relatively simple graphic here to illustrate the dramatic improvement in timeliness. What we have here is the application processing time. This is the time the application is filed with FERC to the time that the Commission issues the license.

And on the X-axis here, it's the number of months, and zero would be the time that we received the

application. Now, this bar up here of the traditional process, is based on actual data that we presented in the 603 report, and that reported a median processing time of 47 months under the traditional process to process an application.

Now, the lower bar here under the integrated process, is a projection on our part, and we believe that with all the safeguards that we put in place to improve the timeliness, we think we're going to drop that down to about 17 months.

Now, the other thing I want to point out to you here is the two-year point, the 24-month mark, which is the time that license would expire. And you can see under the traditional process that is often necessary for the Commission to issue several annual licenses in order to keep the project operating through the application processing period.

As you can see, in the integrated process, we think that will be a rare event.

(Slide.)

MR. WELCH: Before I finish, I want to go over five other aspects of the NOPR, just to sort of point out some of the highlights to you: Process selection; the pre-application document; our cooperator/intervenor policy; study dispute resolution, and our proposal for tribal

consultation.

Process selection: As you all know by now, we are talking about three processes: The integrated process, the traditional, and the ALP, the alternative process.

The difference here is that the integrated process will now be the default, so, in other words, if an applicant chooses to use the traditional process or even the alternative, it would solicit its comments from all stakeholders in its Notice of Intent, and the Commission would look at those comments and decide whether it made sense for an applicant to use the traditional process.

Now, the pre-application document is something that we're proposing to replace under the traditional process, the initial consultation package. And this is an opportunity to provide all the participants with all of the available environmental information, right from the very beginning.

And this will provide the basis for issue identification, study requests, and ultimately the NEPA scoping document.

The PAD, as we call it, will apply not only for the integrated licensing process, but will now apply in the traditional process as well. So we're proposing to do away with the initial consultation package.

So we urge you to take a look at that particular

section that talks about what is in the pre-application document, and we're asking for your comments on whether we should be adding more things, whether may some things aren't necessary, and we're really looking for some guidance from you on that.

The important thing to look at is the form and the content of that document will be a precursor to the applicant's Exhibit E and eventually the Commission's NEPA document. So things are structured in very distinct resource areas.

What we're hoping to do is to create a living document that moves throughout the process and evolves from the PAD to the license application to the FERC NEPA document. So you'll be seeing a similar document throughout the five-year process.

(Slide.)

Currently, as many of you know, our policy for cooperating agencies is that you cannot be a cooperator on a NEPA document and be an intervenor at the same time. Now in order to coordinate processes and promote more cooperation among federal agencies in the NEPA process, we're proposing to alter that process by permitting a cooperating agency to be both a cooperator and an intervenor at the same time.

Now understanding that there's ex parte concerns, we are including in our regulations a rule and modifying the ex parte rule to require disclosure of study information provided by the agencies. Let me just say a little bit more about that. So if Commission Staff received technical information on studies and any kind of technical information from a cooperator, we would be cooperated under our proposed

rule to put that information in the record for all parties to see.

What we would not be required to put in the record would be just the exchange of drafts back and forth between the cooperators, with a thinking that eventually that draft will be made public in its final form.

(Slide.)

Everyone's favorite topic. Study dispute resolution. I'll just briefly take you through our proposal for study dispute resolution. Remember, this is early in the process before the application is filed.

The basis of the study dispute resolution is the study criteria, and that's in Section 5.10. We propose a series of seven or eight criteria that everyone, all study requesters would have to follow. We'd like you to take a look at those study criteria, evaluate them, let us know if there need to be more criteria or less. We're very interested in your comments on that particular aspect.

Now the applicant would be in the process by filing a draft study plan for all stakeholders to comment. If there are some disagreements about what the necessary studies are, the first step is informal dispute resolution where we would meet informally -- and we're calling that a study plan meeting -- all participants, including FERC Staff, will meet informally for one, two, three days,

whatever it takes to informally resolve these differences.

The next step in the process then is hopefully all those differences will be resolved. The applicant will then present a final study plan for Commission approval, and the Commission will approve that study plan with any needed modifications.

(Slide.)

Now the next step is more formal dispute resolution. And that is, resource agencies, including state and tribal water quality certification agencies, those agencies with mandatory conditioning authority would then have the opportunity to dispute a FERC-approved study plan.

This is a 70-day process that we're proposing. Things will be happening relatively quickly. The first thing we would do, we would convene what's called the advisory panel, and that would consist of FERC Staff, and that would be a different staff member than was involved in the development of the study plan, so we'd sort of get some fresh eyes. Resource agency staff, same thing. A different agency staff member. And what we're calling a third party neutral. That would be another party with knowledge in the particular resource area that would be acceptable to FERC and resource agency staff.

Now what's the applicant's role? The applicant's role would be to provide comments to this panel and the

information that the panel needs to make the decision.

(Slide.)

Now what will the panel be looking at? The panel would then make a finding to whether the study criteria that I just told you about are met or are not met. Once they made that decision, the panel would provide their finding to the Director of Energy Projects, Mark Robinson, and the OEP director would then make a decision with respect to the study criteria or any other applicable law or FERC policy.

(Slide.)

We're also proposing to improve tribal consultation, our relationship with Indian tribes. And we've talked -- we've had five tribal meetings throughout the country with various Indian tribes. We've gotten some input on this.

And what we're proposing is that Commission Staff would initiate early discussions with the affected Indian tribes in order to develop the consultation procedures, as opposed to we have not come up with very strict, you know, step one, step two, step three thing. We thought it would be more effective that we could tailor the tribal consultation to the needs of the individual tribes in the individual situation.

Now to help us do that, we're proposing to establish a position of Tribal Liaison. That would be a

person or persons here at the Commission that would deal with all matters with Indian tribes, help staff in this tribal consultation process in all matters in front of the Commission.

Right now, for the purposes of the rulemaking, Elizabeth Molloy here is our Tribal Liaison, and she has been facilitating our meetings with the tribes.

(Slide.)

So with that, I'll turn things back over to our facilitator and we'll move into sort of the next stage of the process.

MR. KATZ: Thank you, Tim. What we want to do next is to identify the issues for discussion during this workshop today. And to start that out, we're asking John Clements to go through the major issues that we identified at the regional workshops to give you folks an idea of what seemed to be the themes that we are hearing across the country. And once we've done that, we'll open it up to you to identify any additional key issues and then to prioritize the issues for discussion today.

John?

MR. CLEMENTS: I'm working off the slide here. You can see the short list up there on the slide. People did raise a number of other subjects, but those were the ones that people expressed the greatest interest in talking

about.

The actual comments and recommendations that we got with respect to each of those things are very slim at this point, because a lot of the time at the workshop has been devoted to clarifying parts of the proposal. So let me just go through the few things where I can say that people actually made some specific recommendations.

On study dispute resolution and criteria, we got almost no specific comments on the criteria themselves. The principal discussions had to do with the role of cost and what it should be. The most identifiably specific suggestion we got was that there be a provision added that there should be a specific or explicit balancing of the cost of a proposed study versus the incremental value of the information that's provided. There wasn't any agreement on that, but that was a proposal that's out there. And PG&E has some glosses on that which I'm sure we'll see develop better in their written comments too.

On the actual formal dispute resolution process itself, the biggest issue there was eligibility. The most frequent remark we got was that people didn't like it being limited to agencies with mandatory conditioning authority or tribes. They wanted to allow any entity to participate in that formal dispute resolution process or to actually raise a dispute. Or barring that, provide some additional

opportunity for entities other than the license applicant to participate in one respect or another.

With respect to the panel part of it, there were a lot of comments with respect to that. Some people suggested the applicant should be on the panel. Some suggested we don't need a panel because the Commission can decide it, whatever the issue is.

Some people said there wasn't enough time, and a few people suggested that the disputing agency should not have a place on the panel too under the theory that the Commission is acting in its quasi-judicial capacity. And so to have the resource agency that brings the dispute involved in that element of the decisionmaking process is inappropriate.

We had a few comments with respect to the traditional licensing process dispute resolution, and the only real specific one was some people said the Part V study criteria ought to be applied to the resolution of any dispute in the traditional licensing process.

On cooperating agencies policy, that was principally discussed in California. Predictably, California thinks that the change in policy ought to apply to state agencies as well as federal agencies, and that is premised on their view that a joint NEPA document with the Commission and the state is sort of central to the success

of any kind of an integrated licensing process.

Process selection. A number of people said there ought to be criteria. It should not be a good cause. But we haven't actually gotten any specific criteria recommendations at this time. I'm sure we'll get those on paper. The closest thing that came to that was someone who suggested that there ought to be a consensus ought to be one of the criteria, and maybe that the applicant ought to be able to -- or ought to have to show that it would somehow result in the early resolution of disputes to use the traditional process.

Timing of water quality certificate application. Again, that was almost exclusively a California issue. The state of California at this point is saying that the water quality certification application ought to come after the draft NEPA document is issued, under the theory that they can't process an application or an application for a certification isn't complete until the NEPA document is complete. As you know, we suggested something different in the proposed rule.

On settlements, a lot of people wanted to talk about it, but people said very little. Actually, the only specific comment I've got is a suggestion, and we heard this the first time around, that there ought to be some kind of a time out provision, but it wasn't clearly articulated, the

nuts and bolts of how that might work.

A lot of people wanted to talk about the preapplication document. We did a lot of that in Milwaukee. There's basically two points of view. Some state agencies were of the opinion that it shouldn't be limited to existing information, that what that PAD ought to be is basically a pretty complete set of environmental data to begin with. And only when you've got that, can you begin to do the scoping, which leads to the question of if it's complete day one, what studies do you need to do? But we didn't go there.

From a licensee perspective, there were a lot of I thought very thoughtful and careful looks at the details of what's in there, and some suggestions that we were requiring way too much. In particular, one that jumps out is Part XII. There's information from the Part XII regulations that's in there, and a number of people suggested that that is unnecessary in this context. So we're looking forward to a lot more specific comments on what might actually be in there.

Timeframes. Generally speaking, people said they were too short wherever one looked. The one I'm going to add to this list here -- it's not up there on the slide -- is draft license application. We had a pretty good discussion of that, especially in Milwaukee.

There were a few people that think maybe we ought to limit it -- maybe there's more than a few -- people who think that we ought to limit it to Exhibit E rather than the whole draft license application, looking just like the final. That that would be a whole lot easier from an administrative perspective and maybe all that other stuff isn't necessarily needed in a draft license application. So we hope to hear a lot more on that.

And then finally on the tribal consultation and liaison, I guess three key themes we got out of that was consultation is something that we can't prescribe by regulation. We really need to develop it case by case and negotiate it case by case with each tribe, because tribes have different views as to what it ought to be.

Tribal participants were generally of the opinion that timeframes in there are inconsistent or incompatible with the way tribal governments work. In a nutshell, they meet less frequently, and that a lot of times they need to go back to whatever the tribal authority is, whether it's a chief or a council, before they can file or say anything on the record. They don't meet under schedules that look like the schedule that we've got in here.

And then finally, on the liaison, the general tenor of the comments was that that person ought to be an expediter really, not a subject matter expert or a

decisionmaker. It ought to be someone who gets the Commission's professional staff together with the right people from the tribe and make sure that the communications are flowing back and forth.

And related to that, that person ought to be not only providing education to the tribe about the FERC process, but should be receiving education from the tribe about the tribe and its resources and its issues.

And that pretty much sums up what we've got so far in those comments.

MR. KATZ: Thank you, John. What we'd like to do now is have folks from the audience identify for us additional issues that you think should be discussed today. So please raise your hands and we'll pick on you. Wait until Ken gets you the microphone, please.

MR. MARTIN: I'm George Martin with Georgia Power. Perhaps it's included in the timeframes. I've noticed that you observe that comments came that the timeframes were too short everywhere. We would like to consider the transitional period.

MR. KATZ: You mean the transition between the current regulations and the new regulations?

MR. MARTIN: Yes.

MR. KATZ: Okay.

(Pause.)

Don't all leap out of your seats at once. Are there any further issues folks would like to identify?

MR. MOLLER: Thanks. David Moller, Pacific Gas & Electric Company. On some further review of the proposed reg text, a couple of other issues have jumped out that I'd like to have some discussion of today.

One is some clarification about specific requirements of the new regs and how they would apply to or be different for a licensee potential applicant and a nonlicensee potential applicant, with special emphasis on the nonlicensee potential applicant. I think there's some lack of clarity around that.

Secondly, and this may come into that cooperating agency, but I think it's a little broader issue. And that is how the regs either attempt or don't yet provide for establishing the relationship among FERC and the other participating agencies, not only in terms of cooperating on the environmental analysis but on other aspects of the proceeding.

And then finally, there are a couple of things specific to the scope of the proposed Exhibit E that I would like to touch bases on. I think the identified subjects would cover all the rest of the comments that I might have to make.

Thank you.

MR. BARTHOLOMOT: Henry Bartholomot with EEI. A couple of other issues offhand. There may be others as we go, on process selection. You may have mentioned it, John, but I know there is certainly a lot of interest on the applicant licensee side to have that be much more available as an applicant choice.

We had a sense from the Chair at the last meeting that he didn't intend to force everybody into a single mold, and yet the NOPR proposes to be basically have the ILP be the default. It's an untested process. It's a new process with a lot of changes in it. And to basically make that the model that everybody's going to have to fit into, we've said it repeatedly -- I'll just reiterate it -- that there's a lot of concern about that, and the applicants want the traditional process freely available not for a good cause and not for something quite a bit more.

The other that I'm sure you've gotten some indication of concern on is the push toward a cooperating agency approach on the NEPA document. It raises fundamental ex parte concerns, and they're deep and they're serious, and we will certainly lay them out in our comments.

But it's not something that we feel the NOPR in any way satisfactorily addresses, and it's a serious issue that we have to look at. We think there's a fundamental APA ex parte issue that cannot be resolved the way it's being

proposed in the NOPR.

There are some other issues, but those are the two I'd mention.

MR. LEAHY: This is Jeff Leahy from NHA. We would like to see discussed this CEI ruling, how that's going to be affected with this. Our members have said there's going to be a lot of stuff in the PAD that's going to be required that's going to be CEII.

MR. KATZ: Anyone else?

MR. SHANE: My name is Brendan Shane from Van Ness Feldman. Just one very specific question dealing with the 10(j) inclusion in the process. The language in the proposal on Section 5.25 seems to refer to 10(j) as mandatory conditions. And I just wanted to clarify that. Because our understanding is that they shouldn't be mandatory. It should be recommendations.

MR. BARTHOLOMOT: Henry again. I'm sorry, I forgot one other very significant area of concern, and I think it's just not really focused on in the NOPR, although we certainly made it a big part of our comments going in, is the need for the Commission to take a more active role in the end of the process, balancing the license conditions and in particular, doing what it can to manage the mandatory condition inside the process.

And we gave a number of very concrete suggestions

on that. And they really seem to be missing in the NOPR. As we've said, if we had an area where we would like to see improvement, it's in the mandatory condition side of the process in the NOPR. It deals with much different issues and it leaves that unaddressed.

MR. KATZ: Any further issues folks would like to mention?

(No response.)

MR. KATZ: What we will do now is to show the great democracy that works here at the Commission, and we're going to go through these issues one at a time and ask folks to raise hands so that we can get a sense by way of prioritizing which issues are of concern to the greatest number of people.

Would you rather have recess now or take the math test? Yes. We'll just go through them, and basically whichever gets most votes will be the order we discuss them. So why don't we just take it from the top and start with study dispute resolution.

Please raise your hand -- and you may vote -- you don't have to just vote for one. You can vote as many times as issues you think should have high priority. We're just trying to get a sense of what has the most concern for the crowd.

MR. WELCH: Vote early and often.

MR. KATZ: But only with one hand.

(Laughter.)

(Show of hands.)

MR. HOGAN: Nineteen.

MR. KATZ: Okay. Cooperating agency policy?

(Show of hands.)

MR. KATZ: Yes sir?

MR. MARTIN: I had suggested as a subject for discussion relationship between the Commission and the other participating agencies, particularly those with mandatory conditioning authority. It's broader than just cooperating agency policy or status. It didn't go up as a specific item, but --

MR. KATZ: That's probably because it was your friend Liz and she decided that she would ignore you on the keyboard.

(Laughter.)

MR. MARTIN: Thank you.

MR. KATZ: I see it being typed in there now though. Thank you for reminding us of that. Ken, what did you get on cooperating agency policy?

MR. HOGAN: Let's do it again.

MR. KATZ: Let's try that again. Cooperating agency policy? And we are going to treat David's point as a separate issue.

(Show of hands.)

MR. KATZ: It looks like we lost votes since the
last time.

(Laughter.)

MR. KATZ: What have you got, Ken?

MR. HOGAN: Two.

MR. KATZ: The panel says three, so let's make it
a three. We had a late hand I think.

And the next issue is process selection.

(Show of hands.)

MR. HOGAN: Twenty-two.

MR. KATZ: Did you get that, Liz?

MR. HOGAN: Two.

MR. KATZ: Settlements?

MR. HOGAN: Sixteen.

MR. KATZ: Next is the pre-application document or PAD, a popular favorite.

MR. HOGAN: Twenty-eight.

MR. KATZ: The issue of timeframes?

MR. HOGAN: Four.

MR. WELCH: No FERC Staff voting.

(Laughter.)

MR. KATZ: Tribal consultation? Sorry about that. The draft license application.

MR. HOGAN: Eight.

MR. KATZ: Okay, now the tribal liaison?

MR. HOGAN: Zero.

MR. KATZ: And the transition timeframe between the current regs and the new regs?

MR. HOGAN: Fourteen.

MR. KATZ: Clarification about requirements of the regulations applied to licensees as opposed to non-licensees?

MR. HOGAN: Three.

MR. KATZ: And how the regulations establish

relationships between FERC and other agencies?

MS. MALLOY: Exhibit E.

MR. KATZ: Exhibit E, sorry. I had to do in the order that David said, and it's not getting that way.

Exhibit E.

MR. HOGAN: Three.

MR. KATZ: Issues regarding critical infrastructure, energy infrastructure information.

MR. HOGAN: Nine.

MR. KATZ: 10-J, and I think we may be able to handle that one from the panel. John, do you want to address that subject quickly?

MR. CLEMENTS: I have one on that. Be very specific about where is it he sees that language.

MR. KATZ: The 10-J recommendations are recommendations under the statute, not mandatory conditions, so I don't think the intent was to change that.

MR. SHANE: Brendon Shane. It was on D-83 in the second paragraph.

MR. CLEMENTS: Paragraph B?

MR. SHANE: Yeah, the mandatory terms.

MR. KATZ: Rather than getting into a discussion, why don't we take a look at that and see if there is a clarification we need to make.

MR. CLEMENTS: Duly noted.

MR. KATZ: Okay, Commission balancing of license conditions?

MR. HOGAN: Ten.

MR. KATZ: And finally, the relationship of FERC and mandatory conditioning agencies other than the cooperating agency for NEPA purposes issue?

MR. HOGAN: Fourteen.

MR. BARTHOLEMEW: To just clarify, do you need --

MR. KATZ: Hold it. Yes, that would be the way that I see it, that David was raising questions about there would be interaction between the Commission and other agencies other than specifics.

MR. BARTHOLEMEW: I was asking for clarification on that, because I didn't see a bullet on that. Could we, with that clarification, take recount on that one, cooperating agency policy means, in part, the ex parte issue.

If that's what you're saying --

MR. KATZ: That's what it means. If folks want another vote --

MR. CLEMENTS: It's your issue, so that's what you mean it to mean.

MR. BARTHOLEMEW: No, I had suggested that as an additional bullet. It wasn't listed, but I don't know if

others understood that.

MR. KATZ: Is there confusion in the crowd?

Would you like a re-vote? Let's feel free. Let's try the cooperating agency policy again. Hands, please.

(Show of hands.)

MR. HOGAN: Seven.

MR. KATZ: An additional groundswell of support.

Okay, the way our agenda reads, we would be taking a break at 10:15. What I would suggest is that we take the break now from 10:00 till 10:15. Well, I thought maybe it would give us a chance to sort of -- if Liz wants to put that in numerical order and so forth --

(Pause.)

MR. KATZ: Or we can just start with the first one, if that's what folks would like to do. Is there a consensus we'd just like to plunge right in?

VOICES: Yes.

MR. KATZ: Okay, well, let's start with the pre-application document then. Would someone like to kick it off. There are lots of hands, 28 of you. Twenty eight like the subject, but nobody has anything to say? Yes?

MR. MOORE: I'm David Moore with the law firm of Troutman Sanders in the Atlanta office. We attended the Charlotte meeting, and made some comments which I hope will be incorporated into the record for today's comments.

From the discussion of the issues earlier today, I didn't know whether or not that you'd had a chance to take into account, the Charlotte comments. The pre-application document came in during that meeting, and there are several concerns, many of them related to the timing of the pre-application document, but I will limit my comments to the content.

The requirements for the PAD are very highly detailed, and in some respects, they are more comprehensive, in fact, than the prior Exhibit E requirements.

And just as a couple of examples of problematic areas, the PAD requires in Section 5.4 a general description and it is a general description, but of the entire river basin, and in some contexts, that's a problematic requirement.

And we feel as though it's not necessarily applicable or relevant to a relicensing proceeding. And with respect to some of the specific requirements in there, one requirement we commented on this in Charlotte, is a description of hazardous waste disposal sites, for example, and that would be within the entire river basin.

And the question to the Commission would be, what's the relevancy of that sort of information? And this is just an example of one piece of information and one type.

So we're going to be providing written comments

regarding specific information requirements. The concern is that the pre-application document is going to overwhelm the application process, and particularly for licensees who are trying to transition into this new process. It's going to be very, very difficult to meet those specific requirements within the timeframes allowed.

And one thing that I have concern about is the requirements are so detailed and they might be better suited for a policy document rather than a regulation, but they are so detailed that one concern I have is that we're going to see comments back on our PADs that say something like you don't have information as required in 5.4(b)(2)(d)(1), as required in the current reg.

So, my comment would be that we would request that the Commission revisit the specificity of those requirements, perhaps consider moving those into a policy document rather than a regulation, if that's appropriate, but also look to the relevancy of particular requirements within the PAD regulation and sanitize that so that we're not providing and compiling information that's not relevant to the license application.

MS. VIRGO: Sarah Virgo, Longview Associates. I attended the Manchester meeting, and I'm not going to repeat comments that were made at that meeting regarding a lot of the specificity of the PAD.

One of the suggestions that has come up is taking a lot of the requirements of the PAD and just having them available in the project reference room. And I would like consideration that there not be a mandatory requirement to actually have a public project reference room, but that the documents still be made available upon request.

Our experience with a couple of clients is that we have received no requests to ever come to a project reference room, particularly -- even on reservoirs where there are thousands of interested homeowners. So that would be one suggestion.

My second suggestion is, with regard to the PAD, I'd heard on the panel discussion at the NHA conference this week, that the intent is that the PAD is a precursor to the license application and that we're trying to have a sort of document that evolves over time.

And I'm wondering if we could restructure the PAD so that it actually resembles the license application and Exhibit E, or environmental assessment document, and that where there are gaps, because that information will be developed during the licensing process, you include just a statement to be filled in later.

MS. SKANCKE: Nancy Skancke. One of the things that we tried to focus on, too, was how the PAD would fit into trying to integrate a preliminary permit process into

the ILP. And if the purpose -- I think, as Sarah alluded to, the PAD is the precursor to the license application, there needs to be some flexibility in what is included in the PAD, because we also have to figure out where the preliminary permittee drops into the ILP process.

But the preliminary permit holder is looking at numerous issues. One is just initially developing whether there is any need or appropriateness for a project on this site. And depending on how this fits into the preliminary permit process and the ILP process, it may be premature for them to be circulating that kind of detail for them to be able to preserve their priority.

As a second aspect to it -- and it comes up, I believe, in connection with the competing, which is going to come up later on, but I think that one thing that needs to be addressed is how the PAD is stated, and required, as opposed to perhaps discretionary, in the context of a competition situation.

I don't think the Commission wants to be in the position. I think some court cases have supported it that a competitor can just basically xerox of an original PAD and call it its own, and meet competitive standards.

So those are two issues that I think need to be addressed, and we'll try and address them in comments through NHA.

MS. MILES: Can I ask a question? This is Ann Miles with FERC. On what you said, Sarah about the public reference room, I'm curious if other people have had the same experience, that it's not getting much use.

And then -- and if the sense is from people who might use it, if requesting it when they need it would be sufficient? And either in comments here or in your comments, it would be good to get a broader sense of that issue.

MR. SABATIS: Ann, this is Jerry Sabatis from Reliant Energy, and I can answer that question. We and a predecessor, Niagara Mohawk, spent thousands and thousands of dollars maintaining a public reference room to no public interest, because we did not receive inquiries.

And we have determined that we could manage a system where we could provide the information on request in a fairly quick turnaround, without having to compile it in a specific room area.

MR. MOELLER: David Moeller, Pacific Gas and Electric. Our experience has been very similar with 26 licenses, and most of them having gone through some phase of relicensing or been relicensed. We have very rarely had anyone come to any of our reference materials or use them for any purpose at all.

I had had my hand raised to discuss comments on

the PAD, in general. Shall I go into that now, or do we want to talk about licensee experience some more?

MR. KATZ: Go ahead. I encourage folks to respond to other people's comments, so that they don't just sit there, and we get a sense of whether it's consensus or a difference of opinion on particular things, but feel free to raise your individual comments as well, David.

MR. MOELLER: Thank you. I attended the Sacramento workshop, and also attended at session at the NHA conference where the NOPR was discussed somewhat. And there were a couple of things that came up there that I don't know that have been explicitly discussed, and those are the ones that I wanted to touch on now.

The first one is this clarification about the intent of the PAD and the scope of the information requested in the PAD in terms of is it intended to be basically existing information, or is it intended to evoke a bunch of new studies and development of new information?

It seems, in the course of discussion, it's been discussed that the intent is existing information, to gather it up and make that information available to the participants in the proceeding, as a starting point for, among other things, identification of what additional information may be needed.

It's been pointed out at the Sacramento workshop

that the terminology in each of the resource sections in the PAD listed in the regs, is inconsistent in describing the nature of the information to be provided. And I have two specific suggestions:

It seems that several of the resource sections -- so this is in 5.4 where they talk about a specific resource area -- use the terms, of the proposed project, to the extent known and available.

I would suggest that all of those terms are essential terms and should appear in each one of those resource area descriptions. And I would suggest that there be an additional word put in there, and that's the word, reasonably, in front of known and available, so it would read: Of the proposed project to the extent reasonably known and available.

The other suggestion I would make around clarifying the intent is, there is an intent statement at the start of the description of the content of the PAD, but what is missing right now is a clear intent statement that it is not intended to require that a potential applicant perform studies and develop new information at that point.

And so I would recommend that at 5.4, Subparagraph (c), Subparagraph (1), there be a specific intent statement added, something along the lines of it is not the intent that the potential applicant perform studies

or develop new information for the pre-application document.

And that would simply answer this question, is that the intent or is it not the intent?

There are a couple of other comments that I would like to make with regard to the PAD. Certainly some of the material that seems to be required under the PAD seems to be excessive, and we will be commenting on that in our written comments.

It came up at the discussion at the NHA conference the other day, the prospect of rather than having to provide hard copies of the PAD to basically everyone who might conceivably want a copy, whatever the final scope of the PAD is, the question was raised about a possible distribution of an electronic format or posting the PAD on the website.

I'd like to propose a specific approach for that. In Section 5.4(a), where it reads -- it's the sixth line, page D-50, if someone wants to look at it, where it reads: A license filed with the Commission and distribute to the appropriate agencies, and so on; instead of distribute, say file with the Commission and make available in electronic format or hard copy format, upon request.

And I think from the experience that Jerry and I and I'm sure many licensees have had, very few people will even request a hard copy. So that would be a specific

proposal there.

Two other items on the PAD: One is an issue that has been brought up as an issue, but I haven't heard anyone propose a specific solution to it. And that is the concern that on a given proceeding, it may be necessary, because of the complexity of the project, and/or the issues related to the project, it may be necessary for a licensee to begin its process of obtaining a new license in advance of the five and a half years.

The way the draft regs are triggered right now, a licensee can't file their NOI and their PAD prior to five and a half years.

Certainly a licensee could go ahead and start some sort of process in advance of that, but it isn't until the NOI and the PAD and the study plan are developed -- are filed, that all the formal process, FERC participation, development of formal study plans, and so on, is initiated.

So it may be that the solution there is to simply eliminate the five-and-a-half-year number, and just say no later than five years, licensees shall do all of this stuff.

And then, finally, one thing that I think is a bit ambiguous in the draft regs right now is whether the requirement to file a PAD applies to a non-licensee potential applicant. I think, at best, it's ambiguous. I'm

curious as to what the drafter's intent was around that, and I would point out that if the intent of the PAD is to replace the initial consultation document and becomes, in fact, the draft document that eventually evolves into the Exhibit E and into the draft license application, and into the NEPA document, if a non-licensee potential applicant does not prepare and submit a PAD, what would be the basis for the parallel process that the non-licensee applicant would need to be going through to develop its study plan, perform its studies, go through its consultation process, and ultimately develop its license application?

I'd be interested in just a straight answer from the drafters, whether the intent was to have it be required that a non-licensee potential applicant develop a PAD? If that was the intent, I have a quick fix to suggest.

MR. CLEMENTS: I thought, David, that was our intent, that non-competitors would have to do that, too. I'm going to, of course, go back over this transcript and then look at the preamble and the regs and make sure that we've clarified what our intent is.

MR. MOELLER: Okay, may I offer a specific suggestion around that?

MR. CLEMENTS: Yes, please do.

MR. KATZ: You may.

MR. MOELLER: If you go to page D-50 -- and I'm

proposing this at this time, and we'll propose something in our written comments, as well, but with the idea of maybe evoking some discussion around this. It's probably worth doing this now.

Right now, the lead paragraph, Subparagraph (a) at the fifth line -- well, you can back up to the preceding line -- that an applicant -- and then on line 6, must at the time it files its notification of intent, and then it goes on that it must also file the PAD --

Since, as I understand it, under the current regs -- and these seem to be the same -- a non-licensee potential applicant would not be filing a notice of intent. If the timing and requirement for filing a PAD is triggered by filing a notice of intent, then a non-licensee potential applicant would never be required to file a PAD.

So, instead of triggering the filing of the PAD, to the filing of a notification of intent, it should be simply triggered no less than five years prior to the license expiration date, a potential applicant must file this PAD, and then it would clearly apply to licensee and non-licensee potential applicants.

MR. CLEMENTS: Okay, got it.

MR. KATZ: Tim?

MR. WELCH: Tim Welch, FERC Staff. I just want to clarify a little bit, what our thinking was in developing

the regulations for the PAD.

What we were trying to do here is, we're trying to strike a balance, in that we thought it was very important that as much information of the existing environment could come out in the very beginning of the process as possible, not only from the applicant, but also from the agencies and tribes as well.

We see a variety of initial consultation package here at the Commission. Sometimes people file them and we see them and they sort of run the gamut from being, you know, very comprehensive and very good and all the way to one or two pages.

So we wanted to sort of get everyone on sort of the same footing, and be much more specific about the types of things that stakeholders would need in order to make good decisions and early decisions about the studies that need to be done, and the information gaps that needed to be closed prior to the application.

So, we wanted to pretty much keep things to existing information, and that's why we used that language that David talked about earlier, you know, to the extent known and available, and we definitely need to take a look at that to make sure that's more consistent, but then get very detailed to assist applicants in knowing exactly what we're looking for.

And so what we're hoping to look for in the comments -- and we would like you to sort of take the approach of looking at things about, you know, in your experience, what are the things that most projects need?

We know that a lot of this stuff in here is not applicable to every single project in the United States. So maybe help us sort of make a triage or a dichotomy a little bit about the things that are really, really needed, and the things that are often needed, but only in certain circumstances.

So I would encourage you to sort of -- when you go through these things, sort of look at that with that type of thing in mind, to help us strike the balance between getting good, specific information and not overwhelming every single licensee in the country. So help us do that.

MR. KATZ: Ann, did you have something to add?

MS. MILES: I just wanted to say one additional thing: One of the things that we find that -- to elaborate on what Tim said, is that folks don't understand how the projects operate. And even at the time -- even at the time we'll get to the NEPA document, it will be a question of not -- you know, how is it really working?

If everyone can understand that better, I think it's a lot easier to see, you know, where they might be some good solutions. So if there is a better way -- you've got a

lot of experience with knowing how your projects operate and knowing how that gets translated into terms that resource agencies and FERC Staff, who may not be engineers, can understand.

So if there is a better way to do the description of the project and how it operates, I'd be interested in your input on that, too.

MS. JANAPUL: Rona Janapul, Forest Service. I wanted to go back to the question of the public reference room, and I wanted to tie that in particularly with the issue now of information protection under CE-2.

You know, I haven't had much experience with the Forest Service with licensees individual public reference rooms, but I have heard out in the West, where there are more ALPs going on, if that information room is such that it's a meeting room, a kind of place where people can get together, it seems to be more of a friendly, inviting place where work actually gets done by stakeholders together.

My past experience back in the '90s, either as representing a licensee who was looking at other licensees' public reference rooms or with an NGO who went out and looked at licensees' public reference rooms, they were not very user friendly.

I did not go to Niagara Mohawk's, but, you know, just general questions of hours, copying availability, did

you have to pay for copies, there were a lot of things that weren't very settled or user friendly at that time.

And I would suggest you can talk to your own public reference room and see how many people actually come and use things that are required to put there for the hydropower file.

But I think probably the use of those things was on the down swing, as use of the Internet was going up and things were becoming more and more available. You know, there was quite a bit of talk about NHA. Do we really have to mail things? Can we put it on the website? Can we send you a CD, but as those things become less available on the web, people might really need those reference rooms.

So I wouldn't -- I'm not a personal fan of them, but on the other hand, if we're not going to have availability on the net, maybe we'll be using those rooms more. So, I think it's something that we need to tie into that discussion.

MR. WILSON: I'm Rollie Wilson with the Department of the Interior. I suspect the department would be filing comments later. So until I get a chance to talk to my other departmental colleagues, I'll just take these views as my own I think.

The conversation that I've heard this morning about the preapplication document and the public reference rooms speaks to me about an issue of access to information. And I think I sympathize and hear the concerns of people of not wanting to produce hard copies and go to the expense of producing information when that information is not going to be used.

And like Mona, I think I would encourage -- I know nothing about public reference rooms or what's in them or how they could be used. But I think, as I heard Mona suggesting, public reference Web sites and access to information there may be a good tool. And the CEII thing I also know nothing about. So I don't know how that may impact that.

But the larger point I want to get to I think is that this early document, the preapplication document, I think should go out to a lot of people. This is similar to what I think I heard Tim and Ann saying.

The integrated process in large part starts out as an outreach process in my view, getting information out

to people who may not be aware of the circumstance upriver from them or what's occurring at the project on the lake on which they live.

And there may be more efficient ways to distribute that information, but in a lot of cases, at the start of a process where you're going to have collaboration and joint decisionmaking, you need to make sure that people have at their hands at least an initial assessment of how this project may or may not impact their lives.

And I think that that is a responsibility for public resource users and can maybe be improved in efficiency sake, but also a necessary part of this integrated process, getting the information out the door at the first step.

MS. VERVILLE: Sarah Verville, Longview Associates. I'd like to pick up on some comments of David's with regard to consistency. The 5.4(c), the specific discussion of the resource areas, there are times that the regulation says information to the extent known and available, and there are other times it says to the extent known, available and applicable.

I'd like to see some consistency that it's to the extent known, available and applicable throughout the resource sections.

There also is some inconsistency with the use of

the term "surrounding area", "surrounding vicinity" in the project vicinity, project area. And I think a look should be taken at making those consistent or just revisiting why there are different terms throughout 5.4(c) and the specific resource areas.

And I'd like to reiterate that I like the language in the current regulations that talk about in the project vicinity and commensurate with the scope of the project.

MS. SKANCKE: Nancy Skancke, GKRSE. I had a question in connection with the PAD, the NOI and competition. I don't know if you want to hold that to I think we're later on talking about competition. But it really addresses it here. Better now or later?

MR. KATZ: Why don't you ask the question and then I'll try to decide if it seems to fit here or it's later?

MS. SKANCKE: Okay. As I understand it, and if I'm dead wrong, please tell me, because I'm still working through all of this, the NOI would not be filed by a competitor, but the PAD, as John was saying, would be, and I guess I'm asking why not an NOI by a competitor?

And secondly, the reason why I could see an NOI would be useful by a competitor is, number one, it gets that person on the map. And if in fact there are three

processes, do we -- how do you handle when a competitor chooses one process and the original licensee chooses a different one?

(Laughter.)

MR. WELCH: Pass.

(Laughter.)

MS. MILES: I have to say honestly, John, you can correct me if I'm wrong and we did more than I thought. I don't think we've thought about this level of detail with the competition, so I think it's good that you're raising these things, and I think we need to talk it through in more detail. I don't have answers to you.

MR. CLEMENTS: On the NOI point, quite frankly, I don't remember the reasoning anymore. All I know is that the Commission twice considered requests by the industry to have competitors file NOIs and both times said no. And that's the course we took in the NOPR.

So if in your written comments you can come up with some additional argument concerning that, they might be persuaded to go otherwise. But they didn't see any -- in the absence of any articulation of why their previous decision had been wrong. That's the possibility of different processes being used.

I kind of scratched my head about that too, and I think as deep as my thinking got was that if the existing

licensee is using the ILP, it's going to be very difficult for any potential competitor to go in and use something else. They would have a hard time getting together any consensus to use an ALP, because everybody would be looking to the existing licensee and its ILP as the venue for taking care of the relicense issue.

I mean, what resource agency or environmental group would have the resources to commit to two different processes, especially one that is as labor intensive as an ALP? I could see theoretically a potential competitor wanting to use the traditional licensing process. But I'm not sure that that would give them any advantage either. They'd still have to deal with the business of trying to get the cooperation of the agencies and the public and the tribes and the environmental groups.

So as I looked at it I said, as a practical matter, the nonlicensee potential competitor is in a real box. They're going to have a hard time doing anything once the template is set by the existing licensee.

But, you know, if people have deeper thoughts, let's hear them.

MS. SKANCKE: Well, I'm not asking you to commit the Commission obviously, because I know you won't and can't do that. But is there any problem --

MR. KATZ: Nancy, could you repeat your name

again for the reporter?

MS. SKANCKE: I'm sorry. I'm very sorry. Nancy Skancke, GKRSE. Again, I'm not asking you to commit for the Commission. But is there any problem with having the original licensee establish the process for the competition?

MR. CLEMENTS: It's a good issue. Yeah, give us your written comments on it. Just thinking about it cold, I don't have any brilliant thoughts.

MR. DACH: Bob Dach, Fish and Wildlife Service. I need to invoke the Rollie Wilson caveat in that these are for myself until we have a formal response.

MR. MOLLER: We'll just put you down in the comment summary as Bob.

MR. DACH: Dave, thank you.

(Laughter.)

MR. DACH: But for clarification for me, first of all, the comments on the PAD I think have been good so far. Certainly from our perspective, we want this as a useful document, and we don't want a lot of extraneous information being dumped on us.

The one thing you brought up, David, I'm curious about was the dropping the five-and-a-half year time period. My question is, would you be proposing that the formal proceeding then start whenever the license applicant filed their NOI? So let's say seven years before they wanted to

begin the process, is the expectation that that would come with a formal FERC proceeding similar to the ILP now at five-and-a-half years? Or is the first two-and-a-half years or whatever kind of off the record?

MR. MOLLER: Well, the intent -- this is David Moller. The intent would be to enable the licensee, potential applicant, to begin the proceeding at the point in time that they thought would be necessary to successfully complete it by the expiration date.

So the intent would be that at the time the licensee potential applicant files the NOI and the PAD and the study plan, that that is the start of the formal proceeding.

I had suggested a possible approach was to simply drop the five-and-a-half year. Another one would be to make it, you know, add some time to it. It need not go away entirely, if there's some concern about a licensee potential applicant starting way in advance.

But the intent would be to give the licensee potential applicant some ability to start the mechanism proposed in the ILP at an appropriate time to complete that mechanism prior to license expiration.

MR. SIMMS: Frank Simms, American Electric Power. Regarding the question on the reference room, we did nine projects in three different states, set up a reference room

or a reference area for each one. It's never been open. They're still dusting it now to clean it off for the next one.

If somebody did, though, come to us and wanted information during the process and we got that specific request for information and was able to provide it to them in a timely manner. But to set up a separate room for each time, I really don't see that as being necessary from our experience.

Regarding the PAD, a couple of quick comments. I agree with Bob over here that you want a document that's usable and you're not throwing a lot of extraneous information on the people. And it seems as though this document is orienting itself more towards the environmental side studies and so on knowing the project operation.

And you've probably heard these comments before. So from our point of view, when you look at page D-56 and you're looking at paragraph (l), paragraph (m) and some of the information about original project costs, net investment, single line diagrams and so on.

From my point of view, I don't see where that would fit in necessarily to the PAD and would be something that could go either into the draft application or into the final application.

MR. KATZ: David Moller?

MR. MOLLER: As a follow up to a comment that I believe Rollie made, DOI, with the idea that some potential stakeholders who would have an interest in the proceeding probably do need to get something in writing to alert them to give them some basic information.

It strikes me that one possible solution here would be that there's kind of two parts to the PAD. We frequently do this in our relicensing proceedings is put out some sort of notice or newsletter or information piece that we distribute very widely.

And that might provide some of the basic information, just to familiarize people with the fact that there is a FERC license project, that it's coming up for relicensing, and here's some general characteristics, and then have the more detailed information that's ultimately determined to be useful for the PAD then available in some other venue, like post it on the Internet or something like that.

Two other things I'd like to touch on. Nancy posed this question about why not have a nonlicensee potential applicant, in other words, a competitor, for an application, file an NOI? My understanding is similar to John's. It's been repeatedly asked for and repeatedly turned down.

MR. CLEMENTS: I know it was about -- they were

concerned that they wanted to foster competition, and they thought the NOI by a competitor would not.

MR. MOLLER: I think there was some sort of antitrust aspect to that as I recall. But in any event, as long as it's clear that a nonlicensee potential applicant would have to prepare and file a PAD and begin the formal process proposed in the ILP on the same schedule as a licensee potential applicant, it's really irrelevant whether they file an NOI or not, because it will have the same effect.

With regard to this concept of a nonlicensee potential applicant having to follow the same process selected by the licensee potential applicant, again, let's face it; these folks are in competition. I can't see them collaborating on process information studies or anything else sort of as a matter of the nature of competition.

Finally, I would like to go back to one other comment I made back on this issue of clarifying the need for a nonlicensee potential applicant to prepare a PAD. The wording that I proposed there, I suggested deleting the link to the filing of the NOI and making the trigger point for the PAD simply a timeframe.

It occurs to me that potentially that could cause a de-link between the filing of the NOI and a PAD for a licensee potential applicant. So I'd like to enhance the

proposed wording I gave before. So it would say instead of upon filing of the NOI, it would say that the PAD must be filed no less than five years prior to the license expiration date or, for a licensee potential applicant, at the time it files its notification of intent.

So that way it comes in at the correct time for the licensee potential applicant and no less than five years prior to license expiration for the nonlicensee potential applicant.

MR. HOGAN: Susan, can you give me an idea of how many hands we've got left on the list?

MR. KATZ: None.

MR. HOGAN: Zero hands? Okay. Does anyone have anything else to say? Otherwise, we can wrap up and take our break before moving on to the next subject. I see Bob -- Rollie, sorry.

MR. WILSON: Hi. This is Rollie Wilson speaking basically on my own behalf again. Just a quick, hopefully quick reply to the last two commentors about the PAD and the access information.

I actually find those single-line diagrams very, very useful in terms of explaining where the project is and is not. And I think the point that I was trying to make about although I recognize the burden in it in having that kind of information go out early and to a lot of people, is

it may alert someone as to the location of a transmission line either on their property which would be surprised if they didn't know about it, but maybe they don't, or in a wildlife refuge that they like to go hiking in or something.

And that may invoke an interest in the project and a desire to participate. And I think that's an overall good thing, and at that early stage would not want to see us asking people to take extra steps to get the information on their own.

I'll wrap it up there.

MR. KATZ: Okay.

MR. CLEMENTS: Can I just say one quick, quick last thing on PAD? When we were in Milwaukee, somebody made a suggestion that -- we were talking about the stuff in there about the original license application being in there and all that stuff -- and it was suggested that maybe what we ought to have is a requirement for a description of the existing project, sort of a physical description, and its operation, something that would be understandable to a layman and would have some useful sort of map content to it, and that you could replace a whole lot of paper with something fairly concise but explains the nuts and bolts of how it works.

So, that was just an idea that came out there.

MR. KATZ: All right. With that, why don't we

wrap up the discussion of the PAD? This would be a good time for our morning break I think. Why don't we come back at 11:50 by this clock and move into discussion of study dispute resolution. Ten-fifty. Sorry about that. Is process selection next? Process selection will be the next topic.

(Recess.)

MR. KATZ: Welcome back. We're now ready to continue with this section. The next item on our agenda is process selection. Once again, please don't all knock over Ken in your rush to the microphone.

Please go ahead.

MR. SIMMS: Frank Simms from American Electric Power, and I hope you bear with me a minute. I apologize, because a lot of you go to these other workshops. For us, this is our closest place, so this is our workshop.

Process selection, let me explain the dilemma we're in and maybe you can help clarify. We're currently in the process that we've just prepared our communications protocol. We're going to come in for a request for ALP -- good music next door.

(Laughter.)

MR. SIMMS: But our notice of intent is not due until the end of 2004, the beginning part of 2005. The ALP is very intensive, you know, resource-intensive, both on ourselves and on the agencies.

And upon review of this ILP, there are things that we like about it. The problem is, we have to go and continue on through a process that we're going to be able to make an application, get a license in a timely manner, and one of my questions is, are we going to be pretty well assured that this is going to be a rule in July. If I were

to decide to go in that direction, where should we go from here? How do we work this out?

I know this may be more in transition, but we need to select a process now so that the work that we're doing is the correct work to do, so that we fit the schedule, so that we get everything done correctly, appropriately, and on time.

So, what I'm asking for here maybe is more some advice or at least are we getting an assurance of a rule in July that I'd even want to direct ourselves in that direction?

MR. KATZ: It's a good question. It strikes me that that is more of a transition issue, which is a little bit further down. I think the intent of the process selection question was to discuss the way that the rule establishes the process selection, which is that the new ILP will be the default and the manner in which you could move to other things.

So, your question will get answered. Well, if anyone on staff has a quick response, why don't you go ahead, then?

MR. CLEMENTS: I think you can pretty much rest assured that there will be a final rule issued in July. I'm not sure quite how that would affect your calculus.

You say you're trying to put together an ALP,

which must mean that you're dealing with other people in trying to get together a stakeholder group and communications protocol and those things.

If you're doing that, I would think they would be mighty unhappy if, at the end of all of that, you just walked away and said, oh, we're going to do this new ILP instead.

And there's no reason you can't come up with an ALP that looks like an ILP, if you can agree on it. The ALP is pretty much whatever process you want. So, if you can get a consensus on attractive features of the ILP you'd like to incorporate into an ALP, you can do that now.

MS. MILES: I have one thing on that, Frank, too. I would think if your company wants to do an ALP and you're able to get the group together, that there would be a expectation, if you have developed a consensus, that certainly FERC would approve use of that process.

I don't know any -- we have not denied any, except one where there was not an agreement, not a core of participating parties that agreed that that was the way to go. So if that's one of your concerns, I don't think you need to worry much about that.

MR. SIMMS: Frank Simms again. I think, though, that we need to provide the opportunity to the people, the stakeholders and so on, that are involved currently in

understanding now that we're headed in the ALP direction, to say that this is available and it's going to take some of the resource commitments and decrease them for you.

And I would then say let's make a decision now as a stakeholder group, or let's vote on it now as stakeholder group, that since we haven't gone yet so far into the ALP process that let's go this direction, but in order to do that, there has to be some confidence within ourselves that we're going to have the ILP sometime relatively soon here.

I just don't want to waste anybody's time. You're right that you can prepare documents that look exactly like an ILP or ALP -- I get mixed up with letters anymore, but a PAD or whatever, so that you could incorporate that into the ALP process, no problem.

But we're kind of in an interim quandary here, I believe, is the way it is. I don't know if that was even considered when the rules were put together.

MR. KATZ: Well, I think there was consideration, which, as I said, we'll discuss in a little bit, on how the transition between the existing rules and the new rules work. I guess what I would suggest on this one is to call Ann's office and see if you can get some help on an individual basis, because your concern is very real.

I'm not sure whether it will lead to specific language or changes in the rule as it exists, so I think Ann

is walking amongst the audience, and perhaps the two of you should try and see what you can figure out on this one.

Does anyone have anything else on process selection?

MR. BARTHOLEMMEW: It's Henry Bartholemew with EEI. I'll reiterate what I mentioned earlier about getting this posted as an issue. We've said repeatedly over the past six or eight months, that it's very important to have the traditional license process, and we'd say the ALP remain as alternatives, not that are available only by permission of the Commission in the TLP context, but at an applicant's selection.

And we'll comment on this in more detail in our comments, but the basic elements are that we have an ILP, an untested new process with a lot of new elements, a lot of new things going on. You shouldn't mandate that that's default.

The TLP is well defined. It's been out there for a long time and a lot of folks understand it, and are able to work with it quite well. There are cost elements. The ILP clearly is going to be more resource-intensive in a pre-application stage for the applicant in many ways, and that may not fit everybody's resource base, either on the applicant side or the other stakeholders side of the equation.

And the TLP being available is at applicant

selection without having to show good cause or make other justifications, as long as really enough notice is given to everybody around the stakeholder table and to the Commission and the resource agencies, that should be the mode.

MS. VERVILLE: Sarah Verville, Longview Associates. On one of the NHA panels the other day, there were comments, I think, by nongovernmental organizations and maybe agencies, that they wanted to have one process; that three processes were confusing.

And as I recall, the FERC staff person -- or I'm not sure who actually responded, but there was a response that dispensing with three processes at the beginning would be risky if the ILP doesn't actually prove to be an effective process.

I would like to offer a suggestion that the ILP not be the default process for a transition period of perhaps three to five years, and that during that three- to five-year period, applicants be allowed to choose which process they use, with the burden on others to clearly demonstrate why that process is not in the public interest.

If, after the transition period, it appears that the ILP is being successfully used, then at that point, consider making the ILP the default process.

MR. KATZ: Before we go on, just let me tell you that for those of you who are finding that FERC is a much

funkier place than they ever hoped we would be, the music is scheduled to go for about another ten minutes, and we have had a request from at least one person in the audience that folks try to speak up in the interim, to make sure that everybody can hear. Thank you. David?

MR. MOLLER: David Moeller, Pacific Gas and Electric. I think the suggestion that was just made to have a transition period of probably three to five years, sounds about right, where the ILP is not the mandatory default. It makes a lot of sense.

We also have some concerns about how it will play out generally. We think the ILP is a good concept. We're very optimistic about it, but until we actually see it play out, our concern is that by having it be the default, particularly in the absence of any clear demonstration that a licensee potential applicant would have to make in order not to use the ILP, just seems like high risk.

So I think it's a combination of both some transition period where it's not the default, and also some clarification about what sort of demonstration a potential applicant would have to make in order to get approval to use the TLP, would be appropriate.

MR. KATZ: Bob?

MR. DACH: A little followup on the interim period here. I'm Bob Dock with the Fish and Wildlife

Service, again here for educational purposes.

What if nobody chose to use the ILP in three to five years, or only one person chose to use the ILP in three to five years?

The idea would be that -- I mean, again, speaking for myself, it seems to make sense that you want to try it on one or two people before you try it on everybody. But how do you get the volunteers? I mean, is there -- I mean, the people who are speaking up are obviously concerned that they don't want to do it, or they just don't want to be forced to do it? I'm having a little problem understanding how it could be assured that it would at least be tried over that interim period.

MS. SKANCKE: Nancy Skancke for GKRC. Bob, I think you'd find that there are a fair number of people that would use the ILP and would be excited about using the ILP. I think the concern that I've heard from the industry is that there are some projects that the traditional just works better, and everybody probably would agree it works better. It's maybe smaller projects, smaller issue, less significant environmental impacts.

But the ILP is what people really would like to have to be able to integrate, get the FERC involved early, get the agencies involved early. So I think that giving the applicant the chance to choose, based upon their projects,

will give us some greater guidance on whether one process is the best way to go in the future, or whether the choices of process are the best way to go, given the variety of licenses and projects we have.

MR. SIMMS: Frank Simms, American Electric Power. I agree with her. When we started the alternative licensing process, it was a choice, and there were quite a few number of licensees that went for that process. I think the ILP definitely has some advantages.

It's just, again, the uncertainty as to exactly when it's going to go into place, and I think having the choice does make a lot of sense. I think the three- to five-year interim period seems to make a lot of sense to let people decide.

I think you're going to find that there are going to be a number of licensees who will go for that particular process.

MR. DACH: Bob Dock, again. So, if this is a -- again, just so I can understand -- if this is a significant issue, and it appears to be since it ranked so high, would a lot of the discomfort with this being the default process go away with industry reps if this was optional for an interim period? Say, at the end of that period, then it did become the default process? Would that remove a lot of the heartburn on this issue?

MR. SIMMS: Frank Simms, American Electric Power.

I don't know if I can speak for the industry.

I don't know if you necessarily even need to have a default process. I think what you're looking for is the process that's going to get you to the best result and get you to the end, both environmentally and cost-effectively.

Is it necessary to have a default process? I don't think so. Is it necessary to have process that's followed, depending on what the environmental issues are, what the size of the project is, what the goals and objectives are?

Sure, they should be followed, so I don't think it's necessary we go to default, whether it be heartburn that it went to default. The proof is in the pudding. Let's see a few projects go through the process and see what the ups and downs were.

MS. SKANCKE: Just one last comment. This is Nancy Skancke. And I'd love to hear other people's comments, but I'm trying to reflect what we've heard from the industry in putting together comments we have on behalf of NHA.

The concern is, we don't know exactly how the ILP is going to work, just like when the ALP rolled out, it had been experimented with a little bit. People had some track record on it.

I've heard from the industry, grave concern that we just don't know how it will work. But if it becomes economically efficient, then even smaller projects will find that it is the way to make it work, because certainly one of the highlights of the ILP process is getting the FERC involved early in the process, and getting them, those that will be basically managing it when it gets to FERC in the application, involved early.

And that is a high point to it, so it does have a very attractive aspect to it. It's just not for everybody.

MR. CLEMENTS: Do people have any specific criteria that they're able to articulate about what processes -- pardon me -- what kinds of applications might be better suited to continue using the traditional process?

MS. JANAPUL: This is Mona Janapul. I recall that at the stakeholder drafting sessions in December, we did come up with some criteria about when use of the TLP might be more appropriate or not, or which projects might be just off the table for a TLP, you know.

But we discussed things like small non-controversial projects where people generally supported the idea of the TLP, so maybe you want to go back and take a look at those. But it certainly was discussed at the stakeholder drafting sessions, and maybe it would be another

thing to bring up at this next set of stakeholder drafting sessions.

I don't know if it would be under this topic, but I would certainly -- if anybody has any comments here, my recollection is also at some of the public meetings, there was some general objection to any changes in the TLP or at least the changes that were proposed, if people have a position on that, I'd certainly like to hear it.

And also about the ALP, no changes were proposed, but there was a question right now, although I think Tim said it's never happened, but if an ALP for some reason people no longer continued to support it and it went away, the way it's laid out now, is, it would revert or change to a traditional licensing process.

If the ILP is the default, is that, you know, what's appropriate now for something like that? So, if people have any positions on the changes the Commission has proposed for the TLP or something like that, you know, maybe the stakeholder drafting sessions or maybe now or maybe in your written comments, that certainly is a concern to my agency, the changes that were proposed or not proposed.

MR. KATZ: Thank you, Mona. That's helpful. That isn't completely germane to this topic, so if folks want to do that, we can put that on the agenda at a later point. Mr. Springer? Or was there someone else first?

MR. HOGAN: There's quite a few.

MR. KATZ: Sorry.

MR. SPRINGER: Fred Springer from Troutman

Sanders. I wanted to reinforce something that I think Nancy just said a minute ago. I think one of the fears, at least that I see, in making the process a default process, without maybe a three- to five-year transition, is that I think a lot of the industry people that are contemplating using it are trading off some of the things that they are required to do early, for example, follow a Mark Robinson-approved study plan, with whether or not they are going to get the certainty that they believe that process is at least advertising to give.

I think that if the certainty is there, then the process becomes advantageous, but certainty then means is FERC really going to follow through and not take a significant amount of additional information requests later on? Are the agencies going to not ask for a lot of other things later on?

So until these things are known, because of a few years of experience, there is a certain level of fear. And I think that's part of why, at least to me, making it the default when there is no experimentation, and, as somebody mentioned, of course, what do we have, three to five years of experimentation before the Commission ever put out rules

on the ALP?

We don't have that here, so there are those fears.

MS. VERVILLE: Sarah Verville, Longview Associates. I wanted to respond to John's question with regard to I think it was what types of projects would continue to use the TLP or would have --

We discussed this in the Manchester meeting, and there, I think, there was a certain class of projects that are run-of-river, you know, insignificant reservoir fluctuations, don't have anadromous fishery resource issues, smaller capacity, and non-controversial, with that term having to somehow be defined, that would do probably much better in a TLP, until we know exactly how economical and efficient the ILP would be.

So it's not a project that would be classified by size, but perhaps by issues and operation.

MS. SHERMAN: This Rebecca Sherman. I work for the Hydropower Forum Coalition. I just wanted to say that my understanding of the rulemaking right now is that there is an opportunity to use the TLP for projects like you just described. And the FERC is asking for criteria.

So maybe those comments, you know, suit their question best, in that it's not impossible, even if the ILP is the default, to have projects that belong in the TLP, to

use the TLP. That makes sense.

But we put so much work into fixing and creating this new process that to suddenly say, well, let's hold off on that for three to five years, maybe it makes sense for certain projects, is to really -- I mean, and to continue to use a process that we know has a lot of problems, doesn't really make sense to me.

It seems like then if we didn't -- if we sat out this interim period, we'd also have to do some serious thinking about the TLP as the present default, or maybe, as Frank pointed out, we don't have a default process. I don't know.

But the last thing is that three processes, I think we can all agree, is a lot of processes, and it's a lot of different regulations and different possibilities. I know we really should think smartly about, you know, creating a best process and having offshoots for other types of projects that really belong in different places.

MR. DACH: This is Bob Dock of Fish and Wildlife.

At the NHA conference, I heard it expressed a few times, too, that folks didn't think managing three -- I mean, having three choices was that big of a deal for a lot of us to understand.

The thought process, certainly with my folks, again, was that one process is best, because then we can

concentrate our efforts there, and then it sort of became the default process because it didn't look like we were going to get one process, which was where we were headed.

And now we have, you know, the three processes. I think what we're most concerned about is the fourth process, which is the CTA/ILP the combined traditional/alternative integrated licensing process, which is where we start to have concerns.

So just so you know that the concern with us is to know, you know, two years into an effort, where the heck we're at with three choices on the table, and now a fourth, which is what we have now, the hybrid.

So, the concern is, if we have more than one process, how do we stay in the process that we've chosen from the beginning, and if it does change, how do we know how that process will come to fruition, and how do we stay engaged with it and understand what's going on with it?

So, I mean, those are our -- you know, those are our baseline issues, and the way that we thought we could deal with all of that is just to get rid of everything else and go with one process, so, just so you know how we got to where we got.

MR. KATZ: Okay, it looks as though we've -- oh, we've got one more. Why don't we take this last comment and then move on to studies.

MR. MARTIN: I'm George Martin, Georgia Power.

And I wanted to hold on this to be perhaps the last commenter on this. I think we've perhaps moved ahead to transitional timeframes in this discussion of process selection.

From our efforts to identify the projects or the licensees who actually fall upon the cusp of the effective date, the October date that we've heard about, we find ourselves considering a process selection while under a proposed transition timeframe.

And straddling the effective date, we have a number of months, three or less, to prepare a PAD in expectation of selecting the revised traditional process or the revised ALP or the ILP. And, you know, a three- to five-year transitional period for the industry, that may be appropriate, but I think that for the few projects that actually fall within that transitional period, very close to the implementation date or the effective date, they may regard some special consideration.

I hate to offer a year or a two-year window that they could select the appropriate process, and I do believe that the traditional, for those of us who may fall within that actual timeframe of this year, this fall into early next year, that the traditional process should be reserved for the full five and a half to five-year window to submit

the notice of intent, because there are certain instances where a project warrants a traditional/traditional process.

MR. KATZ: Okay, thank you. With that, I'd like to move on to our next topic, which is study dispute resolution.

MR. WELCH: The study dispute resolution process is on page D-62 of the books.

MR. KATZ: Once again, we need a brave soul to kick this off, and I see one in the back.

MR. ROLLIE: Hi, this is Rollie with the Department of the Interior, speaking on my own behalf. I guess I'm just wondering, are we talking about study dispute resolution in the ILP or the TLP?

MR. CLEMENTS: We'll start with the ILP and then see where that leads.

MR. WELCH: Or we'll start with the TLP and see where that leads.

MR. DACH: I'll start us off. I'm Bob Dock with Fish and Wildlife Service.

I think that study dispute resolution process was just an outstanding piece of work.

(Laughter.)

MR. KATZ: David?

MR. MOLLER: Hard act to follow. I have several comments on the dispute resolution process, and I assume

that this subject is also covering criteria, study criteria, as well?

MR. KATZ: Yes, it covers that whole gamut of that section of the proposed regs.

MR. MOLLER: Okay, I think it's important to recognize the scope and intent of the proposed dispute resolution process, because if one recognizes what it's for to try and resolve disputes among the Commission and state and federal agencies and tribes with mandatory conditioning authority, and if one accepts that that's its use -- and I'm accepting that as its proposed use -- then I have a number of comments around that.

I think other commenters may talk about the appropriateness of it and so on, but I'm going to just accept that first item and go from there.

I want to talk first about the study criteria. And I spoke on this same subject at the Sacramento workshop, and it became clear to me, talking to individual attendees afterwards, that the point that I was trying to make was somewhat missed.

And so I'm going to try it from a little bit different angle: The proposed study criteria that are in the draft regs right now, I think are just fine. They probably need a little tweaking, a little clarification, but they're good as far as they go.

However, mostly what they do is sort of explain the reasoning behind a study request, and they don't really get to a very key issue, which I think always comes up in trying to resolve study disputes, and that is basically what is the value of the requested study in the context of the proceeding?

Now, I think what happened before when I brought up this issue of the value or the merits of a proposed study in the context of the proceeding, is that it immediately got related compared to the cost and a lot of people heard the issue as around the cost.

Certainly cost is one consideration, but it's not the only consideration. The issue is what is the value of that information going to be in the context of the proceeding, one of the considerations in evaluating that is cost. So I'd like to propose three specific additional criteria for the list of criteria and I'm going to give a real-world example, not naming any projects, exactly how this played out:

On a specific proceeding, an agency with mandatory conditioning authority requested a suite of amphibian studies be performed on all five of the project-affected reaches.

That came in as a formal study request. The agency actually used the criteria that's currently in the regs for study request after filing of the license. And the criteria that a study requester in the current regs has to demonstrate the validity of their request looked very similar to the ones proposed in the regs right now.

The requesting agency had no problem explaining using that criteria why they were requesting. Like, well, amphibians use water. The project affects water. I mean, it's pretty straightforward to do that.

However, when we sat down with the requesting agency and said, well, from the licensee perspective, while acknowledging that there's probably some nexus no matter for all five reaches, but when we looked at the relative value for each of the five reaches, there was a huge difference. Some of the reaches were clearly amphibian habitat or potential amphibian habitat. Some even had amphibians in it. Others were completely outside of the range, the known range for the amphibians that were being targeted by the study.

And as we went through the five reaches, it became very clear it was a very high value study request in the context of the proceeding for some of the reaches and very low value study request in the context of the proceeding for some of the other reaches. And ultimately,

everybody in the proceeding agreed that the studies ought to be performed some reaches and not others. It's exactly that kind of evaluation that I'm trying to get addressed in the context of these study criteria, which the current criteria do not address that value issue.

So I'm going to propose three specific additional criteria, not in any particular order. The first one would be to describe how the information anticipated to be obtained through this requested study would be used in the context of the proceeding.

Oftentimes we find that it's a nice to have piece of information or of interest to somebody, but in fact, it won't affect any decision made in the context of the proceeding. So that would be the first one.

The second one would be to describe any indications of problems with regard to the resource to be studied. And this is simply again to help get at the issue of value. If there's an obvious problem around the resource that's being requested to be studied, that would tend to make it be a high value study. If there's no indication, that doesn't mean there isn't a problem, but at least if there is an indication, chances are it should be studied.

And the third, and I'm changing the wording a little bit on this from the Sacramento proposal to try and defuse it a little bit -- but it's to assess the relative

value of obtaining the information compared to the effort to obtain it. I'll change it from "cost" to "effort". It's not exclusively cost.

But the point is, is this a high value study? And if so, it probably warrants a high level of effort to get it. But if it's a very low value study with a very high level of effort to get it, that should be considered as part of the dispute resolution process in trying to evaluate the validity of a request.

I'd like to go on to a couple of other subjects about --

MR. KATZ: David, excuse me. Why don't we end it at that just to see what other points, or if people have a reaction to that, and we can come back to you for your other points momentarily. Does anyone have any reaction to that point or anything further?

(No response.)

MR. KATZ: If not, we can return the mike to David.

(Laughter.)

MR. MOLLER: That worked great.

(Laughter.)

MR. KATZ: Well, I interrupted you for nothing, and I apologize.

MR. MOLLER: I'm going to follow up my own

comment, then, since nobody else did. One thing I'd like to point out, I think it's essential for everyone to recognize, and it's clearly the intent of the NOPR that whether it's being used for informal dispute resolution or the formal dispute resolution, that all of the criteria should be considered. It's not like just one knocks out the whole thing, or three is enough to make it. But they all need to be considered on their own merits.

So as I propose these, don't hear them to be an exclusive criteria that if that one isn't made, it knocks it out.

Okay. A couple of other items on the dispute resolution process itself. One of the items that was teed up at the Sacramento workshop was not discussed in any detail, and there was no specific proposal as I recall to resolve it, is this issue of the scope of subject that an agency requesting formal dispute resolution can request.

And the concern here is that as the draft regs are written, an agency with mandatory conditioning authority could initiate a formal dispute resolution in a subject area that goes beyond their jurisdiction. So I have a proposed fix for that.

If you turn to page 62, it would be Section 5.13, subparagraph (a). Right at the end of that, I guess the last sentence, second-to-last line, it starts, "those

agencies may file a notice of study dispute with regard to the preliminary determination." If it was changed instead to say that they could file a notice of study dispute in response to the preliminary determination with regard to resources within its jurisdiction. Then that would simply clarify that that would be the scope of where they could initiate that.

I have two other specific dispute resolution items I'd like to bring up. One of them, it actually speaks a little bit to a subject I just mentioned with regard to application of the criteria.

If you go to page 63, Section 5.13, subparagraph (j), it starts off by saying the panel -- this is the dispute resolution panel -- will make a finding with respect to each information or study request in the dispute as to whether the criteria set forth in 5.10 are met or not met and why, and then provide a recommendation based on its findings.

My concern here is that it sounds like the scope of consideration that the panel is empowered to make is limited exclusively to consideration of the specified criteria. I'd like to suggest that there may be other considerations that it would be of value for the dispute resolution panel to consider and comment on in making their recommendation.

And I would propose that the wording be expanded to accommodate that. So it would read when it gets down to where the panel will make a finding -- pardon me. Actually, at the end of that sentence, so when they're making their recommendation based on its findings, I think it should be added, "and any other relevant considerations".

And then in addition, not only should the panel be required to make its findings relative to the criteria, but also I would suggest that a new sentence be added on the end that would say, "The recommendations shall explain how it meets any criterion set forth in 5.10 which otherwise would not be met." In other words, if the panel is going to make a recommendation based on an evaluation of the criteria, then they should explain how what they recommend happens will address any criteria that they say have not been met.

So I both want to expand the scope of what they can consider and also have them provide basically a rationale statement of whatever their recommendation is.

A third item related to the dispute resolution proposal is the issue about the potential for the director in the end to make a decision which has some error of fact in the decision. And presently, at least as I read this, there's no potential for anyone to request review of the director's final decision.

So I would propose that in the end of each of the sections where it talks about the director reaching a final decision that there be a sentence added, and I can name those specific sections. But it would be something along the lines of: "The disputing agencies and tribes and potential applicant may request review of the director's decision with regard to errors of fact."

I certainly recognize that we don't want to reopen the whole subject of whatever the dispute was about. but at least with regard to fact, so that if the director's decision comes out, and in the example I gave there, names the wrong reach, right now there's no opportunity to get back on that.

I'd like to make one other comment on the dispute resolution process. And that has to do with the enforcement of failure of a potential applicant to perform the study that comes out in the director's final decision. The only point that I want to make around this is, whatever the enforcement mechanism is, it needs to be the same for a licensee potential applicant and a nonlicensee potential applicant.

Because absent that, a nonlicensee potential applicant has ever reason to sit back and let the licensee potential applicant, who can be ordered because they're a licensee to perform the studies, just let him perform all

the studies, and the nonlicensee potential applicant sits back, bides their time, can't be ordered to act, and simply uses all the studies performed by the licensee potential applicant.

I would suggest that one possible approach on this is in the current version of the TLP in the draft regs, there is a provision that says if a potential applicant does not perform the studies that come out in the director's decision, they're at risk of having their application found deficient. That may be as good as can be done to have the same enforcement applied both to a licensee potential applicant and a nonlicensee potential applicant.

MR. KATZ: Thanks. Nancy?

MS. SKANCKE: Actually, I have a couple of questions, if I can, to our illustrious panel up here about the intent and perhaps the audience would -- I'm sorry. This is Nancy Skancke with GKRSE.

The questions I had were, number one, one of the things we've been trying to grapple with is how to find this illustrious third panel member who will act free of charge and get involved in the project, and I'd be interested -- so that we can craft our comments appropriately. If you have some ideas already from the FERC staff where this cadre of experts is going to come from. Because it may affect how we respond, and we want to respond the best way possible to

you.

And I do have a couple of other questions, but I can be put off.

MR. CLEMENTS: That would be Fred would be the expert.

MR. KATZ: Does anyone have any thoughts on that?

(No response.)

MS. MILES: We don't have any answer, but what we were thinking is that we probably would need to issue some sort -- something along the lines of how we found third-party contractors for that list, issue some kind of a notice and let people apply to be on a list. To serve for free?

MS. SKANCKE: To serve for free.

MS. MILES: We would I think reimburse -- it was travel, right?

MR. WELCH: Yes. We have standard regulations in place for reimbursing people who volunteer to do stuff for us.

MS. MILES: And I think that this is probably one question we'd like to probe a little bit. We were thinking that there might be quite a few people who would like to serve in that capacity. Maybe we're wrong about that. I guess we'd like some feedback on that.

But the idea was that we would search out a group. It would be on a list, and they would be available

for a particular dispute.

MS. SKANCKE: Just to follow up on that, though, your timing provides that there's a set time in connection with the process, the 7 to 8 days, but you also indicated and reaffirmed I believe today that the people involved in the process are not those involved previously, and particularly this third party person coming from the list, would be coming in without prior knowledge of the project.

Have you thought about specific ideas on how to ramp up on an education basis for these people, as opposed to using those that are involved in the process, including the applicant, to help resolve some of these issues?

MR. WELCH: I guess as far as the -- Tim Welch, FERC staff. As far as the education process, Nancy, I think that that's where we felt that the applicant would be of most value. It would be to bring the panel members up to speed, because the applicant is of course most familiar with the project.

MS. SKANCKE: Nancy Skancke. The applicant is not on the panel. So this would be before the panel process starts and there would be -- and how do you deal with other parties who may not think the applicant should be the only one educating?

MR. WELCH: Go ahead.

MR. CLEMENTS: It wouldn't simply be the

applicant doing the education. The panelists would have available to them the preliminary determination on that specific issue, and then there would be the notice of intent from the disputing agency which would I believe articulate the rationale for why the preliminary determination ought to be overturned, so that they would have a paper record in front of them, and then the applicant would be permitted an opportunity to put in any additional information or argument that it thought was bearing on the issue.

They would be coming in cold, but there would be something there to inform their decision and their thinking.

MR. WELCH: There's a very specific timeframe on page D-63, subparagraph (i), no later than 25 days following the notice of the dispute. The applicant provides the information.

We've gotten a suggestion to alter the language there to say the applicant and any interested party may file with the Commission during that time period.

MS. SKANCKE: Thank you. That's helpful. One last question. Is there any I guess I would adverse position preliminary, because it's not in the NOPR, for the parties agreeing to set forth to this panel disputes on nonmandatory condition issues?

MR. CLEMENTS: I'm not sure I understood it.

MS. MILES: The idea here was that the panel

would be used in a limited fashion for disputes with mandatory conditioning agency. It wasn't foreseen -- I think the hope was that it wouldn't need to be used that often, that the disputes would be resolved through the informal process, through the face-to-face meetings, and that this would only need to be used in rare instances.

And we didn't foresee it being broadened to other types of disagreements that may go on during a process that there are other means. There are a number of fixed meetings as you go through the process, and those face-to-face. It's the hope that those meetings will be used for any other types of disagreements.

MS. VERVILLE: Sarah Verville, Longview Associates. I'd like to expand a bit on David's request that perhaps there be some review of the OEP's decision. And that is that the applicant be allowed to request review under extraordinary circumstances.

And I'm at the moment thinking of extraordinary circumstances being something that the finding significantly perhaps increases the cost of the study plan contemplated and budgeted by the applicant such that it imposes a hardship.

MR. SIMMS: Frank Simms, American Electric Power. I've got a question and a comment. The first question is on page D-61, Section 5.11, study plan meeting. Who's going to

have that meeting or schedule it? Is that the Commission, the applicant? I think there needs to be clarification in there just who's going to do it.

As for the third party, one possible suggestion is maybe to follow what the FERC dam safety has been doing for facilitators for failure mode analysis where there is a proposed list of consultants, so on and so forth, to act as facilitators in the failure mode process, get those approved, and then there's a training. That would just be one possible suggestion. And then you'd be able to pick from that particular group as similarly done with dam safety to get those people.

MR. BARTHOLOMOT: It's Henry Bartholomot, EEI. A couple of quick comments. There is concern, and as we went into the pre-NOPR set of comments, we offered a recommendation that rather than going toward a panel approach to dispute resolution, the Commission's current process and actually current criteria weren't badly broken. And we did have some concerns about making the process more elaborate and using the panel approach, some of the reasons already having been discussed.

I'm glad to see that it's focused on the mandatory condition setting. That helps keep it confined somewhat. And Ann's comment about hoping that it won't have to be frequently used.

But I think we'll probably still send the signal that even as to those conditions, the existing process of Commission staff making the decision on the disputed study with input by the applicant as well as the agency is still an alternative that for most folks has worked well. And so the starting question is why depart from that?

Another alternative to the panel approach, especially since it would be involving the interested agency, resource agency staff in making a recommendation, albeit somewhat focused, it would be why not use the FERC dispute resolution staff? You have a dispute resolution office. And it seems that if you feel as though the front line staff at the Commission working on the particular project application needs an additional sort of set of input, perhaps that would be a better mechanism.

So, just a thought.

MR. WELCH: Just a quick response on that, Henry. A lot of ideas came up about using the dispute resolution service. And another idea that came about would be to use FERC Administrative Law Judges and that type of thing.

The only concern there is that these disputes tend to be really on the highly technical side. So there was a need to have a technical person in there, like if it was a fishery biologist dispute, it would be beneficial to have a fishery biologist in there. But that's definitely an

interesting idea.

MR. CLEMENTS: Another concern with using the DRS is that it's strictly on a voluntary basis, and they're not really equipped to operate in this kind of timeframe. One of the goals of this was to get expeditious resolution of disputes, and the DRS isn't really keyed for expedition. It's more keyed to other considerations.

MS. JANAPUL: Mona Janapul, Forest Service. If you didn't understand, Bob Dach was one of the leaders in the Interagency Hydropower Committee in developing this process.

MR. DACH: That has nothing to do with my comments.

MS. JANAPUL: I understand. But I did want to respond to a couple of questions from Nancy and others. And I want to go back to something Ann said. There was a general thought when we developed the IHC proposal that this would be used in very few circumstances.

We were very optimistic that use of the PAD pre-scoping, pre-NEPA, and that the informal dispute would make this circumstance a rarity. And we certainly hoped that is from an agency workload point of view as well.

But having said that, to respond to who would be the third person, we had quite a bit of discussion about that. We were concerned about the timing, getting the

person in there with the right background in the right timeframe. So we wanted to cast our net widely.

We were concerned about conflict of interest. You know, were they already involved in the project? We didn't want that. If they were paid, would that be a conflict of interest? But one of the pools that we talked about and that our agencies use on a lot of occasions, particularly here in D.C., is other agencies who are not involved in hydropower but have these technical expertise. National Association of Environmental Professionals. The National Academy of Sciences. The USGS.

So I mean, we were looking pretty broadly because, again, notwithstanding David's proposed amendments, most of the criteria are very specific and scientific. At the Charlotte and some of the public meetings, there was a discussion back and forth that this was an adjudicatory panel.

This is not an adjudicatory panel. This is a panel of technical experts who are going to make findings on pretty technical criteria but still retain it for the director to make the kind of decisions that David was talking about for his criteria in his overall review of what the Commission has already approved of as a study plan.

So I'm not -- I'm just trying to let you into some of the thoughts on the background of it and the third

party panel member. But we're wide open on that. I would certainly encourage a lot of comments in this area, a lot of work in the drafting session. I think this and some of those other things you were talking about, the PAD, those are really good things to come in the end of this month and give some real concrete input on.

But we're wide open on that. And also, my agency did not have a position that this process could not be used for the 10(a) or 10(j) agencies. We didn't have a position one way or the other on that.

MR. SPRINGER: Fred Springer with Troutman Sanders. One concern I guess I have, and based on I think, I don't remember, John or whomever, tried to explain how the agencies and the applicant would have input to the panel, and it sounded like it was primarily written input, and then the panel would deliberate.

But when you consider that at least a neutral, and especially the way Mona was just talking about it, may very well be not highly educated on hydro, and maybe the other panel members. It seems to me that the panel could get to a point where, in its deliberations, it needs additional clarifications, or it might be coming up with sort of a position in between some of the different suggestors, and they would have a concern as to how might that work and could it be done.

So I think there ought to be an opportunity for the panel on its own, not somebody on the outside suggesting to it, but that the panel have an opportunity to go to whomever they wanted, especially the applicant, to get additional clarification, or to ask questions as to how potential changes in studies or plans might actually work or value added and some of the other criteria we've talked about.

MR. CLEMENTS: That's not explicitly in the rule, but it was our intention sort of by leaving it blank to allow the panel to come to its recommendation and decision in the way that it thought best, so there's no intention to preclude it from talking to people or asking for some additional information or setting up a teleconference with the disputants. The panel can pretty much do what it wants at this point.

The only kind of administrative consideration there is the panel might want to do things that cost a significant amount of money, depending on what they want to do. And we really haven't come to grips with that, because it's an unknown entity. So if people have specific comments on how the panel might want to do its business, those would be welcome to.

MR. SPRINGER: And I guess, John, just a final thought was, it would be better to express that somehow

either in the final rule or in the preamble so that one party or another wouldn't start taking issue with how the panel is operating, saying, well, I get to speak to because that person over there spoke or that sort of thing. Just lay down a little bit of rules.

MR. JOSEPH: Brett Joseph with National Marine Fisheries Service. Just to respond to a couple of comments that have been made and express a concern that I have with what I'm hearing in those comments, it seems that if anything needs to be made more explicit, it's the underlying reason for this panel, the initial concept.

I think Mona spoke to it a moment ago. We were conceiving of this panel as basically a technical review panel, not as an adjudicative body. And what I'm hearing in a number of these comments suggests to me that maybe that's not clear in the way that it's being read in the language here.

Because if this were an adjudicative body, it would make perfect sense to be looking at other relevant sources of information, have a more robust process for input and so forth. But what we were looking at here was essentially a peer review panel, perhaps with a little element of mediation thrown in there, but largely a technical panel that has a narrow task, a narrow focus, and that is to review, provide kind of an objective check on

whether or not the record as it has been put together to justify a particular study request on its face provides that justification, leaving -- and this was our starting point and our ending point -- the recognition that the Commission has the final say on whether or not to require study subject to rights of appeal.

So the consideration of other relevant information is in there, but it's the decision of the director that is considering information that go beyond the criteria.

If with these changes, we're moving beyond that kind of a technical panel and looking at really an adjudicative process, then we're talking about a very different animal. And I think that's not where we wanted to go with this. But again, for my agency, we're open. We're hearing these suggestions. I just, like I say, I'm concerned that there might be some misreading of what was intended here.

MR. KATZ: Ken, Susan, how many have we got on the runway?

MR. HOGAN: Just David Moller.

MR. KATZ: Okay. David, why don't you have the last word on this one, and then we'll take our lunch break?

MR. MOLLER: Thank you. I want to respond, particularly to these two comments over here, because it's

very helpful to hear what the IFC was thinking was the use of this panel.

I have a couple of thoughts around that. One, I hope everyone in this room is really clear about this issue that the purpose of the panel is to study disputes among agencies and tribes with mandatory conditioning and authority. And as a practical matter, there's a real use for that. Because each of those agencies has some sort of statutory authority probably to get the study they want one way or another.

So it makes a lot of sense to have some sort of a special process that if those agencies with that authority really are in disagreement over what studies need to be performed, it does make some sense to have a process targeted specifically at resolving that class of disputes.

Once accepting that, back to this issue about the sort of the technical nature of the proposed criteria. I'd like to point out that even though that panel, which may consist primarily of technical experts and focus primarily on technical criteria, might only value criteria that are technical, keep in mind it's that same criteria that the initial study requestor in the more informal setting of working together with all the participants, they need to use that same criteria to explain and justify their initial request.

Those same participants, long before there's any formal study dispute resolution, are then going to discuss the merits of the requested study based on that same criteria. The participants in a formal dispute resolution are then going to consider those same criteria. Actually, I skipped a step there. FERC is going to make a decision, initial decision, based on that same criteria. Then the panel uses the criteria. And let's face it. In the end, the director, if they have a lot of disputes coming to them, they're going to be pretty hard pressed to make a decision that just totally ignores the recommendation of the panel that's been established specifically to make a recommendation.

So I would point out that even if the panelists may not have a lot of need for a value type criteria, all the other participants in trying to figure out what studies should or are going to be performed do have a very strong need for that value type criteria. And they will, both because of FERC's familiarity with what's trying to be achieved and the close-in participants in the proceeding knowing what they're trying to achieve, they will be in a position to advocate or speak against a study proposal based on its value in the context of the proceeding.

And so I just -- I think your points were very good. The panel may be very technical and may not be in

that adjudicating-type position, may not have a strong need for value-type criterion, but all the other users of those criterion will.

MR. KATZ: All right. Thank everyone for their participation this morning. We're going to take a lunch break. I would really like to start precisely at one, because we've got a lot of ground to cover yet.

Thank you.

(Whereupon, at 12:00 p.m. on thursday, April 10, 2003, the workshop recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:03 p.m.)

MR. KATZ: We are ready to start again. Welcome back. We hope everyone enjoyed our local cuisine.

The next topic on our agenda is settlements.

MS. MOLLOY: We had one.

MR. KATZ: I know that we had one person that felt that they wished to speak further to study resolution, but I do not see him here, therefore he comes under the category of snoozing and losing and we are going to move ahead to settlements.

(Laughter.)

MR. KATZ: Strike that.

MR. KATZ: No, if there is really someone who feels they need to add something, we can try and take that up later, but I don't want to delay the proceeding. We've got a lot of topics to go through. And here he is, late, but better than never.

We'll hand the microphone to someone for one last comment on studies. And what I'm going to propose is, generally for the afternoon, that we move ahead and see how we're doing, and when we get to our afternoon break, after we get back from that, we can discuss, briefly, how you might want to allot the time left, if it looks like we won't get through everything.

Time for one quick comment on the topic of study disputes.

MR. MOORE: I don't know whether I said it was going to be quick.

MR. KATZ: Please identify yourself.

MR. MOORE: David Moore, with Troutman Sanders, and for those of us up front, we can't see the progression of hands, so it's sort of difficult for us to put ourselves in the queue appropriately.

I was wondering if the panel would not mind explaining either the thought process or just the process regarding study disputes, and particularly focusing on the study requests that can take place after the initial study plan and the study dispute resolution, and what the thought process was there.

Specifically, my question relates to, from time to time you'll hear that one of the benefits for licensees in this process is more certainty regarding studies.

But it appears to me, just in counting up the number of times that you can get additional study requests, I think in the ILP you can have as many as four different points at which you may get into some sort of an issue regarding studies. I wondered if the panel could comment on what the thought process was there, and how that would work with respect to studies that might previously have been

requested and issues that have already been resolved.

MR. CLEMENTS: What I think you're asking about is, after the preliminary determination and after any dispute resolution, there's a period for the conduct of studies, which is in 5.14. And there is the initial status report after presumably a year or a field season of studies, and then there's a second opportunity, and then there's provision in there referring to requests for additional information or studies, in response to that report and the meeting that goes with it.

And then there's criteria in there which the intent of when we drafted those was, if you want something new or different, you need a very good reason why you didn't get it in in the first place and in the study plan. So you have to address, you know, was there some environmental anomaly that queered the study results, or something like that.

You have to show that you're not just asking for more information, and the idea also here was to raise the bar, so that at the end of the initial period, it's a good cause, why it should be approved, you know, in light of the criteria that we set out there. And then when you get to the updated status report, it's extraordinary circumstances.

So the idea is, the deeper you get into the process, the more you should have resolved all of these data

information and gathering issues, and you should just be actually gathering the information, so we're trying to deliberately make it more difficult to come in at that point.

MR. MOORE: So would the expectation be then that with regard to the studies that had gone through the studies to be processed and some resolution had been made, that although someone could subsequently make a study request that was similar, but that that determination that was made following the earlier process, that would be the end-all; that would be the end of the decision?

MR. CLEMENTS: I'm not sure I followed that.

MR. MOORE: Maybe if I explain the issue or the hypothetical that I see that could take place, it might help. Parties, mandatory conditioning agencies request a study. You go through a study dispute resolution process, and the Director makes a final decision regarding that study. But after this first season of studies, there's a opportunity to make additional study requests. And as you mentioned, there is some language in the regulation that appears as though it raises a higher threshold, but my question is, what if a party, whether it be a mandatory conditioning agency or any other party, requests a study that's very similar, but yet you've had a decision by the Director saying that that study was not appropriate or

otherwise shouldn't go forward?

Would that foreclose or estop someone from raising that same issue again?

MR. CLEMENTS: Well, they could raise it, I assume, as a practical matter and that the determination would be that we've already resolved that issue. And I can see, in a theoretical way, that, you know, somebody requesting a study might try to -- well, let's put some different tweaks on it, and if we just, you know, if we package it a little differently, maybe we can get it again.

And our expectation is not to encourage that, and I would hope the practice would actually be to actively thwart that sort of thing.

MR. MOORE: Well, one of the comments I would have is that one thing that's very important with study requests is the certainty regarding future studies that need to be conducted. And perhaps there might be some ways to even more define what extraordinary circumstances might be, whether in the preamble, I would suppose, or in the regulation itself. And we'll provide some written comments to that effect.

MR. CLEMENTS: Okay, we'll take comments on that.

MS. MILES: You may want to look at the criteria that's in 5.14(b). That's what we're getting at there. If that doesn't do it for you, then give us some language,

other suggestions. That's to get at narrowing study requests.

MR. MOORE: One other comment I have on the dispute resolution panel is -- and you've heard from several licensees, the concern regarding the makeup of the panel, and I won't reiterate those concerns.

I would say that I'm interested to see how, given the way that Federal Government delegations go, how you would find somebody within an agency that might be knowledgeable enough but not be within the delegation chain of command that may have made the decision to request a study in the first instance.

And so perhaps it will be difficult to find somebody that may be able to serve in a resource agency capacity on a dispute resolution panel. That's just a question. I don't know if anyone has thought of that.

MR. CLEMENTS: It's not limited, necessarily, to other agency people. It could be people, say, from a state agency or it could be an academic with an expertise in the area, or it could be a consultant with a lot of expertise in the area or -- we're very open to ideas as to who those panelist volunteers might be.

MR. MOORE: I was under the impression -- well, I was talking about the one resource. Is there not a one resource agency member of the panel?

MS. MILES: Yes. One FERC Staff, on resource agency, and the third-party neutral.

MR. CLEMENTS: I'm speaking about the neutral.

MR. MOORE: My comments goes towards the resource agency personnel.

MR. WELCH: Yes, we had some comment about the same issue, I think, in Sacramento, and right now it reads a person from the Commission staff or a contractor in the Commission's employ who is not otherwise involved in the proceeding.

And I think the idea was to get someone like, as I said earlier in my talk, some fresh eyes on the subject. Some people did point out that it would be really difficult, as you say, to find someone that absolutely knows absolutely nothing about the project.

So it has been suggested that perhaps that language be changed to someone who has not otherwise been involved in the development of the study plan, just to kind of loosen it up a little bit.

MR. MOORE: I think it will be less difficult to find somebody who knows nothing about the project. I think the agencies are big enough where you could find somebody certainly within that area of expertise. I guess my concern is, depending on what level within the resource agency the request comes from, you may end up having it from a level

that, as a matter of federal delegation, perhaps, it would be difficult to find somebody who could actually counter a determination that the study might be made by some office head or supervisor or other director level.

Finally, one possible concern that I have is might we be involved with multiple dispute resolution panels? Could that happen within the 70-day period, that we might have a panel going on on several different issues at the same time?

MS. MILES: That could happen. The hope is that it doesn't. We've had a lot of comments that perhaps we should have a panel that if there were to be several different disputes that dealt with aquatics, that it could deal with several things at the same time.

MR. KATZ: Thanks for the comments, and we will now move on to the topic of settlements.

MS. VERVILLE: Sarah Verville, Longview Associates. I haven't thought this through thoroughly, but I have heard a lot of concerns and I have similar concerns that there really needs to be a time out for settlement, because it is just so burdensome to be continuing in the licensing process and negotiating a settlement at the same time.

And yet I understand the desire here to be as efficient as possible in the licensing process and to do

this in a very timely manner. My thought that just occurred to me is -- and I don't remember if you can do this under the statute -- but to require the NOI and the PAD be filed at five and a half years prior to license expiration, as opposed to five to five and a half years, but just have it at five and a half years.

That if the parties in the ILP decide that they want to undertake settlement, that you've built in a six-month period for settlement. If they are not going to do settlement, then you, I guess, continue through the -- you get some extra time in the ILP process as far as preparing your application and doing your studies, et cetera.

As I said, I haven't thought it through thoroughly, but I'm looking for a way to build in time for settlement.

MR. CLEMENTS: Section 15, which applies to the Notice of Intent, requires it to be no later than five years before the expiration, and the Commission has always interpreted that as being Congress wants licensees to be able to file up to five years, so it's hard for me to imagine the Commission trying to give -- or force licensees to give more notice than Congress has said they need to.

MR. SABATIS: Jerry Sabatis with Reliant Energy. This morning, when Tim made the initial presentation, he showed a graphic that indicated comparison of current

process experience to the expectation of the staff under the new ILP.

And that graphic indicated that it was something like 18 months that was the prediction that the FERC could turn over a new license from the date of filing the application. And it appears to me that the assumption is that the application would be not disputed for that to come to fruition.

And I would submit that I think that that is very optimistic, from experience I have had and from what I have observed. Oftentimes, you could have -- an applicant could have notice in the context of study scoping. Where the dispute arises is when the studies are completed and the license applicant then has to convert those studies into protecting, mitigation, and enhancement measures.

And it is the degree of protection, mitigation, and enhancement that is oftentimes disputed right through the filing of the application, and then it is at that point that FERC has to unravel those disputes and that oftentimes leads to very protracted proceedings.

And I also heard Ann say this morning -- and I agree with her -- that oftentimes the stakeholders don't have a clear understanding and picture of the project and the project operation and the many nuances that come into play.

And what I've observed is, oftentimes you can have one or two token site visits, and you can exchange study papers ad infinitum, and people still do not fully understand the project and how to work out an agreement until you roll up your sleeves and undertake some very intense negotiations and get into one another's heads on the interests and the resource goals that each party is trying to uphold.

I cannot envision how the ILP process would necessarily be effective if everyone has to stay with the process and there is only time to exchange papers and there's not a means of having a breakout for those parties to negotiate so that they can in turn prepare an application that all the stakeholders can agree on and then not end up with an application filed with the Commission that is under dispute and would not necessarily be processed by the Commission in 18 months.

And even if the Commission processed it, they could issue a license with disputes outstanding and then end up with license orders under rehearing and future litigation.

So I would ask the Commission to reconsider its current considerations on the settlement process, to look at other alternatives such as the one that Sarah suggested where perhaps enabling parties to start earlier and trying to facilitate settlements, we think that would be the biggest opportunity to improve the process.

MS. MILES: Jerry, I have a question. Where in the process that's laid out, the ILP process, would you think is a good place to put this roll up your sleeves?

MR. SABATTIS: In NHA's comments in responding to the 17 or whatever it was questions back in the fall -- as a matter of fact, I wrote much of those comments to that

question -- there were a couple of points. One could be at the draft application stage.

In the traditional process, agencies are given 90 days to review a draft application and comment on it. And if they choose to not even comment, the applicant has to wait 90 days. There is a window of opportunity there, and in the current regulations under the traditional process, there is supposed to be, what do they call it, a substantive disagreements meeting.

There is an opportunity at the draft stage. I also suggested that at the point where studies are being scoped, oftentimes there could be a study that might cost more than the resource interests affected, and that's a later topic we're going to discuss. And a license applicant might propose why don't we settle on this issue? We have a protection mitigation and enhancement measure that we would propose by coupling with it a qualitative study. We can mitigate for the issue without a more rigorous quantitative study.

So there are two windows in the process that I could think of that could apply.

MR. WELCH: One thing I think quite often that everybody misses in regards to time outs for settlements, and with the possible exception of the one thing that you pointed out, Jerry, is right around just before license

application is filed under the traditional process, sort of an issues time discuss disputed issues.

I mean, the current traditional process does not include any provisions for time outs for settlement, yet we all know that many, many instances, there's many success stories of settlements under the traditional process.

So I don't think there's anything here to preclude anyone from calling a, quote, "time out" at a specific time. Anyway, just a thought.

MR. DIAMOND: This is David Diamond, Department of the Interior. Just an observation. I definitely agree with the commentators that it seems to me that there's a general feeling that settlements in many instances can help you get to that streamlining and certainty outcome that you're looking for here.

And it seems to me, though, that it's difficult to say at any one point in the process is the point where a settlement is going to happen. You get to that point where you can settle at that magical instance where you have agreement among the parties, which could be anywhere.

So I'm struggling here. How can we accommodate a settlement and encourage it without kind of boxing it into a particular place in the process? I guess one question I have is in the ALP, my assumption, and I don't know if there are statistics that would support this, is that there's more

ALP projects end in settlements than those in the traditional process. Maybe that's true.

And then I guess my further assumption would be more projects that go through the integrated process would end in settlement potentially than those in a traditional process. Now that may not be. We'll have to see on that.

But my question on the integrated process -- well, I've lost it. But anyway, there's something there. How can you accommodate the settling parties? And I guess the concern, in response to what Tim said, is that this integrated process has lots of process steps just at the point where you might, if you had some space and time, be getting to this -- doing the things that you would need to do to get to that magical point of agreement.

MR. WILSON: This is Rollie, and I'm definitely speaking on my own behalf this time, because I think I might be the only person in the department that believes this.

Although I did hear some good suggestions for when settlement time-outs might be, my concern about the settlement issue is that it is framed on our experience with the TLP and the ALP. And in my view, if the ILP is working correctly, it will allow the regulatory agencies, plural, to function in their appropriate rolls while working collaboratively with the stakeholders at a particular project.

And the need to do something other than what the regulations say might fall away, and settlements may only need to be needed in the ALP if they actively sought and in the TLP where you have parties in a notice and comment-type litigation who need to find a time out to seek a common ground.

The suggestions earlier on maybe not bogging people down with process and allowing them to get together and find that common ground might be some ways to soften the ILP to encourage that more. But I wonder if developing a regulatory process that brings people together and encourages that kind of cooperation may eliminate the need for settlements altogether. Again, that was strictly on my personal behalf.

MS. NALDER: I'm Nan Nalder. I'm with Acres International. My question has to do with the relationship with the Section 401 agencies and whether or not FERC can do some outreach to your sister agency EPA. Or have you been doing that during this rulemaking?

And also the second part of it is with the Section 106 and particularly with the tribes, I understand that you're going to have a tribal liaison concept that's been introduced. But I wonder how those get tied into settlements. Because that's where some of the parties that are most difficult to bring to the settlement team are the

401 agency and the tribes.

MR. WELCH: Tim Welch, FERC staff. We did have our round of regional workshops with the 401 agencies prior to this rulemaking to get their ideas about some of the problems involved with the traditional process.

Many of the 401 agencies have been present at our regional workshops associated with the NOPR. We've had some discussions with some of the 401 agencies, some teleconferences and that type of thing about the NOPR as well.

So as far as the outreach, those are three things that we've done. The same with Indian tribes. We've had separate tribal meetings with tribes associated with each of the regional workshops.

As far as specifically talking to them about how to bring them to the table, I'm not sure if we had that specific of a discussion.

MS. NALDER: Have you talked with EPA?

MR. WELCH: Not specifically. The question, have we talked to EPA. And Ann Miles says yes we did.

MS. MILES: They were involved in some of the discussions with the rulemaking early on for the NEPA aspects of it in particular.

One more thing on that. The whole idea of this ILP is that the state agency will be there with everyone

else at the very beginning, and that would be one of our goals would be to get them to the table and to work out with them what they need to do their process and make sure it's integrated with what we need and what anyone else needs.

So I think there's two things going on. That's one of the goals of the ILP. The other is we know there are some states where there's just -- they need a lot more time one-on-one with us, and we've realized that from our regional outreaches that Tim was talking about, and so we'll also be doing that effort separate from this.

MS. SKANCKE: Nancy Skancke, GKRSE. I'd be interested in the comments from the FERC people but also from the other resource agencies that are here.

With respect to NHA's comments and its first set of comments on this settlement issue where we proposed that recognizing each proceeding is moving along at a different pace, and settlement may be appropriate in some proceedings at different stages than others, that we recommended or suggested to FERC that there be a notice to be filed that could stop the process on an individual case, the notice being similar to what is triggered under the Commission's current rules for triggering ADR or DRS, where the parties come in and file something and basically say they want to do a dispute resolution.

But by putting it in the specific hydro

regulations as opposed to just having the general provisions under the Commission's Rules of Practice and Procedure, it, number one, shows the Commission's interest in facilitating settlements. And number two, it recognizes perhaps that the Commission is going to be willing, if all the parties come in and ask for that time out, the Commission is willing to entertain it, and people aren't going to have to be trying to use the regular rules to get that in a particular case.

We'd like to -- the reason I'm asking this for comments is because if people have real strong problems with that, we'd like to know how to try and fix our proposal.

MS. MILES: I guess the one comment I've got is that tension between issuing a license by the time it expires. I think if the idea was that there was a notice to stop it and it could stop it for some period that was going to extend it beyond the expiration of the license with the direction that we have right now, that would be very hard for us.

And we've been quite clear. Where we've had extensions of time to continue to do settlements that if it doesn't extend it beyond the expiration of the license, it would be possible that we would grant it, and with some other criteria also.

So that's the biggest issue for us.

MR. JOSEPH: Brett Joseph for National Marine and

Fishery Service. I just want to weigh in. My agency shows that concern that's been expressed regarding the lack of any explicit provision for flexibility to accommodate settlements in the rule.

I think it would be helpful to have that in there. While I would echo David's point that he made earlier about the difficulty of specifying a particular point in the process where that should occur, I don't think it would be wise to do that.

But the overall concern that we have is that here we have now three processes. One of those, the ALP, by its terms is explicitly contemplating settlements as an outcome. One of the main focuses of this new ILP is to achieve more timely resolution of disputes and encourage collaboration, which would suggest that it's tending towards encouraging settlements, but it doesn't go so far as to make that explicit.

And given the discussion we had about the choice of process, we would be concerned that with the lack of an explicit provision for settlements in the ILP that the parties would feel compelled to go to the ALP process if for no other reason than they would believe that that would be the only avenue to reaching a settlement as an outcome. So I think something needs to be put in there that provides flexibility.

I heard Ann's comments. I think it needs to have some sideboards on it, not an unlimited flexibility, but a flexibility that could be afforded at appropriate points in the process as determined by the parties when they feel that a settlement is close at hand.

MR. DIAMOND: I'm David Diamond, Department of the Interior. Just to specifically answer Nancy, Interior supports the idea that there should be a specific provision to accommodate settlements, and we'd be very interested in seeing specific ideas there.

And again, I think the challenge is to try to respond to the concern that Ann just expressed. There has to be some way of showing the Commission that you're close to that magical moment or there's some reasonable expectation that you are going to get there. So how can we write that in to make it so it's not going to be leaving you in a black hole in a proceeding rather than getting you closer to really short cutting things and getting to that good outcome?

MR. KATZ: Anything further on the topic?

(No response.)

MR. KATZ: Seeing not, we will move on to the next topic, which is the relationship between FERC staff and other agencies. And that's as distinguished from the cooperating agency process, which is listed as a separate

topic further down the line.

MR. MOLLER: This is David Moller, Pacific Gas & Electric. Since I teed this subject up, I'll take the lead off comment on it to explain at least the issue that I was trying to address with this subject.

It's quite clear that one of the major goals of the NOPR and the ILP specifically is to foster greater cooperation among the agencies involved in a hydrolicensing proceeding, and particularly among those with mandatory conditioning authority.

And yet, as has been pointed out, even the formal dispute resolution process, which is successful only to those agencies with mandatory conditioning authority, is not inherently binding on the very agencies that are the only ones that can use it, because they have their own statutory authority that enables them to do things in the context of hydrolicensing separate from FERC.

So it strikes me as I look through the regs that although there's that clear intent to foster cooperation among the agencies, there's really nothing in the regs to make that happen. And so I have a proposal around that.

And the proposal is this. Knowing that FERC can only condition itself and the licensee, a licensee, is to add a provision to the regs that upon receipt of a notice of intent from a licensee or I guess it could be upon receipt

of a PAD from a nonlicensee potential applicant, that FERC would within some period of time, 30 days, 60 days, whatever seemed appropriate, that FERC at its initiation would consult -- using a good regulatory term -- would consult with the state and federal agencies who will have jurisdiction in that proceeding to sort out what their relationship will be in the context of that proceeding.

And this consultation would cover such subjects as are any or all of those agencies consulted with agreeable to having the formal dispute resolution procedure be binding upon them? Are they agreeable to doing joint scoping for development of environmental analysis? Are they agreeable in preparing a joint environmental analysis? Are they agreeable to adopting FERC's proposed timelines in the ALP for various things to happen?

And to get that understanding of what the relationship is going to be among those agencies of jurisdiction in the context of that proceeding and then FERC in its scoping document, one, as one of the sections in there, describe its understanding of what that relationship is going to be.

Now a couple of things about this. It's of high value for all the participants in the proceeding to know what that relationship is from the beginning. It could be any one of those combinations. Some of the agencies could

agree to be bound by the formal dispute resolution mechanism, some not. That's good to know.

As participants in a proceeding, I would like to know. Can I expect that the participants in that dispute resolution process are willing to be bound by it? Going into a proceeding, I'd like to know. It's great that FERC has moved its scoping up front to be coincident with general scoping among the participants, but it's of high value to me to know whether the state water agency is going to require another scoping three years later for its environmental analysis.

Right now, even though the preamble encourages that, there is nothing in the draft regs that makes that happen.

So that would be my proposal, is that FERC condition itself to consult with those agencies on a proceeding-specific basis. If there was already some standing agreement say with the state water agency in that state that covered all proceedings, you wouldn't have to revisit it on a proceeding-specific basis.

But absent some standing agreement among the agencies of jurisdiction to consult with them on a proceeding-specific basis, lay out how FERC and the other agencies are going to relate specifically around the issues that are important in the context of relicensing, and then

specify that in the scoping document so everyone will have the benefit of that information.

MR. KATZ: Reactions to that proposal?

MS. NALDER: I would add one aspect to that. In addition, with the agency sitting down with the federal and state agencies, I would broaden that to the tribes. And then following that initial discussion, I think it would be good to have a meeting with the agencies, the tribes and the applicant, the current licensee, to just lay it all out there and see if you can come to a better framework for the relicensing.

MR. KATZ: Anything further? Jim Welch?

MR. WELCH: I think, David, although maybe it needs to be more explicit, but I think we sort of contemplated, at least part of what you're saying, if you go to your chart here on the back in box 4 where the Commission holds scoping meetings, site visit, discuss issues, manage objectives, existing info needs, process, plan and schedule.

I think we were thinking our hope is that at that meeting, a lot of these discussions between FERC and these other agencies would take place in the development of this process plan. I think we looked at the process plan as being defining our relationship. But maybe we need to be more explicit exactly about those items that you talked about. But we did contemplate that. And, as I said,

through the process plan.

MR. MOLLER: Two things. One, in response to Nan's. Yes, the tribes should be consulted too. That's a good add.

Tim, the only thing I'm concerned about that is in the event that an agency of jurisdiction doesn't come to the scoping, they've decided to have their own scoping. The whole point here is recognizing FERC can only condition itself and the licensee is for FERC to commit that it will go out and consult with those agencies of jurisdiction, just like when the licensee gets that consult.

Obviously, if you try and consult and the agency is nonresponsive, obviously that's the way it goes. But the point is, rather than having a passive thing, hey, here's out date. You're invited. Please come. And, hey, you didn't show up, so we'll go on, instead to make it a little bit more active than that where FERC makes an active effort to consult with those agencies of jurisdiction.

I have to tell you there's sort of an ulterior motive here. Not only would this inform all the participants in the proceeding exactly what that relationship is, but I have to think that unlike the current process where that consultation, how we're going to relate often gets put off for years at a time until there's some substantial event like this NOPR, I have to think that if

proceeding after proceeding FERC keeps going to the agencies of jurisdiction and saying how are we going to relate with each other on this one? Can we do it better than we did on the last one? Hey, is that relationship we had over there, can we do this over here?

If the questions get asked time after time after time on a frequent basis instead of on an infrequent basis at some significant event like this, I suspect that over time, those agencies will learn to work together and to figure out what works in the context of the ILP and what their relationship can and should be.

MR. KATZ: I saw Brett's hand in the back and he hasn't had a chance to speak to this yet, so if you could get him a microphone. Ann, if you want to speak while Ken's wandering to the back.

MS. NALDER: I just wanted to add one thing to what David just said. The scoping meeting is quite often a well orchestrated event that doesn't encourage people to really sit down and talk about what they think.

I think the concept that we're discussing is you have, as David put it, an active discussion before that scoping meeting, so that you go into the scoping meeting knowing some of the issues. I think the scoping would go far better if you were to have this pre-scoping sit down with federal state agencies, tribes, and the licensee.

MR. CLEMENTS: I just had some concerns about what David is saying. What I'm thinking is that where we talk about defining our relationship with another agency, it's typically in the context of doing an MOU for a cooperating agency agreement or something like that. It's limited.

And it strikes me that you may be suggesting that we kind of have an MOU with the agencies or multiple agencies about the whole process. Because when you talk about, you know, what's our relationship and you look at all these things, you could be taking this process as it may turn out and that could turn into a renegotiation of the licensing process for every case, which I think is fine if you're in an ALP context.

If you're in this context where you're trying to work within a defined process with the goal of trying to get something accomplished in some reasonable amount of time, and then you're starting all over. So the notion of deadlines and everything else that everybody wants that they're not seeing gets back on the table case by case by case by case by case. So that makes me nervous.

MR. JOSEPH: Brett Joseph, National Marine Fisheries. Just to respond, yeah, I was kind of hearing two different things, David, and I appreciate your further clarification.

Whether in fact you were alluding to an MOU -- I know that was earlier in the NRG proposal, and I share the concerns just expressed by John Clements with that degree of formality. Short of that, my thinking was along the lines of what Tim expressed, which is that the process as currently contained in the NOPR does provide a step for a process plan to be incorporated early on.

But if what you're asking is that there be a step where we're just sitting down and having a discussion so that we can ensure that at least the parties, the resource agencies that will be involved are going to be responsive and at the table and there be an understanding early on what that role is going to be, you know, we're supportive of that. But with the qualification that it not amount to a renegotiation of process steps and roles that are already set forth in the NOPR.

So I guess I'm just simply echoing comments that FERC just made. But that's my response.

MR. KATZ: Nan, go ahead.

MS. NALDER: Nan Nalder, Acres. My thought on that, Brett, is that it's not to create more process, because I think that we're all just totally exhausted and tired of process, process, process.

It's an informal opportunity to sit down and discuss things before the formal public scoping meeting to

see if there are things that are going to come out of the woodwork that it would be better to know about before you go into the public meeting. To find out if there are some existing difficult relationships between the agencies and the licensee. To find out if there are disputes between some of the state and federal agencies. It just seems it would be a good forum.

It's not to come up with an MOU. It wouldn't be anything cast in concrete in the way I would perceive this. I'm not sure what David had in mind. But we've talked about this up at Northwest Hydro Association board meetings also.

MR. KATZ: Before David speaks, is there anyone else who wants to speak on the topic?

(No response.)

MR. KATZ: If not, David, why don't you, since you opened the topic, why don't you close it?

MR. MOLLER: Okay. Thanks. My thought was that in fact it would be informal. And in order to avoid this reconsideration of all possible issues, my thought was that there would be some list of a minimal number of issues that would be part of the discussion.

If there was concern about getting too broad and out of control, it could be limited specifically to those issues. But I think the four that I mentioned are ones that could easily be addressed in an informal setting in a short

period of time, which were about are you agreeable to be bound by the so-called binding dispute resolution process? Are you willing to do joint scoping? Are you willing to do some sort of joint environmental analysis? And are you willing to participate on the plan timeframe, the FERC plan timeframe?

Those are pretty straightforward questions that shouldn't open up a lot of other issues. If it was productive in the context of the discussion to discuss some others, that could happen too. Or it could be quite exclusive.

The point is, and I'd like to -- I have to tell you, Nan and I had not discussed this at all. This is no tag team going on here. But she makes a good point. If you rely on the scoping meeting for that to happen, I mean, we've all been to many scoping meetings, that's usually focused on issues. You know, what's the process? What are the issues of concern to people? There are many participants in scoping that probably haven't even thought about the proceeding, what is this relicensing thing all about? You know, I live up on this lake and I don't have the boat dock I want.

That's going to be a tough setting for agencies that perhaps don't have a great working relationship to sit down and take a hard look again. Well, are we going to

joint scoping on this one? So I think the scoping meeting may not be the best forum. I would envision it being informal. I would not envision that it produces an MOU. But it produces some sort of meeting of the minds about how the participating agencies are going to relate to each other in the context of the proceeding. And it might be that they're going to work together or they're not.

But again this would be very valuable information for the licensee and for all other participants, as well as the agencies to know up front.

MR. CLEMENTS: Is there any reason that couldn't take place, that discussion, outside the contest of the specific process regs on an ongoing basis?

We all know what projects are coming up. Maybe it would make sense for us to sit down with, you know, say NIMPS, the Fish & Wildlife Service, and California on something we know is coming up and saying, you know, have we got a basis to work together here that we can go forward with when that NOI comes in?

MOLLER: David Moller. I think absolutely there's that prospect. I for one would hope that is exactly where it would go so these consultations wouldn't have to happen in each proceeding.

But right now we don't know what's going to happen, and the licenses just has to guess along the line of how are the other agencies going to participate, and what is the relationship going to be?

I would think, and my understanding of the IHC process was that those federal agencies that participated did substantially reach some at least meeting of the minds as to how to relate to each other in the context of hydro relicensing.

I don't think that meeting of the minds has been achieved with the state agencies, as far as I know. So it may well be that a lot of the work with regard to the lead federal agencies has already been achieved. That would be fine.

MR. KATZ: Why don't we take one more burning opinion, burning personal opinion, but not for his agency.

MR. WILSON: This is Rollie Wilson with the Department of the Interior. That's okay. Thanks, John.

MR. KATZ: Thank you.

(Laughter.)

MR. KATZ: Why don't we move then on to Transition Time Frames.

MR. MOORE: David Moore with Troutman, Sanders. The reason I raised my hand on this one was specifically related to the time period that was provided for using the old process. It's a three-month transition period.

One of the concerns that we have regarding that transition period is that it may be inordinately short given the fact that we're going to a new process and having to develop what I think are more detailed and comprehensive documents in terms of the PAD document, in particular. Also, the study plans which come with the Notice of Intent. We would request consideration of an additional time period to be able to prepare those documents.

We have looked at FERC's web site regarding what licenses are up for renewal, and it seemed to be a handful that will fall within this period. I would say that offhand I believe it's around a dozen perhaps.

But we have a fixed target in terms of when we have to file our Notice of Intent, but this is a moving target in terms of when this rule might come out. With all due respect, if it comes out in July we can plan on that, but we're not sure exactly what the requirements will finally be for these preliminary documents.

As a result, we may have as little as only a couple of months to prepare those documents. So we propose a longer transition time frame. It seems like one year might be appropriate.

It is a little unclear as to how the language is drafted what the Commission's intent was with respect to how the transition time frame would work, and if the panel has any--actually, it would help me to understand more how that transition was intended to work, if there are some comments on that.

MR. CLEMENTS: The theory behind that three months is that if you were a licensee and you needed to file an NOI, that you would have to at that time already under the existing regs have to have in place everything that is required by 16.7(d) to be made public. And that there is a

substantial overlap between that and what is in the PAD.

So the theory was that it wouldn't be that difficult to make that conversion. There might be some additional things, but that in any event what you are required to come up with is existing information.

You weren't required to do any studies or things like that. So that we thought three months would be enough time to retool a 16.7(d) public information statement and whatever else you need for a typical first-stage consultation into the PAD.

And of course we are open to, you know, open to people giving us different opinions on how long is an appropriate time for that.

MR. BARTHOLOMOT: Henri Bartholomot, EEI. I would actually second David's comment. I think a longer lead time so the folks aren't swept into this evolving rule without time to digest it is good housekeeping.

I would add three other points.

We talked this morning about the point about not making the ILP a default that evolved into a discussion of well, maybe you could at least wait three to five years and see how things are going.

I think it is going to take perhaps longer than that because of the lead time involved in licensings and going through the--you know, even with the ILP approach, I

would venture to guess you're going to see five, six, seven-year type processes because people are going to have to be gearing up, as they already do, sometime before.

And PAD and NOI and so forth are coming in the door of the Commission, and that is five years out, and you are going to have some time potentially even after license expiration if things don't go as well.

So I think another element of the transition, I would still say and we'll file it in our comments, is it's better not to have a designated default. But I don't think a three to five year window experience is going to be necessarily enough to see how this works fully in practice.

Two other small points--not so small but quickly made.

If we read it correctly--and I understand there has been some Q and A on this maybe at the regional workshops, the dispute resolution and collaborating agency provisions with the ex parte concerns are meant to kick in immediately even if you are in a TLP and you're already in the middle of that process. And I think those also need to be covered by the transition provision, that if you're in an ongoing licensing, you have entered that with an expectation as to what the ground rules are.

Those rules should not fundamentally change as to how you use dispute resolution panels, and so forth, and the

cooperating agency status sort of kicking in at least without the applicant saying yeah, okay, we can work with that.

MR. CLEMENTS: Well anyone whose NOI is filed prior to the three-month period there is covered under the old rules. So that none of this would apply to you unless your NOI is due at some point three months or later than the issuance date of the final rule.

I guess one other clarification on transition. There is the process, the big ILP process, but there is also the provisions we put in there for MAPs and those things that we're going to ask in the license application, the information on hydroelectric capacities and stuff.

That goes into effect for any license application that's filed three months or later than the issuance date.

MR. KATZ: Jim Welch, did you have something?

MR. WELCH: Yes. Getting back to your point about those dozen or so projects, actually I think it is like 8 or 9, we do have some concerns about those particular projects. We are doing all that we can to contact those folks.

Actually, we are preparing sort of an initial advance notice of license expiration, at least alerting those folks to this proceeding and offering Commission staff help in going over the proposed regulations just so no one

will be caught flatfooted.

I think a couple of Georgia Power Projects are in that group. So anyway we're definitely thinking about those eight or so projects.

MS. NALDER: I have a different question. Nan Nalder, Acres. On the transition time frames, I know I asked this question in Portland, John, but there are a few people out there who are in the middle of the ALP who are interested in knowing whether or not they can somehow take advantage of the time frames that are in here that are imposed on the participants.

I know a lot of people don't like the time frames, and some of my clients don't, some do, but where you have a rag tag relicensing where it is very difficult to keep people focused, those time frames are going to help a lot.

Can people who are in the middle of an ALP come in and consult with you to see if they can somehow adopt part of it?

MR. CLEMENTS: Oh, if it's an--if they are having an ALP, I don't see any reason why they can't do those time frames. And I don't see why they would have to consult the Commission if they're doing it on a consensual basis in an approved ALP.

MS. NALDER: John, the problem is that a lot of

those "consensual basis ALPs" have turned into circuses. And a little bit of structure would help particularly much in a couple instances.

MR. CLEMENTS: Well be that as it may, once you are in an approved consensus-based proceeding, you could have an applicant, I suppose, come in and try to impose through the Commission some kind of order on that, but I would think that would raise the question of whether you're in an ALP anymore.

MR. MOORE: David Moore with Troutman Sanders, again, addressing John Clements' comments.

We have looked very closely at what we believe the new rule on the PAD requires, as well as the study plan.

It appears to me that there are a number of things that are included in the current process, the current Part 16 regulations in terms of it being a broader, more comprehensive document.

And maybe I'm reading it wrong, or maybe someone could help me interpret that. Maybe if the Commission is going to provide some assistance with developing that sort of a document. But nevertheless, it does appear as though there are a number of different things that are required.

As well, the way the ILP process works, anyway, it looks as though you develop the study plan at the same

time as you do the PAD. And that's an additional requirement which comes at a different time. And you do it prior to actually scoping.

I see a confused look on your face, but if I'm reading this correctly you actually do the study plan. You file that with a Notice of Intent, and that is done prior to scoping. Which means that then you've got to have some idea regarding what studies you anticipate having to do.

And please correct me if I'm wrong about this, but my concern is that these first few projects are going to have difficulty in going through this process and then we will be in study dispute resolution.

MR. CLEMENTS: I don't see a draft study plan until box six, which is pretty well into it.

MR. MOORE: Well I hope that you're right and I'm wrong, because that would relieve at least one of my concerns.

MR. MOLLOY: The proposed study plan is to accompany the revised preapplication document, which is a little further down on the first one. I don't know if that's where you were reading that, but that's after scoping.

MS. MILES: Also, I believe that there's some form of a draft study plan in the initial consultation document that's required now. So I'm not sure it's that

different.

There are certainly some things that are in more detail in this end, and that is something we want to discuss.

MR. MOORE: When the term "deadline date" is used in the transition period language, does not refer--what date does that refer to? We have a six months period during which we can file an NOI, and I see the term "deadline date" used in the transition language throughout the regulation, "applications for which the deadline date for filing an NOI."

MR. CLEMENTS: Would you point me to one particular place you're looking at?

MR. MOORE: Well here's one example on page D-7 at the top of the page.

MR. CLEMENTS: D-70?

MR. MOORE: D-7.

MR. CLEMENTS: D-7, okay.

MR. MOORE: And this is in the Part IV Regulations. This is the same language that appears throughout: "Applications for which the deadline date for filing a notification of intent to see a new or subsequent license", and I was confused as to whether that meant five years or five and a half years.

MR. CLEMENTS: It is both--it is five years,

because the statute allows you to go up to five years.

MR. MOORE: Okay.

MR. MOLLER: David Moller, Pacific Gas & Electric. Depending on the exact date that the order is issued, it does not appear that Pacific Gas & Electric has any licenses that would be subject to the three-month time frame.

Nonetheless, it seems to me that it is pretty short. And I would join with the other licensess that have proposed some extention. My thought would be that an extention to at least six months would be appropriate.

Even, John, with your comment that much of the information should be being prepared by those licensee potential applicants, nonetheless there's a whole shift in process here.

So not only are these handful of licenses going to be dealing with the short transition time, but they are also going to be the guinea pigs, so to speak, the ones that are going to beta-test this new procedure.

So I think the concept of staff giving them some extra help and guidance is a terrific idea, but my sense is also it might be better to lengthen that out to at least six months.

I would like to ask the staff group here a question also on another time frame issue. That is, it has

been point out, I htink actually this morning it was touched on but it certanly came up at the NHA conference and at some of the other workshops, the concern about the adequacy of the time allotted between steps four and step six, which is when the participants in the proceeding are supposed to be working together developing what will become a draft study plan.

And the question I have, I have to say in all but the very simplest proceedings that I've been involved in, the development of the study plan has taken a lot more than the allotted time here.

Frequently we're talking about dozens of studies, and just to identify what the issues are that need studying and then to develop the plans, get all the technical reviews, the plan, and so on, it takes some time.

The question I would have for the staff group here is: What kind of a finding, or what kind of a threshold would staff want to see to perhaps create some time out in that time frame? Or at least provide some extension of those time frame?

I'd like to make that comment in my comments in response to the NOPR, but I don't know what you would be looking for as being a suitable threshold to grant an extension in there.

MS. MILES: This is the issue. It's bigger than

that. It's the notice of intent is due five years before, and the application is due two years before expiration. Everything has to fit in that three-year time frame.

So I don't think there's an answer to that particular project. And you can see these just meet that. We've spent a lot of time looking at little bits of days in there, and it is amazing how quickly they add up.

So feel free to look at things in different places, but know you're probably going to push something else. If you tweak here, you tweak there.

This is--I think the idea of these time frames is one way we saw how it all fit together. It doesn't mean there is not flexibility within a particular project, for them to put it together slightly differently than this. That would be done in establishing the schedules at the beginning for each project.

I mean, one other big concept of this IFP is that a schedule is established at the beginning and so everyone knows when they need to make comments on this, or responses to that, or have this available to the group. And then if that schedule needs to be changed, it would be changed so that everyone understands those differences.

MS. VERVILLE: Sarah Verville, Longview Associates.

Ann, you may have just answered my question,

which is: It seems that there's incentive for the applicant to start five-and-a-half years early as opposed to five years. Given that that gives you six months, I'm assuming that then staff or the Commission would be a little bit flexible in the time frames that are laid out in this flow chart? So that you're not ending up with a final product say six months before the two-year filing date?

MS. MILES: Yes.

(Laughter.)

MR. MOLLER: That was exactly the question I was going to ask. But having said 'yes,' let me ask then what would be the finding staff would be looking for if the potential applicant in fact starts early and requests to insert the time of the early start in between those two steps?

Can you give us some finding that staff would need to say 'yes' to that?

MR. WELCH: No.

MS. MILES: Good answer, Tim.

(Laughter.)

MR. SPRINGER: Fred Springer with Troutman, Sanders, again.

John, let me just ask you for clarification because I guess you answered David with something I wasn't expecting you to say. So let me ask again.

On the transition with the three months, if it becomes three months, if a licensee currently has an NOI date which--I'll give you an example; let's say it's in February and the three months is like the end of October--if five-and-a-half years would put you on one side of the effective date, and five years puts you on the other side of the effective date, I guess when I first read this I presumed that as long as you were anywhere between five to five-and-a-half years, you could sort of pick whether you wanted to use the old process or the new process.

But when you use deadline date to mean five years, the way you just defined it, that would definitely put this process and what they would have to do in the new process.

MR. CLEMENTS: Yes. I did mean the statutory deadline of five years. That was the idea. It wasn't based on a five-and-a-half year.

MR. SPRINGER: Well I would then put the suggestion forward that it be rethought as to how it is expressed to give people who are in that six-month window between five and five-and-a-half years an opportunity to think which one of these processes might be best for them because of the other complexities.

And in fact I think other people on the staff has given a different answer over some of these different

sections.

MR. CLEMENTS: Yes. Ann says I'm full of it, so.

(Laughter.)

MS. MILES: No, I'm saying I gave a different answer. So obviously it's a topic of some confusion.

MR. CLEMENTS: Clearly we need to clear something up here. I'm trying to make it as user-friendly as we possibly can.

MR. SPRINGER: Thank you.

MR. MOORE: Not to beat this dead horse, but under the--David Moore, Troutman Sanders--but if the word "deadline" does mean five years, then I guess, you know, legally we could file a notice of intent at the five-and-a-half-year period and the rule wouldn't even really be out yet, but our deadline would be at five years. So then the rule would come out and we would have, by virtue of this language, have been subject to the new rule. I see a real legal problem with that.

MR. CLEMENTS: I would think you could file your notice of intent any time you're permitted to under the regulations, which is the five-and-a-half years, if you want.

And once you've filed your notice of intent, if you do it within that three-month window--assuming the three months was the file-to--then you would be under the old

process.

MS. SKANCKE: Nancy Skancke, GKRC. Just to clarify and hopefully not to confuse, we've heard a lot of discussion about people not wanting to use the ILP and wanting to get the transition period extended.

Hypothetically, there might be people who would like to use the ILP. And, John, you had previously said that they could build an ILP under the ALP.

Is there flexibility to choose to do the ILP for those that would like to before this rule essentially gets adopted by I guess starting an ALP and trying to get into the ILP early?

I don't have a client with this, so I am not one of the eight, or I'm not one of the ten, or whatever it is, but I just would like to understand.

MR. WELCH: I thought you weren't going to confuse the issue?

(Laughter.)

MR. CLEMENTS: If somebody wanted to try to do that, I guess they'd have to go out and get their consensus on which to do the ALP. And they would have to, presumably in doing that, get a consensus that an ILP-tinged version of the ALP is where they want to go, and then do as you would with any other ALP application, which is just come in and then file a question to use it and, you know, show that

you've satisfied the requirements.

MR. KATZ: So the answer to your question is, 'yes.'

MR. CLEMENTS: Yea, right, what he said.

(Laughter.)

MR. KATZ: Does anyone have anything further?

(No response.)

MR. KATZ: If not, our next subject is the balancing of license conditions and, Henri, that was your topic. So would you care to start it?

MR. BARTHOLOMOT: It got listed in that shorthand form, but the issues as I was really trying to characterize it was the need to focus on Commission management of mandatory conditions as they're coming in to the license.

A lot of it is at that tail end of that process. There are steps along the way, and some of them we have talked about, but--and I don't have the list at the top of my head.

But what we said to the Commission is: You are the ones that are ultimately going to issue the license, and what comes out in that license package is what the applicant is going to have to evaluate. And everybody looks at it and says can we live with this? Does it need to be litigated? And so forth.

So, you know, the Commission, as the licensing

agency, has a major responsibility. And we see a lot of effort in the proposed rule at getting good process and more effort to do positive things, surface issues, surface information needs, develop more of a collaborative relationship. But at the end of the process, there still is--there are several things the Commission could do on managing mandatory conditions, starting with giving its views on them.

And some of it may come out, although that may be less common in the NEPA process and the NEPA document, but it is an important part of the licensing process that the Commission not step away even if it feels it may not have the authority to modify our particular mandatory conditions that are coming in. It is still very important for the Commission to make its views known, at least on a request by an applicant, and to also take a fresh look at the end of the day.

I have heard some tension in some of the December or November meeting here between other agencies, the Tribes, the States wanting a final say and not being willing to sort of put their conditions in so you can incorporate it in the Commission's NEPA review, and wanting the final say on what goes in in terms of their conditions.

But the Commission does have the 10(a) responsibility and the Part I responsibility to make sure

the license fits all of the big picture requirements that are laid out there.

So part of it is opining about the impact of the conditions, the reasonableness, and so forth. Part of it is taking a fresh look at the license package and saying, gee, we've got six things coming in here on Fish and Wildlife issues, four of them as mandatory conditions. There are two where we can do some modification in light of the other four that we think needs to be done.

I think the ALJ process at the Commission averted to in the NOPR, if it's done properly, can be another helpful tool. It is a way of putting, especially areas where there are basic disputes over the need for a particular condition, or a justification of the record for it and so forth, that is a process that, if it is made available in a reasonable way--and today it's not. It's a very limited availability tool--it could be another way of having a fact-finding process by an independent arbiter, an ALJ, to make sure the record is robust on those conditions.

So I would like to see more attention paid to the Commission management of the mandatory condition process on the license side of it. That is not exclusive, but that's a few head thoughts.

MR. KATZ: Going once, going twice. Let's move on to the CEII question.

MR. LEAHEY: This is Jeff Leahey from NHA. Since I brought this up, I'll just say that to be honest, we haven't really thought this out totally yet with the CEII rule coming final just about a month and a half ago.

But during NHA's conference, I had several members come up to me and express the concern that information that will now be protected under the CEII rule is going to be required in the PAD, and they wanted to know how they should rectify that situation. This wasn't discussed at all in the NOPR, so it was kind of hard to come up with things to respond to.

MR. CLEMENTS: Let me clue you in on the latest with the CEII. Just yesterday the Commission issued another Notice of Proposed Rulemaking dealing with CEII, and this one pertains to information that the Commission's regulations require an applicant or a potential applicant to provide directly to members of the public, agencies or tribes.

Things like 16.7(d), your initial consultation package, and if it existed at this time, it would include things like the PAD, which is also supposed to be filed with the Commission. So it would be covered under either rule. But the idea of this NOPR that's coming out is that it would

deal with how you deal with CEII for those kinds of things. And the general proposal is that it would be essentially treated the same way as it would be if it were filed with the Commission. So for purposes of something like the PAD, as I understand it, the PAD would be subject to our CEII rules.

Now the one thing that I'm not sure people are really grasping is that nothing in our rules prohibits an applicant from providing CEII directly to anyone. If you filed say a PAD and you made the appropriate omissions and put in the appropriate appendices for CEII, you could send the same thing to say the Fish and Wildlife Service. But you don't have to. You could send the Fish and Wildlife Service a complete version of it with all the information.

So what I'm trying to get at is that you can still with these rules, at least as it appears to me, you can still work with the agencies or NGOs that you ordinarily work with. The only time it would be a concern I would think is where there's some CEII that you don't want to make public directly or to provide to someone directly and that if an agency or an NGO or a tribe wants to get it, you would prefer they applied to the Commission to get it.

I'm personally hoping that there will be a minimum of that. That you won't consider people in the federal and state agencies as being potentially threatening

terrorists. We consider them that, but, there's no reason for you to.

MS. NALDER: A question. That's very interesting, John. I didn't know that you were coming out with a new rule. But perhaps you can answer --

MR. CLEMENTS: I didn't come up with it. I'm just reporting it.

MS. NALDER: Perhaps you can answer my question. Will the rule that you're discussing clarify those maps that should be made public versus the map that the specs and the CEII that state to showing facilities and their precise location to the water body? That's been very troublesome for several people I'm working with right now.

MR. CLEMENTS: I don't expect -- well, there's nothing in this NOPR that further clarifies anything that's in Order 630 with respect to that. And the only thing I know that's in Order 630 it's 7.5 minute USGS maps are not CEII. I don't even know what that means.

MS. NALDER: Right.

MR. CLEMENTS: But whatever you saw in Order 630 in the regs is all the guidance that exists at this point.

MS. NALDER: Then do we --

MR. KATZ: Nan, can you hold off a second? Because there are a lot of other folks with hands up and I don't want to just get into a dialogue.

MS. BACON: Suzanne Bacon with Chelan County PUD.

I just wanted to talk more about the CEII issue, because we recently put out our first draft of our preliminary draft environmental assessment, and in Chelan PUD we have a huge Web site with all our information on there. We provide CDs or hard copies to a huge list of stakeholders that includes federal and state agencies but also interested members of the public.

In fact, we actually seek people to get on our stakeholder list. And I was aware that the CEII rule was coming out, so I decided -- and I contacted FERC staff and decided not to put the project maps in the draft. And we added some language in there saying something like contact us for further information about this, which has been omitted.

And I'm wondering -- I know what happens once we file the application, they can go through that process with the coordinator. But when it's just a draft and we get questions, you're saying it's up to the licensee's discretion I guess to be able to decide whether we want to offer that information. But are there going to be guidelines? Do we need guidelines?

I guess I'm a little bit concerned that we do the right thing on providing those kinds of documents.

MR. CLEMENTS: As I read the rule, the Commission

is permitting license applicants or pipeline applicants to decide which information they are uncomfortable making public, at least at CEII, and if they're not comfortable making it public, then anything they file with the Commission they have to redact the CEII. And anything that they make directly available to the public pursuant to our regulations, they may redact it.

But if you're comfortable having a particular map on your Web site, I don't see anything in the rule that prevents you from doing that.

MS. BACON: We've taken it down for now because obviously the horse is out of the barn basically at that point. But I was just wondering if there were going to be guidelines for us making that determination. But if not --

MR. CLEMENTS: If there are, I don't know. I've just been trying to help them with when they put out their draft rules, make sure that they don't forget hydro.

MS. BACON: Maybe I'm the only one wondering about that.

MR. CLEMENTS: No. This has come up elsewhere too. It's a continuing thing, and I'm hoping that by the time we have the final rule written that I'll be able to write something in there which in a clear way explains what's in those rules.

MS. BACON: Okay. Thank you.

MS. SKANCKE: Nancy Skancke, GKRSE. In connection with that, John, do you know the timing when they're going to release this NOPR? Because it wasn't available in draft from the Commission meeting yesterday with the draft orders, and it's not posted today.

MR. CLEMENTS: I really don't know.

MS. SKANCKE: Okay. Because I guess what I'm looking for is how we should address this issue in our comments, which are due a week from Monday. And in addition, there is the whole interplay between effectiveness of the NOPR, effectiveness of the CEII, which are immediately, and now it all plays together. And any guidance you can provide would be fabulous.

MR. CLEMENTS: I've been puzzling that too. I talked to the guy who is the principal drafter of the CEII rules yesterday and told him, that, you know, by the way, by the time you get to or maybe before you get to your final rule on the public information stuff, we may have to put something in our new Part V regulations about CEII, or you may have to fiddle with what you've already done, depending on what you've got and what your timing is.

And at this point, I just don't have a good sense of what their schedule is for getting a fine rule on the public. But the actual CEII rule itself is there. It's done. So feel free to comment and we'll make the best use

we can of everything we've got.

MR. SPRINGER: Fred Spring from Troutman Sanders again. I just want to reiterate for a second what we talked about a little bit with the PAD as it relates to this. I guess some ways using CEII as a reason or excuse leads you to say a whole lot of engineering and design kind of information shouldn't be in there.

But based on what you said about how potentially an applicant could, if they chose, and if it was still required in the PAD, distribute it to whomever, not really in the CEII, I still think, and I think a lot of people would believe here that a lot of that information -- emergency action plans, cross-sections of dams, operation reports, Part 12s and the whole rest of it -- probably doesn't have a real good place in the PAD and more summary kind of information makes a whole lot of sense, that the public could really understand better anyway.

So I guess I'll just reiterate that, take a hard look at it, forgetting CEII. Just use some good sense for us.

MR. CLEMENTS: We've had a number of people say that the Part 12 stuff really doesn't have a place in there. You won't be alone I'm sure.

MS. NALDER: Nan Nalder, Acres. The second part of my question, John, was the Exhibit H also has a number of

pieces in it that may fall within CEII. Have you thought about clarifying guidance on that exhibit?

MR. CLEMENTS: Only what's in the rule. That's all there is right now.

MS. NALDER: Can an applicant who's got to provide a draft application pretty damn quick come in and get clarification on the CEII, how that's going to be reviewed?

MR. CLEMENTS: I'm sure OEP would be happy to talk to you about it.

MS. NALDER: Thank you.

MR. JOSEPH: Brett Joseph, National Marine Fisheries Service. I just want to say that my agency will be commenting on this NOPR.

And one of the objectives that we're going to be seeking is to ensure that the CEII does not operate to place a chill on the ability of applicants to provide sensitive information to the resource agencies; that we will be able to work with FERC to ensure and adopt, through our own internal procedures, adopt adequate safeguards to ensure that any information that is provided to our agency as required under the FERC licensing process will be given the same protections that FERC is giving it under the CEII.

MR. BARTHOLOMOT: Henry Bartholomot, EEI. That was a follow-up point I was going to make. John, you may

have said, gee, folks ought to feel free to provide information directly to other agencies.

I think the Commission, a number of federal agencies have gone through a process of looking in the wake of September 11th at how to handle sensitive information about infrastructure. But the Commission certainly in the hydro transmission gas settings is in the forefront on the energy side.

So there's some sensitive certainly around the industry table about wanting to handle that information carefully. And so you may see people relying, and I think justifiably, on the Commission and the CEII rule. And I was just going to reinforce Brett's comment.

If you need any source of legal authority to be able to sort of extend the umbrella of that coverage, the Paperwork Reduction Act specifically says that the other agencies borrowing information from the collecting agency are to operate under the same confidentiality provisions. So there's a legal mechanism for that.

MR. KATZ: All right. Why don't we take our afternoon break and come back at ten of, please, precisely. Thank you.

(Recess.)

MR. KATZ: Let's get started again, please. If there are folks out in the hall, we're getting started. We

have by my count about eight issues left, which are varying levels of response and about an hour to do them in, so I would encourage folks to be as pithy, which I spell with a "th" and not two ss's, as possible.

Nancy?

MR. KATZ: Off the record for a second.

(Discussion off the record.)

MR. KATZ: Back on the record. I'll go briefly through the topics and see whether we still have interest in all of them. I'm not going to change the order, because the original vote was the original vote. But we'll make sure whether there's still folks who want to address all of these.

The first one on our list is draft license applications. Are there still folks who want to address that? Yes.

The cooperating agency process? Intervenor policy, I'm sorry. Are there still folks interested in addressing that?

(No response.)

MR. KATZ: Yes, that would include ex parte. I see now hands at the moment, but I'll check as we go along.

Timeframes?

(Show of hands.)

MR. KATZ: Yes. Applicants versus nonapplicants?

(Show of hands.)

MR. KATZ: Yes. Or versus -- I'm sorry, licensees versus other applicants I believe is the intent of that topic.

Exhibit F? Exhibit E. Sorry.

(Laughter.)

MR. KATZ: Gas pipelines?

(Show of hands.)

MR. KATZ: Timing of water quality certifications?

(Show of hands.)

MR. KATZ: Yes. Okay. Tribal consultations/liaison? It still has zero.

10(j)?

MR. WELCH: That was a clarification.

MR. KATZ: That was a clarification and we dealt with that? Okay. Why don't we start right in then with the draft license application.

(Pause.)

MR. SIMMS: This is Andy Simms from Klein Schmidt. There's been some discussion about, and specifically under the ILP, and I think only the ILP, of having the draft application be optional or in some way -- well, I guess optional is the best word -- based on the development of information and early scoping dispute

resolution, and especially the issuance of status reports.

And I was wondering if you had collected any other comments along that line or had given it any thought.

MR. WELCH: The things that we've heard about the draft license application is some have suggested that it not be the full blown application but only the Exhibit E.

We had a good discussion in Manchester about this, and some of the resource agency personnel and some of the NGOs also sort of articulated what the importance of the draft license application was to them.

They felt that before the application was filed, they wanted a very clear understanding of what the applicant's proposal was going to be. And many people commented that finding that information out at the application stage really sort of put them behind the eight ball as far as coming up with terms and conditions and that sort of stuff. So the earlier they could find that out what the actual proposal for project operation was going to be, the better.

Those are the two comments, Andy, that stick out in my mind around the draft license application. And others have suggested what you just suggested about the draft license application being optional.

I think a thing that we were thinking about when putting the requirement for the draft license application

here was to provide an opportunity earlier in the process for stakeholders, including Commission staff, to ask for additional information.

And by additional information, I don't mean additional study information, but just information on the project structures, where they're located, some of the more detailed exhibits that normally go with an application would give us an opportunity to see those things and say, well, we need a little more detail on this diagram, and we need a little more information about what you're proposing over here, that type of additional information, so we could all get that in line by the time that the application is filed with the Commission. That was one of the things we were thinking.

MR. KATZ: Anything further?

(No response.)

MR. CLEMENTS: I was talking to a couple of people the other day from a licensee, and they had -- this is sort of outside of the context of this specific proceeding -- but they were concerned about the draft license application in relation to the timeframes, that there was this 90-day period for comment and then they had to very quickly turn it around and take all these comments and summarize them internally and then turn them all into a final license application.

And they were talking about the burden of reproducing this document, producing the draft and then sending out to all these people and then turning around and very quickly, based on those comments, producing another thing and getting it printed and mailed and everything else. Just from an administrative standpoint, at least in their particular circumstance, they were finding it extremely burdensome under the existing regs.

So they were saying it might have been a whole lot easier if, at at least the stage they're at, they had just been able to do an Exhibit E, and, you know, to the extent that that included things like PM&Es and the basic operational proposal, that maybe that would suffice for people to comment.

MR. KATZ: Nancy?

MS. SKANCKE: Nancy Skancke, GKRSE. Just a quick question to see whether you'd be willing to, or you think it would be workable. As a way to perhaps save that expense instead of sending draft applications to parties, are we at the stage in the electronic media that sending CDs to service lists for this kind of a document can be facilitated? It would save all the trees.

MS. MILES: Yes. We are looking right now at electronically filing by some means everything, everything that has not yet had the opportunity to have electronic filing.

So we're in the middle of figuring it out. You know some folks have asked to waive the regs and have gone ahead and filed CDs. Anyone can feel free to do that.

I'm not sure that's the thing we would put in this rule, since it is on this other track where it's going to be done for everything. And it is on a fairly fast track.

MS. SKANCKE: Nancy Skancke again. A clarification on that. If the parties wanted to use something like this, do they need to build it into their ILP process as a part of a protocol at the beginning so that--I mean it's one thing, I'm not talking--I wasn't initially talking, but I appreciate your comment--about what is filed at FERC. That's helpful.

I'm talking about what we have to serve on the parties to the case. And it is sure cheaper to send a CD than to send a five-inch pile of paper. But we would have to build it into our processes is what your nod implies?

MS. MILES: I understand your comment now. We'll think about it.

MR. KATZ: Okay, that topic having been

thoroughly ventilated, let's move on to the Cooperating Agency Policy.

MR. BARTHOLOMOT: It's Henri Bartholomot, EEI. I'll just say a sentence or two, and we will certainly cover it in more detail in our comments. We've averted to it in some of our preNOPR.

We are all on the same page in wanting the Commission to be able to draft a NEPA document and put the file document out in a form where the cooperating agencies can rely on that. There is no disagreement on that.

What we have said, and will continue to say, is that we would like the mechanism for that to be that the resource agencies, as everybody else does, participate in the NEPA scoping, and drafting, and comment, and so forth process. There is a process for that.

Where we have real concern is the Commission is an adjudicatory agency issuing licenses and permits. It has a special responsibility, and it certainly has recognized that traditionally in the ex parte context to be very, very careful in how the decisionmaking is done.

We view the proposal to modify the ex parte rules to allow the resource agencies to participate as full-fledged cooperating agencies in the drafting of the NEPA document, which is going to be at the core of the license process.

And then to maintain party status and be able to fully litigate the issue, having had full access as a behind-the-closed doors participant with the Commission staff in the evolution of those decisional documents is a fundamental legal issue, and I can't express it too directly the depth and breadth of our concern.

It is not just a hydro issue. You do this change and it is going to affect gas pipeline certification processes and other processes at the Commission.

So it is a really big issue for us, and we will cover it in more detail in our comments.

MR. KATZ: Anything further on that?

(No response.)

MR. KATZ: If not, we will move to Time Frames.

MR. MOORE: David Moore, Troutman Sanders. One issue regarding time frames is the timing of the preparation of issuance of the scoping document one with respect to the development of the draft study plan by licensees.

Some of our environmental consultants have expressed a concern or a desire to have the scoping document, or to otherwise identify the issues before we develop the draft study plan.

I haven't looked at the rule with the idea of a way to perhaps change the time frame or time lines for those two processes. I don't know that we could make a switch.

But we would ask the Commission to take a look at that and see whether there is a way to identify the issues, have them scoped out, and then have the, I guess it will be the draft study plan go out then at that point.

I think otherwise we face a prospect of either identifying studies that are unnecessary, or just going with a full suite of studies that perhaps some studies may be unnecessary.

MR. GEARY: Dennis Geary, Normandeer Associates.

Without having the rule up in front of me, my recollection is that in paragraph (j) under the requirements of the PAD, that the applicant is required to come up with some initial type of scoping document that includes the results of any, you know, identifying issues and the results of any initial discussions with agencies.

So that would at least start the scoping process. And then that document is then subject to comment and revision. So I think the opportunity is there to initiate the scoping process pretty early.

MR. WELCH: Tim Welch, FERC staff. Remember, we also have had a scoping meeting prior to that. The scoping process sort of has begun.

MR. KATZ: All right, if we're ready let's move on to the next issue, which I believe dealt with treatment of existing licensee applicants versus potential competitor

applicants.

David, was that yours? Or did someone else raise that?

MR. MOLLER: This is David Moller, Pacific Gas & Electric. I did raise that issue. I was able to weave in two of my three items actually into other questions.

However, there is--

MR. KATZ: How very efficient of you.

MR. MOLLER: Thank you. I was afraid we wouldn't get this far down on the list.

(Laughter.

MR. MOLLER: But since we have, I would like to be more explicit about one of the items I brought up earlier. That is, this matter of enforcement of the Director's final decision on study plan.

Specifically, with regard to enforcement mechanisms for a licensee potential applicant versus a nonlicensee potential applicant.

The concern is that because the licensee is under a license at that time, FERC does have certain enforcement capabilities against the licensee. Whereas, a nonlicensee applicant perhaps competing for the license has no such relationship with FERC and FERC has no authority over that.

So the concern here is, if it is not squarely addressed in the regs, the default would be that there would

be very strong enforcement mechanisms against the licensee potential applicant and virtually none against the nonlicensee potential applicant.

If I were a nonlicensee potential applicant in that situation looking at that final study plan with a direction of the director to perform it, I would then sit back, allow the licensee potential applicant to perform all the studies, and then file my application saying see their studies.

A very unfair situation since we may be talking about millions of dollars of studies here.

What I had suggested before, and I want to bring your attention to the specific wording, if you look on page--It's Section 4.38 in the TOP part. It is on page D-24. It is about in the middle of the page and it's labeled as subparagraph (vi). It's just below the middle of the page.

And it says:

"If a potential applicant fails to obtain information or conduct a study as required by the Director pursuant to" and it makes the reference to the paragraph, "its application will be considered deficient."

I might propose "may be." There might be extenuating circumstances. But in any event, I would propose that that be the consequence of failure--specified

consequence of failure to follow the study plan, both for a licensee potential applicant and a nonlicensee potential applicant.

If not that consequence, then some consequence that can be equally enforced against both the licensee and a nonlicensee potential applicant.

The places I would propose that those be inserted would be at the end of paragraphs, or sections 5.12 and 5.13. 5.12 talks about the initial approved study plan, and 5.13 talks about studies upon the status reports.

MR. KATZ: Fred, were you next?

MR. SPRINGER: Fred Springer, Troutman Sanders.

I want to take what David was talking about but change the focus a little bit. I guess I am maybe an eternal optimist and I'm hoping that one day before I ever quit doing hydro people will want to build projects again, even if just at existing dams.

I know you had a question about preliminary permits, and there's no way I can figure out that if somebody--unless somebody has done an information document before they ever filed for basically getting their preliminary permit, there's no way in the world they could do an ILP procedure in, from the day they get the permit which is three years of course before the priority runs out.

So I think if their industry is ever serious

about doing these things again, you will be into sequential permits where the first permit is spent determining feasibility and getting financing and gathering information so that on the next permit there will be the equivalent information to what you have with an NOI, and then take three years.

The big problem comes in again, like David was talking about, with competition. A lot of different things about permits, including applications that any one of us in the room could do in ten minutes, and competing applicants are easy to come by.

And while there may be some more comments coming in than what I'm going to say here, but some way to figure out how sequential permits can work, and increasing the ante by requiring any competitor to have the same level of existing information documents at least, and to have them filed on the same day so that one is not--no PAD let's say from the prior permittee can be in the hands of a competitor first and maybe have competition and everything end, and then a month later have these things filed.

I mean, just some ways of working on this proposal, if I read it right it is going to require some level of sequential permits, and those things are problematic today.

MR. SONEDA: Alan Soneda, Pacific Gas & Electric

Company.

The one place in Part V that refers to competing applications at Section 5.28, which is at page D-84--I'm sorry, 5.27, appears to direct the competing applicant to Section 4.36 in filing their application.

Is that an intent to direct the competitor to the traditional process only?

MR. CLEMENTS: No, it is not.

MR. SONEDA: Okay. I guess I don't see how it doesn't have that effect, though, as worded.

MR. CLEMENTS: Well, it might.

MR. SONEDA: Okay.

(Laughter.)

MR. CLEMENTS: I don't know. That was one of the most confusing sections of the entire regulations. So I will look at it again very closely and try to make sure that it doesn't do that.

MR. SONEDA: And, John, it may take us back to one of the early discussions on process selection where, if that is--unless it is clarified in the right way, our earlier discussion about when there's a licensee and a nonlicensee applicant, what are the process selection options available to each?

MS. SKANCKE: Nancy Skancke, GKRSE. Since Alan raised the issue, I would like to just quickly--I had

brought the question up earlier because I think like David or somebody else wasn't sure it would ever be addressed, given our schedule.

But I would like comment from FERC people and any other agency people that are still around, and also the NGO community, whether there would be a problem with competitor basically subject to the process chosen by the existing licensee? And why that would be a problem.

The AOP is one thing. I can understand that, I guess, at least the discussion we had earlier address the AOP.

But if an existing licensee believes within criterias established or whatever parameters end up in the rule, the TLP is the process, it seems to me that should have some weight given the existent licensee's position and knowledge of the project.

MR. CLEMENTS: Would you settle for the same process, whether it is a licensee's selected process or one that requires Commission approval?

(Pause.)

(Laughter.)

MS. SKANCKE: I'm thinking.

MR. CLEMENTS: I mean if the point is, you know, is parity--

MS. SKANCKE: Right. Yes, I would argue that,

setting aside--assuming that I lost my argument that the licensee should have the right to choose the process based on the knowledge of the process, and the project, I would say that whatever the decision it is should be binding on the competitor as well. But I still would prefer the licensee choosing the process.

(Laughter.)

MR. CLEMENTS: Understood.

MR. JOSEPH: Brett Joseph, National Marine Fisheries Service, just to respond since you raised the question, obviously one of our major concerns throughout is our staff time and resources.

This problem becomes particularly acute when we are dealing with the competing license application situation.

So we would support any approach that would avoid the situation where we're having to simultaneously participate in due processes, especially if there are two different processes.

You know, we also want to see equity and fairness in the process. But it seems to me that, assuming that FERC is approving the process that the existing licensee is undertaking, that that approval should stand for any licensee going in based on the same considerations, one would hope, and we would want to be participating in a

single process.

MR. MOLLER: Just one other quick item on this to get it on the record. There is some inconsistency in use of terminology in the draft regs among the terms--there's four of them--"licensee potential competitor", "nonlicensee potential competitor"--I'm saying "competitor"; that was misstated.

"Licensee potential applicant", "Nonlicensee potential applicant", "Potential applicant", and "Applicant." All four of those terms are used.

My recommendation would be to use "potential applicant consistently up to the filing of the application, and then use applicant thereafter. And to use the term potential applicant except where there needs to be a distinction between a licensee potential applicant and the nonlicensee potential applicant.

Right now there is some inconsistency around there.

MR. KATZ: Next up is Exhibit E.

MR. HOGAN: You can just keep this one
[microphone].

(Laughter.)

MR. MOLLER: Sorry. David Moller, Pacific Gas & Electric.

I had a question on Exhibit E, a specific

provision of it. The language shows up on page D-72, Section 5.17. It is the last paragraph on page D-72, paragraph (e), "Developmental Analysis."

This is where the regs are requiring the licensee to prepare as part of their Exhibit E a developmental analysis of, as it says: "Discuss the economic benefits of the proposed action, the estimated costs of various alternatives, and environmental recommendations and their effects on the project economics."

And then it goes on to give some details as to evaluating the costs, the net benefits of, and so on. And I just wanted to clarify that the intent here, since this is the licensee's Exhibit E and the licensee's proposal, is the intent here is this developmental analysis is to cover the licensee's--pardon me, the applicant's proposed measures and the applicant's considered actions.

At a later point when FERC and perhaps the other agencies prepare their environmental analysis, then they would be assessing a broader range of measures and potential actions here. But I just wanted to clarify because it's a little vague at this point.

MR. WELCH: I think what David is looking at here is on D-72 and the top of D-73. We are asking for the developmental analysis to be conducted on the existing conditions number one and number two, as proposed by the

applicant, the proposed action, and three, any other action alternatives.

I think what we were thinking here were, if there were any viable alternatives that may have been identified in scoping, we would be interested in those, as well. But I understand the concern.

MR. KATZ: Any other thoughts on Exhibit E?

(No response.)

MR. KATZ: If none, we will turn to the timing of water quality certifications.

MS. NALDER: Nan Nalder, Akers, very quickly, related to some of my earlier comments about the 401 certificate.

If you cannot get the 401 agency to disclose earlier, I don't see an AILP working very well. Because they halved a federally delegated authority that can upset the applecart for everybody else who is on the train and working together. So I would strongly suggest that when you're thinking about the ILP being in default, that you consider whether or not the 401 agency is willing to go along with that.

MS. SHERMAN: Are you done?

MS. NALDER: Yes.

MS. SHERMAN: This is Rebecca Sherman with the Hydropower Forum Coalition.

I just want to understand if you guys could talk just a little bit about, right now as the NOPR stands the clock starts for the water quality certification when FERC deems information complete, that's right, not when the agency deems it complete.

Can you just cover that really quick?

MR. KATZ: Yes. At one time the Commission sort of considered itself to be in the business of deciding whether or not the state requirements had been complied with, or at least the Commission dabbled in that, and it determined as a matter of policy that it was not going to do that anymore; that only the state agency could decide whether the state agency had received enough information, and so forth. And that it was not profitable for the Commission to try and make determinations on that score.

So as a result of that, the Commission said it's going to be a year from day X, and presumably if the state commission is not satisfied it will deny the 401 or take some other action to cause the information to be provided; but that the commission itself was not going to be in the position of deciding whether or not the agency's regulations had been complied with because that was a matter for the state agency to do.

MS. SHERMAN: Right. I remember a discussion about whether the state--I think there was some discussion

about whether the state had the ability to get the information properly, or whether they were relying on FERC to get the information they needed so that they could deem it complete.

Is that right? That's the source of contention?

You're looking at me strangely, John. Sorry.

MR. CLEMENTS: I'm not quite sure I understand the question. If they--as John indicated, if the state things that it doesn't have sufficient information--

MS. SHERMAN: Right.

MR. CLEMENTS: --then the option it has is to deny certification and require the application to be refiled, presumably with additional information. And that is what happens now.

Our hope for this process is that the states will participate and that they will get what they think they need through the development of the preliminary determination, or in the outlying case that they'll think that the result of the dispute resolution process provides them sufficient data to move forward.

MR. KATZ: Right. As some of the federal agency, the research agency folks will tell you, I think there has sort of been an eternal chicken and egg problem in that it would be notice if, you know, there was a final EIS and they won so that people could spend a lot of time using that as a

basis for their conditions, but at the same time then how could you produce the final EIS because you don't know what the conditions are.

And I think, I without speaking for the agency, if they've gotten comfortable, that if indeed the ILP works such that they're getting information at an earlier stage than they were able to get it under the traditional process, that would make their job easier and render it possible for them to move ahead more quickly than they might have in the past, and I think that is our hope with the 401 agencies, as well.

If they see that indeed agreement on the studies, that the studies are getting done and so forth, then if it is working, folks ought to have the information earlier enough on so that they can all do their jobs.

MR. KATZ: Fred?

MR. SPRINGER: Fred Springer from Troutman Sanders. I guess some of what John was talking about, if I'm right, and I hope my memory serves me right, in the future I think two out of the three processes would have the water quality certificate application have to be filed when the REA, around the time of the REA. But one of them was when the application was still being filed?

MS. MILES: It's two of them when the application is filed, the ILP and the ALP. And our thinking was that everything's going to be done up front and we assume when the application is filed, it's very likely we'll have everything, all the information will be available.

MR. SPRINGER: The third one is a little later?

MS. MILES: The third one is the traditional, and that is at the time that FERC issues its ready for environmental analysis notice.

MR. SPRINGER: I guess it just seemed to me that since the REA notice implies that all the information is definitely there and additional information or whatever that I would have just made all three of them at that date. It's not a big comment of mine, but it just struck me that they should all be that date.

MR. WELCH: Many states share your view, Fred.

MR. MOLLER: On that last comment, the date that, Fred, you would be proposing, would be the ready for

environmental analysis date?

MR. SPRINGER: Or some date around that you would have -- I mean, you can't really know the day FERC is going to put out the REA notice. So maybe it's so many days after the notice. I mean, it would have to be some known date, but it would be around that date.

MR. MOLLER: The concern that I have around this is, and the discussion so far hasn't that I've heard address the issue, though, about the certifying agency needing to act within a year under the Clean Water Act, and yet wanting to wait for its final action until the final environmental analysis is complete and available to advise them.

I mean, there's this chicken and the egg thing. And I'm not so sure what the problem is with triggering the filing date for the water quality certification based on the anticipated completion date of the final environmental analysis.

What's driving the need to get the application in at any certain time, other than to make sure it's applied for or submitted in time that when it's time for the certifying agency to condition the certificate, that there is in fact an application on the table? Is there any reason why it needs to be any earlier? Is there anything driving that?

MS. MILES: The one year timeframe for one is

that if there wasn't an application for a 401 until after the final NEPA document, the state would have a year available to them, which could be quite beyond when everyone else would be ready to act.

MR. CLEMENTS: And the state is also running on, you know, a separate process to a greater or lesser extent, and until an application is filed with the state, how is the applicant going to know exactly what the state requires in order to have a complete application?

If the state's not satisfied with the FERC NEPA document providing a complete data base, then it would simply tell the applicant to go start new studies and provide new data. And then we'd be years and years behind.

So the theory of this is that by the time you get through the preliminary determination, or at the very latest, at formal dispute resolution process, everyone will know what the Commission is going to require from the application for water quality and everything else.

So at that point, which is, you know, two, two-and-a-half years prior to the license application date, the state will know and should be able to say what additional information if any it's going to insist on. And so there doesn't seem to be any reason for the applicant and the state to be able to just kind of sit there and ignore that until years later when we finally complete a NEPA document.

It would seem to me at the very latest by the time the application is filed, the license application, the licensee ought to go in and file for its 401 so the state can officially tell it what additional information it wants so that it can do its job. I can't see any reason, frankly, why the 401 application should be delayed beyond the date of any formal dispute resolution process.

MR. MOLLER: Both of you have given some compelling reasons why it should be earlier, to get the state involved and get them clear on what studies are being required and get some sort of feedback on the adequacy of those, and then the one that Ann mentioned as well, making sure that the certification process is completed in time for a timely issuance of the license.

But as a practical matter, when the state agency I'm working with, California, is saying they simply are not going to issue the certificate until the final environmental analysis is complete, and so we're looking at a span that exceeds one year. We're simply saying, this process is laid out for more than one year, but the Clean Water Act only allows one year.

So as a practical matter, we withdraw our application and then refile it to create that whole --

MR. CLEMENTS: All we're talking about is the application filing date. And if you haven't filed an

application with them, how do you know what information they're going to require you to provide?

MR. MOLLER: I agree.

MR. CLEMENTS: I remember Sacramento, and their basic pitch was, well, somehow we'll just kind of communicate sort of prefiling off the record with the application, and we'll kind of tell them what we want, and it'll get done. And I'm going, gee, I don't think so. Anyway, that's my take on it.

MS. NALDER: One point I can make on the state of Washington, several of us in the Northwest Hydroelectric Association are working with the Department of Ecology because they would like to avoid some of the problems that their sister agency has down in California.

They don't have staff. They have one-and-a-half people to do 401s in the state, and it is just extremely difficult for them to do anything more than the bare minimum.

(Pause.)

MR. KATZ: Well, we are actually through our agenda in a more than timely fashion, so I will ask if anyone has anything that has not been raised that they would like to mention briefly? Yes?

MR. BRUSH: Tim Brush. One of the things that strikes me if I'm reading this right, I'm looking at the

flow diagram. It's a pretty compressed schedule, as Ann had mentioned earlier. There's not much room in between steps, and they've got to be pretty well defined.

It seems like it doesn't take into account differences in parts of the country that a project may be, north versus south in particular, species that may be of concern in studies, anadomous versus nonanadomous, that sort of thing, such that if the first step up there, step number one, fell at one point of the year such that when you got down to step 15, you were in November and you were in New York, it's going throw everything out of whack from there on down.

I don't have a particular fix for it to suggest to you today, but just that you think through that from the practical aspect of applying this schedule and having people work within it.

MR. WELCH: Tim Welch, FERC staff. Yes, Tim, actually we did think about that, and we do realize that timing could be funny, depending on when the NOI was due.

And I guess the thing that I would stress is that even though we've got these boxes and the numbers sort of add up in a certain way, we do recognize that as far as the science goes, that the schedule and the study plan will sort of take into account all those things. It might not fit into a two calendar year timeframe, but it's the schedule

that's in the study plan that will determine the schedule by which we will receive the information.

Unfortunately, we can't change the date of the application being filed because it's covered in statute. So if you look at the regulations as far as when we issue our REA notice down in Box 20, the language states that we wouldn't issue that ready for environmental analysis until the study plan has been completed.

So there could be in certain circumstances for the reasons that you mentioned, times where we would have an application, but there could be some ongoing studies that needed to be completed.

MR. BRUSH: Yes. To follow up, certainly the comment I just made has to do with the onset of step one and how it plays out, but of course the other thing, extraordinary events I think is how you called it, the floods or droughts or whatever else, equipment failures, all those sorts of things of course would play through.

And I think you've thought through that already, but I'll just say it for the record. And one other thing is, again, I don't have a specific fix for you here today, just for consideration, I think that the period there where you're doing the study plan development is optimistic. We've been involved in an ALP where writing the study plans took well over a year, and it just could not get everybody

on the same page.

And then those went on from there as well. Some of them, the studies were done before the plan was done. That kind of thing. Hopefully, this is going to be a lot more structured so we can avoid that sort of stuff.

MR. KATZ: All right. Thank you very much. We thank everyone for coming. There's been a lot of useful comment today which will inform us as we proceed forward. As I think everybody knows, our next step is stakeholder drafting workshops, which will be April 29th through May 2nd. We expect to see many of you there and invite your friends.

Thank you very much, and good afternoon.

(Whereupon, at 3:40 p.m. on Thursday, April 10, 2003, the Proposed Rulemaking for Hydroelectric Licensing Workshop adjourned.)